PART-C

MAINTENANCE JURISPRUDENCE UNDER THE SECULAR PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE, 1973: A CRITICAL EVALUATION OF PROVISIONS AND JUDICIAL APPROACH
CHAPTER: VIII.

A CRITICAL STUDY OF THE SALUTARY AND SALUBRIOUS MAINTENANCE PROVISIONS UNDER THE CODE OF CRIMINAL PROCEDURE,1973 AND JUDICIAL APPROACH

1. OBJECT AND SCOPE OF CHAPTER IX OF THE CODE: Besides the remedy of maintenance under different personal laws Section 125 to 128 of the Criminal Procedure Code, 1973 also provides a fairly speedy and summary remedy

1. Section 125 Order for maintenance of wives,children and parents (1) If any person having sufficient mean sufficient means neglects or refuses to maintain (a) his wife, unable to maintain herself or (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or (d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct; provided that the Magistrate may order the father off a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband off such minor female child, if married, is not possessed off sufficient means.

Explanation-For the purposes of this Chapter-
(a) "minor" means a person who under the provisions of Indian Majority Act, 1875 is deemed not to have attain his majority; (b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person for the whole or any of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extent to one month or until payment if sooner made; contd. next page...
of maintenance to all persons irrespective of their community, caste, religion or race.

1 Justice Krishna Iyer, a legal luminary has rightly traced the origin and object of these provisions in these words, 'The British India regime, during the last century, made a provision against vagrancy of neglected wives and children, viz. Section 488 of the Criminal Procedure Code. After independence, the law continued in force. When the old Code repealed, updated and re-enacted in 1973, Section 488 reincarnated as Section 125 with a broader compassion and included in its elsemosnacy and obligatory ambit divorced demsels in distress.

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Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due; Provided further that if such person offers to maintain his wife on condition of her living with him and she refuses to live with him, such Magistrate may consider any ground of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing. Explanation-If a husband has contacted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive ann allowance from her husband under this section if she is living in adultery or if, without any sufficient reason, she refuses to live with her husband or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

Recently, the applicability of the provisions of Section 125 of the Code is curtailed to Muslim wives by passing Muslim Women (Protection of Rights on Divorce) Act, 1986. This aspect is discussed separately in Part-D of the present study.

Under the provisions of Criminal Procedure Code, 1973 the following persons have been given right to claim maintenance:

- Wife including divorced wife
- Children- Legitimate or illegitimate minor child, whether married or not.
- Major legitimate or illegitimate child (not being a married daughter), where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself
- Parents- father and mother.

These sections embody the socially valued provisions of maintenance to the neglected wives, discarded divorcees, abandoned children and hapless parents. It is important to note that the legislature has made various changes in the old provisions of maintenance, thereby, making the new provisions of Section 125 to 128 more wider and socially oriented. The most important change brought in the old provisions is that, now, under Section 125 of the Code, besides wife and children, the parents are also given the right to claim maintenance from their children. While including the indigent parents within the scope of maintenance provisions of the Code it was rightly observed that the principle governing the law of maintenance is
essentially one of social justice and ought to be given wider scope. Hence the inclusion of indigent parents which was not there under the repealed Code. Another significant change is the widening of the ambit of the term 'wife'. Now under the new provisions the definition of the term wife is extended to include the divorced wife also.

The scheme of Chapter IX of the Code reveals that it is a self contained Code. This integrated Code is designed to serve a social purpose and to further the cause of speedy and summary remedy of maintenance. Section 125 of the Code enumerates the condition under which the relief of maintenance can be ordered in favour of the above stated persons. Section 126 deals with procedural aspects and Section 127 relates to alteration in the monthly allowance of maintenance to suit the changed conditions and circumstances. Section 128 deals with the enforcement of the order of maintenance. Thus, these provisions provide a machinery for summary enforcement of moral obligation. In our secular country, chapter IX of the Code may be called a Uniform Law of Maintenance. The provisions of Section 125 of the Code are applicable to all persons belong to all religions and have no relationship with the personal law of the parties. These provisions are truly secular in their nature and all persons irrespective of their caste, creed, community or religion can invoke and get benefit of these provisions. Chief Justice Chandrachud speaking on behalf of five judges Constitutional Bench of the Apex Court has
categorically observed in famous Shah Bano Case.

"The religion professed by a spouse or by the spouses has no place in the scheme of these provisions. Whether the spouses are Hindus or Muslims or Parsis or heathens, is wholly irrelevant in the application of these provisions. The reasons for this is axiomatic, in the sense that Section 125 is a part of the Code of Criminal Procedure, not of Civil Laws, which define and govern the rights and obligations of the parties belonging to particular religion. Such provisions, which are essentially of a prophylactic nature, cut across the barriers of religion".2

The secular character of these provisions was also highlighted by the Supreme Court in Nanak Chand Vs. Chandra Kishore. Zohara Khatoon Vs. Mohd. Ibrahim, Siraj Mohd. Khan Vs. Hafizunnisa, Bai Tahira Vs. Ali Husssain, Fazlunbi Vs. K.Kader.

The Supreme Court as well as the High Courts in India have highlighted the object and scope of the said provisions of maintenance in numerous dicisions. All these observation revolve around the view expressed by Sir James Fitz Stephen who piloted the old code of 1898, stating the objective of the provisions as being 'a mode of

3. AIR 1970 SC 446 1970 Cr.L.J.522
4. AIR 1981 SC 1243, 1981 Cr.LJ 754
5. AIR 1981 SC 1972, 1981 Cr.LJ 1430
6. AIR 1979 SC 362, 1979 Cr.LJ 151
7. AIR 1980 SC 1730, 1980 Cr.LJ 1249
preventing vagrancy or at least preventing its consequence'.
The Supreme Court speaking through Justice Sarkaria in Bhagwan Dutt Vs. Kamla Devi explained the object of Sections 488 to 490 of the old code (corresponding to Section 125 of new code). The learned judge quoted Sir James Fitz Stephen's above observations and then explained further;

"The provisions are intended to fulfil a social purpose. Their object is to compel a man to perform the moral obligation which he owes to society in respect of his wife and children. By providing a simple speedy, but limited relief they seek to ensure that the neglected wife and children are not left beggared and destituted on the scrap-heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence".2

The Supreme Court, further ruled emphatically that;

"We have said and it need to be said again that Section 488 (Section 125 of the new Code) is intended to serve a social purpose. It provides a machinery for summary enforcement of the moral obligations of a man towards his wife and children so that they may not, out of sheer destitution become a hazard to the well being of orderly society".3.

A Division Bench of the Supreme Court comprising of A.P. Sen and S. Natarajan, JJ., has very lucidly enumerated the object


2. Ibid p.85 Emphasis added.

3. Ibid p.82 Emphasis added
of Section 125 of the Code in Subbanu alias Saira Banu Vs. A.M. Abdul Gafoor that;

"Section 125, its forerunner being S.488 has been enacted with a avowed object of preventing vagrancy and destitution. The Section is intended to ensure the means of subsistence for three categories of dependents viz. children, wives and parents who are unable to maintain themselves ... The Legislature being anxious that for the sake of the maintenance, the dependentes should not resort to begging, stealing or cheating, etc., the liability to provide maintenance for children has been fixed on the basis of the paternity of the father and the minority of the child and in the case of major children on the basis of their physical handicap or mental abnormality without reference to factors of legitimacy or illegitimacy of the children and their being married or not. In the case of wives, whether their ties of marriage subsist or not, the anxiety of the Legislature is that they should not resort to begging, stealing or cheating, etc., but they should also not feel compelled, for the sake of maintaining themselves, to resort to an adulterous life or in the case of divorced woman, to resort to remarriage, if they have sentimental attachment of their earlier marriage and feel morally bound to observe their vows of fidelity to the persons whom they have married".2

A Division Bench of the Supreme Court consisting of Venkatarmiah and Mishra, JJ., in Savitri Vs. G.S. Rawat quoted with approval the above stated first para of Shri Bhagwan Dutt decision while explaining the provisions of Section 125 of the new Code. The learned Bench then observed;

1. 1987 Cr.LJ 980
2. Emphasis added.
3. 1986 (1) HLR 48,AIR 1986 SC 984
4. AIR 1975 SC 40
"The Code, however, provides a quick remedy to protect the applicant against starvation and to tide over immediate difficulties. Chapter IX of the Code does not in reality create any serious new obligation unknown to India social life".1

Earlier also, Justice Subha Rao speaking for the Supreme Court has ruled in Jagir Kaur Vs. Jaswant Singh that chapter XXVI of the old Code of 1898 providing for maintenance of wives and children 'intends to serve a social purpose' and provides a forum for them to get urgent relief.

The Supreme Court again examined the provisions of Section 125 of the famous decision known as Shah Bano case. In this historic judgement. The five Judges Constitutional Bench speaking though Chief Justice Chandrachud has very rightly held;

"Section 125 was enacted in order to provide a quick and summary remedy to class of persons who are unable to maintain themselves.... Neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves are the objective criteria which determine the applicability of Section 125. Such provisions which are essentially of a prophylactic nature cut across the barrier of religion... The liability imposed by Section 125 to maintain close relatives who are indigent is founded upon the individual's obligation to the society to prevent vagrancy and destitution. That is the moral edict of law".4

1. Emphasis added.
2. AIR 1963 SC 1521.
4. Emphasis added.
The Allhabad High Court has explained the object of Section 125 of the code in Smt. Alimundissa Vs. State observing that it is the philanthropic and humanitarian aspect of the society that has been enacted under chapter IX of the Code.

The learned judge further observed;

"Sections 125 to 128 are a piece of social legislation brought on the statute, with a view to help deserted wife and child. Section 125 is just a sort of reminder to the husband who is in a position to maintain his wife and child, that in case he refused to maintain, the statutory right of the wife and child it would be enforced by law. To maintain one's child is a social purpose and goal towards social justice".

Justice Padmanabhan of the Kerla High Court has also observed in Hymakrishandas Vs. M. Krishandas that;

"The object of the proceedings under Section 125 is to prevent vagrancy by compelling a person to support his wife or child or parents unable to maintain themselves by a speedy and summary procedure".

In Malati Vs. Raj Kishore, the Orissa High Court has very lucidly explained that;

"Section 125 of the Code of Criminal Procedure 1973 is the provision which only gives effect to the natural duty of a man to maintain his wife and is essentially a speedier available against starvation to be disposed of in a summary way. It is a mode of preventing vagrancy or at least preventing its consequences and it is with this object that Section 125 has been engrafted in the Criminal Procedure Code".


2. 1986(1) HLR 62

3. (1986)3 Crimes 19

4. 1985(2) HLR 580.
Elucidating the object, the Kerala High Court has very rightly summed up in Santha Kumari Vs. Pandananabhan that;

"Chapter IX of the Code or Criminal Procedure, 1973 provides a statutory assuring a docket for neglected wives, children and even parents assuring a strong, speedy and summary remedy to realise and receive maintenance".2

Earlier the Kerala High Court speaking through Justice Bhat has observed in Padmanabhan Vs. Bhargavi that 'these provisions of the Code have been enacted with the benign object vital to the maintenance of social and economic equilibrium in the society'.

Recently, Justice A. Pasayat of Orissa High Court has also explained in Ahalya Barisha Vs. Chhelia Padan that;

"The object of S.125 of the Code is to provide a summary remedy to save dependents from destitution and vagrancy and this is to serve a social purpose, apart from and independent of the parties under their personal law".5

It is also most pertinent to note that the provisions of maintenance contained in the Code are;

"More in the nature of a preventive rather than a remedial jurisdiction, it is certainly not punitive ".

1. 1985(2) HLR 580.

2. Emphasis added; See also Sadasivan Pillai Vs Vijay Lakshmi, 1987 Cr.LJ 765(Kerala).

3. 1981 Cr.LJ 826.

4. 1992 Cr.LJ.493

5. a) Emphasis supplied
as held by the Supreme Court in Bhagwan Dutt. The High Courts have also expressed the same view on different occasions that maintenance proceedings are not to punish the person.

From the analysis of the above cited judgements of the Supreme Court and the High Courts, on the object and scope of the provisions of maintenance contained in Sections 125 to 128 of the Code, the principles propositions deducible are:

- that the main object of the maintenance provisions under the code is to 'prevent vagrancy and destitution'.
- that these provisions provide speedy and summary remedy.
- that these provisions are measures of social justice and serve a social purpose.
- that these provisions embody the moral obligation of a person.
- that these provisions are not aimed to punish the person (non-claimant/Respondent).
- that these provisions are secular in nature and are applicable to all persons irrespective of their caste, creed, community or religion.

2. CONSTITUTIONAL SANCTITY OF MAINTENANCE PROVISIONS: The Supreme Court in Captain Ramesh Chandra Vs. Veena Kaushal has explained the constitutional sanctity of the

1. Rewati Bai Vs. Jageshwar 1990(2) Crimes 266(M>P>)
T.P.S.H. Salva Vs T.P.S.H. Sasina, 189 Cr.LJ 2032(Mad.)
Ayyagari Vs Ayyagari, 1989 Cr.LJ 673;
Manibai Vs. Sukhdeo, 1990 Cr.LJ 646;
Abhaya Briha Vs Chhelia Radha, 1992 Cr.LJ 493(Ori.)
Madhvi Vs. Thupran 1988(3) Crime 183(Ker.)

2. The provision of Sections 125 to 128 of the Code do not apply to a divorced Muslim woman after passing of the Muslim Women (Protection of Rights on Divorce) Act, 1986, which is discussed in detail lateron.

3. 1979 Cr.L.J.3, AIR 1978 SC 1807 decided on 27.4.79. Recently appreciated by the Orissa High Court in Sriram Vs Sriram, 1992 Cr.LJ 1794.

provisions of section 125 of the code. Justice Krishna
Iyre speaking on behalf of the Division Bench of the apex
Court observed unequivocal terms that;

"This provision is a measure of social justice
and specially enacted to protect women and
children and falls within the constitutional
sweep of Articles 15(3) reinforced by Act.39.1

Few months later, a Bench of the Supreme Court consisting of
V.R.Krishna Iyer, V.D.Tulzpurka and R.S.Pathak, JJ., was
'called upon to interpret a benign provision enacted to
ameliorate the economic condition of neglected wives and
discarded divrocees namely, S.125 Cr.P.C. in Bai Tahira Vs.
Ali Hussain Fissalli Justice Krishna Iyer speaking for the
said Bench held that;

"Welfare laws must be so read as to be
effective delivery systems of the statutory
objects to be served by the Legislature and
when the beneficiaries are the weaker sections,
like destitute woman, the spirit of Art 15(3)
of the Constitution must enlights the meaning of
the Section. The Constitution is the pervasive
omnipresence brooding over the meaning and
transforming the values of every measure, So,
S.125 and sister clauses must receive a
compassionate expansion of sense that the words
used permit".

Mr. Justice Padmanabhan of the Kerala High Court has
observed in Hyma Krishandas Vs. M. Krishnadas that;

"The Section is incorporated by way of public
policy and it is a measure of social justice
intended to protect women and children as
envisaged under Art. 15(3) of the
Constitution reinforced by the Directive
Principles of State Policy enshrined in Art.39
of the Constitution".

1. Emphasis supplied.

2. AIR 1979 SC 362, 1979 Cr.LJ 151 dt. 6.10.78 See also
Jagir Kaur Vs Jaswant Singh AIR 1963 SC 152.
3. 1986 (1) HLR 62 at 65.
A Full Bench of the Kerla High Court has thoroughly examined the nature and object of Section 125 of the Code in Balan Nair vs. Bhavani Amma, Justice Bhat speaking for the Full Bench spelled out the Constitutional mandate as follows:

"Though s.125 benifits a distressed father also, main thrust of the provisions is to assist woman and children in distress. That is fully consitant inthe Art 15(3) of the Constitution which states that the prohibition contained in the Article shall not prevent the State from making any special provision for women and children. We took note of Art. 39 of the Constitution which states,inter-alia, that the state shall, in particular,direct its policy towards that the citizens,men and women equally, have the rights to an adequate means to livelihood , that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment".2

Justice K.Lahiri of the Gauhati High Court in Boli Narayan vs. Shiddeshwari has meticulously analysed the Constitutional backing to the maintenance provision saying;

" A short as well as a long look at Section 125 of 'the Code' makes it clear that it is a measure of social Justice to ensure protection to wife,children and parents. It falls within the sweep of Articles 15(3) and 39 of he Constitution and is the case of fundamental duties enshrined in Article 51A and the legislature inspiration is drawn from the Preamsle of the consitution which provide for securing social Justice to all. The Code words printed must be explicated to enable the provision to fulfill its social funtions which

1. 1987 Cr.LJ 399
2. A. ibid p. 404.
3. 1981 Cr.LJ 674
is the generating force for enabling the provision. The Constitution compassion for the weaker sections call for an interpretation having social relevance".

Now, as far as, the Constitutionality of the maintenance provisions of Chapter IX of the Code is concerned, it has been held by the Patna High Court in Gupteshwar Pnaday Vs. Ram Peari that the maintenance provisions are not violative of Art 14 and 15 of the Constitution of India. The Kerala High Court speaking through Justice Bhat in K. Shanmukhan Vs. Sarojini has upheld the Constitutional validity of some provisions of Section 125 and observed that the provisions contained in Section 125 of the Code cannot be said to be violative of Art.14 of the Constitution. Here the leaned Judge relied upon its own High Court decision rendered by Full Bench in Mariyamma Vs. Mohd. Ibrahim. After referring to the Supreme Court decision in Charanjit Lal Vs. Union of India, the Madras High Court had ruled in Thamsi Goudan Vs. Kauni Ammal that the maintenance provision of Section 488 of old Code (S.125 of New Code) of the Code is not ultra-vires of the Constitution. The Allahabad High Court has also held in Iqbal Ahmed Vs. State that the maintenance provision under Section 125 of the Code is Constitutional

1. AIR 1971 Pat. 181, 1971 Cr. LJ 744, decided on Sec. 488 of the Old Code, corresponding to Sec. 125 of the new Code.

2. 1981 Cr. LJ 8300, S. 125 Cl. 4 & 5 held constitutional.

3. AIR 1978 Ker. 231

4. AIR 1951 SC 41

5. AIR 1952 Mad. 529, 1952 Cr. LJ 1143

and does not violate Article 25 and 26 of the Constitution of India. A Full Bench of the J&K High Court has also ruled in Ghulam Nabi Vs. Noora Bibi that an explanation of sub. Section 3 of Section 125 of the Code is not violative of Article 25 of the Constitution.

The Critical analysis of the case law on the subject, reveals that the maintenance provisions contained in Section 125 of the Code are special provisions designed for the benefit and protection of wives, divorced wives, children, and parents. These socially oriented and based on moral values, the provision of maintenance, which are aimed to prevent vagrancy and destitution, cannot be said to be violative of Articles 14, 15, 25 or 26 of the Constitution of India. Vagrancy and destitution cannot be said to be violater of Article 14, 15, 25, or 26 of the Constitution of India.

3. NATURE OF PROCEEDING UNDER CHAPTER IX OF THE CODE OF CRIMINAL PROCEDURE; The main objective of the maintenance provisions in the Code is to provide speedy and summary remedy and to prevent vagrancy and destitution has already been discussed in the preceding pages. These maintenance provisions embody moral obligations and are a measure of social justice. These provisions serve a social purpose and are not aimed at punishing the person.

Undoubtedly, these provisions of maintenance occur

1. 1971 Cr. L.J. 1628.
in the Code of Criminal Procedure and not in the Code of Civil Procedure. Now, we are to critically examine the nature of these maintenance provisions because even though these maintenance provisions are enacted in Criminal Code, yet these are not purely and strictly of Criminal nature.

The Supreme Court and High Courts in India have described the maintenance proceeding under the Code by different epithets. Sometimes, these proceedings are described as 'not strictly of criminal nature'. Some Courts have opined that these proceeding are of 'quasi-civil nature' while others termed these maintenance proceedings of 'quasi-criminal nature'. But, whatever nature is attributed to these maintenance proceedings, one thing is certain that all the Courts have tried to clothe these proceedings with above said terms in furtherance of the above stated object of these proceedings. If one Court calls it quasi-criminal, it is because the Court intends to give relief in a speedy way. If it is termed as quasi-Civil, it is due to the reason that the court does not intend to treat these proceedings as punitive only.

A Division Bench of the Punjab and Haryana High Court consisting of Chief Justice S.S. Sandhawalia and Justice D.S. Tawatia examined the nature of maintenance proceedings in Chanan Singh Vs. Jangir Kaur. The Division

1. 1983 Cr.LJ 1570, The Division Bench make reference to the provisions of Rule 1 in Chapter 7-A of the rules and orders off the Punjab & Haryana High Court Vol.III dealing with the maintenance cases.

"Proceedings under section 488 of the Cr.P.C. are off a criminal character, and its provisions must be strictly cont. next p...
Bench preferred to distinguish from the Supreme Court decision in *Nand Lal Vs. Kanhaya*, wherein the Supreme Court has ruled that the maintainande proceedings were of a Civil nature, observing that the proceedings are 'in essence criminal and on the face of it criminal in nature'. Interestingly to buttress its opinion the Division Bench quoted para 2 from the Orissa High Court judgement in *Norbet Vs. Tersa*.

"But all the same the proceedings under the said chapter are not Civil proceedings so as to attract the provisions of the Civil Procedure Code....".

But, for reasons best known to it the learned Bench left to quote the relevant preceeding lines from the para 2, which had it been quoted, would have presented a totally different picture. Thus, it is essential to reproduce the relevant portion, which runs as follow;

"An application under Section 488, Criminal Procedure Code is not a complain within the meaning of Sectin 4(C) of the Code, and a person against whom such application under S.488 Criminal P.C. is made is not charge with and tried for any offences and so he is not in the position of an accused in such a proceeding. It is well settled that the imprisonment presecribed under Section 488(3), Criminal P.C. is not a punishment, but is merely a means of..."

The Division Bench also referred to *Harbhajan Kaur Vs Manjit Singh* AIR 1969 Del. 298.


2. *1971 Cri. L.J. 1496*. 
enforcing the payment of the maintenance ordered by the Court. That is why the relief given under Chapter XXXVI is considered to be of Civil nature. But all the same the proceeding under the said Chapter are not Civil Proceeding so as to attract the provision of the Civil P.C....".1

Thus, the main thrust of Norbet decision is to say that the proceedings are Civil in nature, not purely Criminal as the Division Bench wanted to infer from the Norbet decision.

A Division Bench of Supreme Court in Savitri Vs. Gobind Singh Rawat, speaking through Justice Venkatramiah has observed that;

"The jurisdiction of the Magistrate under Chapter IX of the code is not strictly a criminal jurisdiction".4

Giving reasons for that, the learned judge observed;

"While passing an order under that chapter asking a person to pay maintenance to his wife, child or parents, as the case may be, the Magistrate is not imposing any punishment on such person for a crime committed by him".

Justice B.L.Yadev of the Allahabad High Court while examining the object and scope of chapter IX of the Code in Brij Mohan Khurnan Vs. Raj Rani observed that these provisions are enacted to serve a social purpose. These provisions could not be said to be strictly of criminal jurisdiction. He emphatically opined that in fact it is a social welfare Legislation. The approach of the Court in interpreting these provisions must be benevolent and justice

1. Emphasis added.
2. Supra.
3. AIR 1986 SC 984, 1986 Cr.LJ 41, 1984 (1) HLR 489; See also Babu Lai Vs Sunita, 1987 Cr.LJ 525 (MP)
4. Emphasis added
oriented. The order must be passed keeping in view, the principles of equity, justice and good conscience and the human consideration must dominate the scene.

The proceeding of maintenance under the Code have been termed as of quasi criminal nature also. As back as in the year 1929 the Lahore High Court in Mehr Khan Vs. Bakat Bhari Justice Jai Lal observed;

"They are, if I may use the term, Quasi Criminal Proceedings pertaining more of a civil than of Criminal character as they are intended to enforce a civil liability of the husband or the father".2

Giving reasons, to treat the proceedings as Quasi Criminal, the Mysore High Court held in Dr. T.K.Thayumanvar Vs. Asanambal that admission made in the pleading can be taken into consideration and acted upon.

Recently in 1992, the Bombay High Court in Ram Chandra Balu VS. Smt. Rakhamabai Balu speaking through Justice S.M.Daud has observed that 'the combined effect of S.128 of the Code, leaves no room for doubt that the proceedings are quasi-civil in nature. Therefore, the rules of pleading as apply to civil proceedings are not to be totally disregarded when dealing with application under chapter IX of the code'. The Gujrat High Court has also

1. AIR 1929 Lah.32 per Zafar Ali and Jai Lal,JJ, see also Maunq Vs Makyway, AIR 1939 Rang 151.
2. Emphasis added.
3. AIR 1958 Mys. 190.
opined in Prabhu Bai Vs. State that the proceeding under Section 125 of the Code are quasi-civil proceedings. His Lordship further observed that under the circumstances, the standard of proof, which is required in these proceedings would largely be governed by the procedure of proof usually adopted in civil proceedings. Justice Dand, referring to the provisions of Section 126 and 127 of the Code in Ramchandra Balu, has also ruled that 'this provision confers upon a Criminal Court has power to review an earlier order. These provisions would show that the main rule in regard to pleading applicable to civil proceedings are also applicable to proceedings for maintenance under Chapter IX of the Code.

A Division Bench of the Allahabad High Court in Smt. Munni Devi Vs. Om Pal has described the nature of maintenance proceeding in different terms. The learned Bench opined that the proceedings under Section 125 of the code 'not criminal proceedings, but are proceedings partaking more of civil nature'.

But, in Balan Nair Vs. Bhavani Amma, a Full Bench of the Kerala High Court explained in detail the nature of maintenance Proceedings under the Code. Justice Bhat speaking for the Full Bench observed that the relief given under Chapter IX of the Code is;

1. II(1985) DMC 432, 1986(1) HLR, 57, see also Uma Shankar Vs. Smt. Geeta Devi, 1985(1) HLR 236(All).
2. Supra p.1922.
3. 1980 All.Cr. 108
Essentially of a civil nature and the proceedings are essentially civil proceedings and not criminal proceedings. The proceedings have been described in some decisions as of a quasi-criminal nature or quasi-civil nature. But we are of opinion that they are essentially of civil nature. The fact that the provisions occur in the Cr. P.C. and not the Civil P.C. and the fact that the recalcitrant opposite party who suffers the order of maintenance and does not obey the order may have to go to prison will not change the nature of the proceedings from civil to criminal.

Justice Bhatt thoroughly reviewed the case law on this point and gives reasons for describing the maintenance proceedings as 'essentially of Civil nature' as follows;

"No doubt, provisions relating to maintenance occur in the Cr.P.C. and not in the Civil P.C. nevertheless, the proceedings are and the relief given is essentially of a civil nature. Chapter IX prescribes a summary procedure for compelling a person to maintain his wife or children or parents. Findings of the Magistrate are not final or conclusive in the sense that they may in appropriate cases be open to scrutiny by a civil Court".

The learned judge further highlighted the civil aspect of the proceedings saying;

"The case does not deal with an offence. The person against whom the claim is made is not an offender or an accused. The order passed against him does not spell out a finding that he has committed an offence. There is no punishment imposed on him, though as a mode of recovery, imprisonment is provided for. He is not charged for the commission of a criminal offence. The object of the provisions is not to punish him for the past neglect. The object is to prevent vagrancy and ameliorate distress".

1. Emphasis added.


3. Emphasis added.
The Sikkim Court in Chandra Bhadur Tomong Vs. Sunder Maya, the Gujrat High Court in Chandrika Ben Vs. State of Gujrat have described the maintenance proceedings also as of 'Civil nature'. But it has been rightly emphasised by the Orissa High Court in Norbet Vs. Tessa Kerketa that though the relief given under Chapter IX of the Code is considered to be of a civil nature, yet, all the same, the proceedings under the said chapter are not civil proceedings so as to attract the provisions of the civil procedure code as the said proceedings are wholly governed by the provisions of Criminal Procedure code. Therefore, the technicalities of construing civil proceedings are not attracted to maintenance proceedings as they are essentially criminal. Consequently, neither the Civil Procedure Code nor the principles there under can in any way be attracted nor the strict rule of civil law, that evidence beyond pleading should be ignored, can come into play. It is true that even though the proceedings are of civil nature, they do not amount to a civil suit.

2. 1(1989) DMC 35.
Thus, the judiciary has described the nature of the proceedings under Chapter IX of the Code as criminal, quasi-criminal, civil and quasi-civil. If we analyse the decisions in their right perspective, we can very well conclude that while criminal or quasi-criminal epithets for maintenance proceedings are used for certain purposes, the term civil or quasi-civil is used for certain other purposes. The necessity of describing the nature of these proceedings under the code in different forms by the courts arises mainly out of the main object of these proceedings. To make the relief of maintenance available to the destitutes and needy persons in a simple and speedy way, the Courts are treating these provisions of maintenance as civil as well as criminal in nature.

The Kerala High Court speaking through Justice K. Moiu in N. E. Vasudevan Nair Vs. Kalyani Amma held that 'the proceedings under S. 488 of Criminal Procedure Code(S.125 of the new Code) are not in the nature criminal Proceedings. They are really civil proceedings, but dealt with summarily in a criminal court for the purpose of speedy disposal on grounds or convenience and social order' justice K. B. Navadgi of the Karnataka High Court has observed in K. P Balaji Singh Vs. Lakshmamma that "It is by now well settled that the proceeding

2. 1989 Cri.LJ 2022
under Section 125 of the code are in the nature of civil proceedings. It is equally well settled, whatever the nature of the proceeding may be, the proceedings are wholly governed by the code. The proceedings are essentially judicial proceedings of a criminal Court and are governed by the code as such."

Justice B.S. Kapadia of the Gujrat High Court has explained the nature of maintenance proceedings under the code in Chandrikaben Vs. State and thus observed.

"Chapter IX of the Cr.P.C serves the social purpose and Section 125 prescribes an alternative forum to get relief. The proceedings are of Civil nature even though they are in the criminal trial (sic. code) and the remedy is summary one. The inquiry under chapter IX is a quasi-criminal one and admission made in the pleading can be taken into consideration and acted upon. The order passed in the application under Section 125 is a summary order which does not finally determine the rights and obligations of the parties thereto. Looking to the context in which punishment is provided under Section 125(3) of the code it cannot be an offence within the meaning of Section 2(n) of the Cr.P.C."

Now, the question which prick our minds is that when the judiciary has treated the maintenance proceedings under the criminal code as that of civil nature, then why the Legislature has enacted these provisions of maintenance in criminal code instead of in Civil Code? This question seems to have found answer in para 9 of the judgement of the

1. Emphasis added.
3. Emphasis added.
Allahabad High Court in *Ravi Gopal Vs. Urmila Devi*. Justice B.L. Yadev has very meticulously stated that:

"Further the provision of Section 125 of the Code have been designedly enacted with a view to give urgent relief to every deserted wife or helpless child parents. Even though the right of maintenance is a civil right, but in view of the urgency involved in providing maintenance with a view to avoid vagrancy, this provision has been engrafted in the Code. In other words, a civil remedy has been provided through criminal Court. The Section has been enacted to serve a social purpose so as to enable a deserted wife and helpless child whether legitimate or illegitimate, to get relief within a short span of time"  

A full Bench of the Kerala High Court has also ruled in *Balan Nair Vs. Bhavani Amma* that:

"The fact that the provisions occur in the Cr.P.C. and not on Civil P.C. and the fact that the recalcitrant opposite party, who suffers the order of maintenance and does not obey the order may have to go to prison, will not charge the nature of the proceedings from civil to criminal. The provisions have been incorported in the Cr.PC only with a view to expedite the proceedings as it was thought that the Magistrate could better deal with the matter in summary way".

From the above critical evaluation of judicial approach and the provisions of maintenance under the Code, the following propositions regarding nature of maintenance proceedings under the Code are well deducible;

- that even though the provisions of maintenance occur in the Criminal Procedure Code, the

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1. II (1987) DMC 311
2. Emphasis added.
3. 1987 Cr.LJ 399 at 405
nature of these provisions is certainly not strictly criminal but civil as well as the quasi-civil for certain purposes too.
-the reading of maintenance provision clearly reveals that.
-the non-applicant is not an accused in the eyes of law.
-the maintenance provisions are not aimed to punish the non-applicant.

-these provisions do not provide for full and final determination of the status and personal rights of the parties.
-these provision aimed to aimed to achieve social justice and to serve social purpose, are enacted in the criminal code to the destitute wife, children and parents in a speedy and summary way within the shortest span of time.

Thus, it is submitted in a concise way that the nature of maintenance proceedings is Criminal because these are engrafted in the Code of Criminal Procedure with the main object to provide speedy and summary remedy by saving the applicant from various dilatory and technical provisions in the Code of Civil Procedure. The nature of these provisions is civil or quasi-civil because the object of these provisions is not to punish the non-applicant but to provide the relief of maintenance to prevent vagrancy and starvation and to ameliorate distresses and to serve a social purpose by enforcing the moral obligation. Thus, it is a unique combination of both, Criminal as well Civil.
2. WIFE'S RIGHT TO MAINTENANCE UNDER THE CODE OF CRIMINAL PROCEDURE, 1973: Section 125(1) of the Code ensured maintenance to three different classes of people viz., wives, including divorced wives, children and parents. As noted earlier, wives and children were entitled to maintenance even under Section 488 of the old Code of 1898. The divorced wives and parents are brought within the orbit of maintenance provisions in the newly enacted Section 125 of the Criminal Procedure Code, 1973. Therefore, the broad meaning given to the term 'wife' used in Section 125 of the Code intends to ensure maintenance to all wives including divorced wives, irrespective of their caste, creed, community and religion. Though, from the very beginning, the secular character of these maintenance provisions of the Code is ensured and wives, including divorced wives after the enactment of new provision in 125 of the Code, irrespective of their caste, creed, community or religion are held entitled to maintenance.

Unfortunately, in our 'secular' country, the Muslim divorced wives have been pulled out of the ambit or operation of Section 125 by passing a legislation, viz., The Muslim Women (Protection of Rights on Divorce) Act, 1986. But, at the same time, we must make it clear here that it is the Muslim divorced wife, who is debarred from...

1. It is worth noting here that, the word 'secular' has been added in the Preamble of our Constitution by the forty second amendment in the year 1978.
having access to the maintenance provision of the Code by the Act of 1986. A Muslim wife of subsisting marriage is still very much entitled to claim maintenance, as the wives belonging to other religion can claim, under the Code. Therefore, now, except Muslim divorced wives, all other divorced wives belonging to the Hindu, Christian, Parsi, Jew communities can claim maintenance under the provisions of the Code. A Hindu divorced wife is also entitled to maintenance under the provisions of the Hindu Marriage Act, 1955. A Hindu wife besides being entitled to maintenance under the Hindu Marriage Act, 1955 has also got the right to claim maintenance under the provisions of the Hindu Adoption and Maintenance Act, 1956.

A Parsi wife, including divorced Parsi wife, is entitled to maintenance under the provisions of the amended Parsi Marriage And Divorce Act, 1936. Similarly, a Christian wife can claim maintenance under the Indian Divorce Act. We have already critically examined in detail the various maintenance provisions of these matrimonial statutes in the preceding chapter. In this chapter an attempt has been made at critically evaluating the provision of maintenance relating to wives under the Code of Criminal Procedure, 1973.

(a) MAINTENANCE TO THE WIFE OF SUBSISTING MARRIAGE: There is no doubt that the main thrust of maintenance provision under Section 125 of the Code is to assist wives in distress, though the distressed parents and children too can take
benefit of these provisions.

According to the scheme of Section 125 of the Code, a wife can claim maintenance from her husband if the following conditions are fulfilled viz.

- that she is unable to maintain herself.
- that her husband has sufficient means,
- that her husband neglects her or
- that her husband refuses to maintain her.

A First Class Magistrate may, upon proof of such neglect or refusal, order the husband to make monthly allowance for the maintenance of his wife. But, the Magistrate cannot order more than Rs.500/- per month.

Thus, wife's right to claim maintenance under Section 125 is not an absolute right nor the husband's liability is unlimited or absolute. A wife may be entitled to maintenance only, if, she is unable to maintain herself and her husband having sufficient means neglects or refuses to maintain her. But, interestingly, the condition of 'unable to maintain herself' was not imposed under Section 488 of the old Code of 1898. In Bhagwan Dutt, the Supreme Court speaking through Justice Sarkaria has clearly analysed the provisions of Section 488 of old Code and 125 of the New Code and thus observed:

"A comparative study of the provisions set out above (i.e of Section 488 and Section 125 in the Judgement) would show that while in Section 488 the condition 'unable to maintain itself' apparently attached only to the child and not to the wife, in Section 125, this condition has been expressly made applicable to the case.

2. Ibid.
Therefore, now the right of wife to maintenance under Section 125 is circumscribed by certain legal impediments and essential qualifications as stated above. It must be clarified here that now, under Section 125, the term wife also includes the divorced wife as per Explanation(B) to Sec.125. But a divorced wife is entitled to maintenance under Sec.125 provided she is not remarried. Sub-Section(4) of Section 125 of the Code disentitles a wife to receive maintenance allowance in certain cases viz.,

i) if she is living in adultery

ii) if, without any sufficient reason, she refuses to live with her husband, or

iii) if they are living separately by mutual consent.

(i) FACTUM OF MARRIAGE AND STANDARD OF PROOF: Undoubtedly, each and every woman is not entitled to claim maintenance under Section 125 of the Code. Only a 'wife' is entitled to claim maintenance. Therefore, a wife who intends to take benefit of Section 125 of the Code will have to prove the factum of marriage. But, whether the Magistrate who is seized of the maintenance application under the Code is required to go thoroughly into the question of validity of marriage?

The Acting Chief Justice B.M. Bhattacharjee of the Sikkim High Court reviewed the pre-independence and post-independence

1. Emphasis supplied.

I do not think that a Magisterial Court under Section 488 is required to go into the question as to the legal validity of a marriage which has been proved to have taken place in fact unless the illegality or invalidity thereof irresistibly demonstrates itself without any doubt or debate.

In Atta Pradhan Vs. Abhi Pradhan, the Orrisa High Court has considered this aspect and Justice B.P. Mahapatra opined that:

"This position is well settled that in order to succeed in her claim for maintenance from the opposite party the petitioner has to establish that she is his legally married wife. Where factum of marriage is denied, it must be proved satisfactorily that there was a valid marriage the onus being on the wife applying for an order under Section 125 Cr.P.C. It is also an accepted position that in a proceeding under section 125, Cr.P.C., the Magistrate is not expected to go into the question relating to the validity of the marriage. Living as husband and wife and being treated by others as such, is quite sufficient for award of maintenance under the section. In other words, strict proof of marriage is not necessary in a proceeding under Section 125 of the Cr.P.C."

Justice David Annusamy of the Madras High Court has also opined in Muniandi Vs. Joshi that in a case for maintenance


6. Ibid, para 9 of the judgement.

under Section 125 of the Code, it is not necessary that the marriage is established beyond reasonable doubt, it is enough for the Magistrate that a prima facie case is made out in order to afford the immediate and speedy relief to the suffering party under Section 125, while leaving open to the aggrieved party the right to agitate his plea before the Civil Court, if he is so advised. Therefore, for the purpose of Section 125 of the Code, the Magistrate is not required to insist on the strict proof of all the formalities of a particular form of legal marriage as is necessary in civil proceedings.

Justice S.K. Chawla of the Madhya Pradesh High Court in Phoolo Bai Joqe Vs.Beero has observed that:

"Unlike matrimonial proceedings where strict proof of marriage is essential, in a proceeding u/s 125 Cr.P.C. such standard of proof is not necessary, as it is summary in nature, meant to prevent vagrancy".

Where the status of marriage is disputed by the other side on flimsy grounds, the Magistrate should exercise his jurisdiction under Section 125 of the Code. He is required to satisfy himself whether prima-facie the parties are married, if he feels so, he should provide the

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9. 1991 Cr.L.J. 3270, see also Mohit Kumar Vs. Hira Mukerji, 1981 Cr.L.J. NOC 48 (Cal.).
speedy relief of maintenance to the aggrieved wife without prejudice to the contentions of the parties to establish their real matrimonial links before the Civil Court. Justice M.S. Patil of the Karnataka High Court has very meticulously analysed the concept of disputed marriage for awarding maintenance under Section 125 of the Code in Smt. Rudramma Vs. H.R. Dutta Veera. The learned judge posed a question: 'In proceeding of maintenance like these, where the validity or otherwise of the marriage is disputed, whether it is permissible or desirable for the Magistrate to decide such questions of validity of the marriage'. The learned judge ruled that in proceedings of maintenance as under the Code, such questions of validity of the marriage cannot and need not be gone into. He further gives reasons for his ruling saying:

i) Firstly because such questions of validity of the marriage are required to be decided by Special Matrimonial Courts constituted under the law in a regularly instituted suit; (ii) secondly because such questions of validity of marriage may arise not merely because of the marriage being in violation of condition in Cl(i) of S.5 of the Hindu Marriage Act, but it may also arise on a contention raised by wife or husband regarding the violation of the conditions in Cls.(iv) and (v) of S.5 of the said Act. When such contentions are raised several aspects like customs and usages governing parties to the marriage, which have also necessarily to be proved before establishing the violation of the conditions of valid marriage, arise for decision and they cannot properly be decided in a summary proceedings like this; and (iii) thirdly because

1. K. Mahiazhagan Vs. Maladevi, I(1987) DMC 90(Mad.)

even though the proceedings for maintenance under S.125 Cr.P.C. are civil in nature, but essentially they are criminal proceedings and the Criminal Court is not called upon to go into such complicated questions of validity of marriage which are to be decided by a competent Civil Court. Therefore, in cases where the validity of the marriage solemnised is disputed in proceedings under S.125 because of the violation of any of the three conditions referred to in Cls. (i), (iv) and (v) of S.5 of the Act, the Magistrate should not convert himself into a Civil Court and sit like a Civil Court to decide such questions. The Magistrate should not also, at the same time, make it an easy course to dismiss the application made to him for maintenance, leaving the wife to establish her status as a wife in a Civil Court. The right course to be followed, it appears to me, is: On proof of solemnisation of marriage between the applicant and the respondent with essential customary rites and ceremonies, the other requirements like neglect and refusal having been established. The Magistrate, who is empowered and conferred with jurisdiction to provide maintenance to a wife unable to maintain herself should award maintenance to the wife leaving the husband to establish the invalidity of marriage in a competent Civil Court. as pointed out in the case of Palmerino Vs Mrs Palmerino That seems to be the proper course; because the sole object in enacting these provisions of maintenance as incorporated in Chap. IX of the Cr. P.C. is to provide cheap and speedy remedy and to prevent vagrancy of a wife unable to maintain herself and any order of maintenance made by the Magistrate is liable to be cancelled or varied, as the case may be in consequence of any decision of a competent Civil Court."

But, where before a Magistrate there is no evidence, much less a legal one, to warrant that the claimant of maintenance under Section 125 of the Code, is the wife of the non-claimant husband, the Magistrate will be justified in refusing maintenance under the Code to the wife.

3. AIR 1927 Bom. 46,28 Cr.L.J. 51.
Now, another important question which arises for our consideration is as to what sort of standard of proof of marriage is required to order maintenance under Section 125 of the Code? Whether the necessary ceremonies required by law for the solemnization of a valid marriage are also necessary for claiming maintenance under the Code? The judicial approach seems to be well settled that the Court exercising jurisdiction under Section 125 of the Code will not require as strict a proof of marriage as in a proceeding in a Civil Court. Therefore the standard of proof required for a marriage in proceeding for maintenance is not so high as is required in connection with the proceedings like the Divorce Act or for prosecution for bigamy under the Indian Penal Code or for matrimonial proceedings. In Man Dutta Vs. Nikhilesh Duttam, the Calcutta High Court has very accurately pointed out that in proceeding under Section 125 of the Code, the reality and the actuality of marriage, apart from the question of legality thereof, is the sole question.

But, nonetheless, the wife who intends to get benefit of maintenance provision under the Code, is bound to prove the factum of marriage, whenever the factum of marriage is disputed. Sometimes the husband may aver that


7. 1987(1) Crimes 570.
the applicant is not his wife as he has not married her, or he may plead that his marriage with the applicant is not valid. In both these circumstances the Magistrate can proceed with the case on merit and may exercise his discretion to award maintenance under the Code as we have discussed above. But where the court is satisfied that apparently there seems to be no factum of marriage, it can refuse to order maintenance under Section 125 of the Code.

The decision of the Allahabad High Court in Phirai Singh Vs. State of U.P is very relevant on the point and needs thorough evaluation. It is a classic case in itself. The facts of this case reveal how these socially oriented maintenance provisions of the Code may sometimes be misused by a woman. The facts of the case were that Smt. Ramawati daughter of Ram Samujh claimed maintenance under Section 125 of the Code from one Phirai Singh alleging that she was the wife of Phirai Singh and a daughter aged about one and a half years was born out of this wedlock. It is evident on record that there was a long standing enmity between Phirai Singh on the one side and the father and uncle of Smt. Ramawati Devi on the other. Criminal and Civil suits were filed by both the parties since the year 1975. Prem Narian, an uncle of Smt. Ramawati was a notorious person and had been dismissed from U.P. Police Service on serious charges. It was also an admitted fact that Ramawati filed an application for maintenance under Section

8. See Dr. Diwan, Law of maintenance in India, p.99.
125 of the Code at the instance of Prem Narain. During the trial, it was proved and brought on record that no marriage was solemnized between Phirai Singh, a widower aged about 60, Thakur by caste, with Ramawati aged about 25, a Harijan by caste. Phirai Singh lived in a joint family consisting of his two sons and grand children. The High Court, after appreciating the evidence on record, opined that 'from the record it is apparent, there is no evidence, much less a legal evidence, that Ramawati is the legally wedded wife of Phirai Singh. The High Court quashed the order of maintenance passed in favour of the wife by the trial court exercising its inherent jurisdiction under Section 482 of the Criminal Procedure Code, 1973.

The facts of Phirai Singh clearly illustrate how an unscrupulous woman could put a reputed and innocent person into trouble and may drag him in criminal proceedings in the Court. Consequently, it is submitted that the Court should not take lightly an application for maintenance under Section 125 of the Code at the first instance. The Court should satisfy itself that at least the prima-facie marriage relationship exists between the applicant and non-applicant. The Magistrate should not believe and rely on each and every allegation of marriage relationship. No doubt, the Magistrate is not bound to determine the validity of marriage under Section 125 of the Code, but at the same time, 'once the very factum of marriage has not been established,'

10. Ibid.
the application under Section 125 of the Code would not be maintainable as the existence of the conjugal relationship is the foundation for claiming an order for the payment of maintenance under the code'.

The wife may prove the factum of marriage either in accordance with the provision of law or with some alleged custom. A Division Bench of the Supreme Court consisting of Justice P.N. Bhagwati and Justice Ranganath Mishra has rightly explained in *Sumitra Devi Vs. Bhikan Chaudhary* that:

"There is no doubt that in order that there may be a valid marriage according to Hindu Law, certain religious rites have to be performed. Invoking the fire and performance of Sapatapadi around the sacred fire have been considered by this court to be two of the basic requirements for a traditional marriage".

But, the learned Division Bench further emphasised that:-

"It is equally true that there can be a marriage acceptable in law according to customs which do not insist on performance of such rites as referred to above and marriage of this type give rise to legal relationship which law accepts".

The Supreme Court in this case allowed the appeal of wife and remanded the case for fresh enquiry as to decide factum of marriage because the Additional Session Judge as well as learned judge of the High Court of Patna did not refer to the fact that for about a decade the parties had lived together. Public record including voters lists described them as husband and wife and competent witnesses of the village of the wife as also the husband had supported

the factum of marriage. The Supreme Court preferred to give a piece of advice to the Courts observing:

"The role of a Court is not that of a silent spectator or a passive agency, where a dispute is brought before the Court, particularly of one of the type with which we are concerned, where maintenance of a neglected wife or minor child is in issue, the Court must take genuine interest to find out the truth of the matter".

From the above observation of the Supreme Court it is evident that in the said case the factum of marriage was proved according to the standard of proof as required for maintenance proceeding under the Code. Dr. Diwan has rightly submitted that the Supreme Court should not have remanded the case as the Supreme Court itself had noted that considerable time had already been lost. Therefore, it is submitted that the appellate Court particularly the High Court and the Supreme Court should save the claimant of maintenance from litigation and provide maintenance to the needy and destitute spouse.

Justice Chettur Sankaran Nair of the Kerala High Court has appreciated the decision of Sumitra Devi in Vijayan Vs. C. Karthiayani observing that the Supreme Court indicated the degree of proof required for establishing a fact under Section 125, Criminal Procedure Code. Even in the absence of religious rites, a marriage according to custom could be

12. Law of Maintenance, supra.
found. The learned judge also opined that the degree of proof required to establish the prevalence of a custom for purpose of Section 125, Criminal Procedure Code is not as onerous as in other regions. The context and concept of legislation contemplates a degree of proof far less in vigour.

In Babu Rao Vs. Shoba Tai it was established that Saptabadi and invocation before the sacred fire ceremonies were not performed in this case. But, the marriage was solemnized according to customary rites i.e Mangal Ashtakas. Justice Dhabe of the Bombay High Court upholding the validity of marriage by customary rites in the case ruled that 'if customary rites do not require the above ceremonies to be performed, then even in the absence of such ceremonies the marriage is valid if it is performed according to the customary rites'. It is pertinent to point out that the burden of proving a custom is on the party who pleads it. The party must show that the custom is certain, continuous, reasonable, ancient and not opposed to public policy.

Justice S.P.Dass Ghosh of the Calcutta High Court, while discussing the question of proof of marriage in maintenance proceedings under Section 125 of the Code held in Sadhu Vs. Sarathi Bala, that the absence of evidence regarding

17. 1985 Cr.L.J. 979.
performance of Sampradan and Saptapadi, two vital ceremonies of Hindu Marriage, is not an error apparent on the face of record so as to lead to the conclusion that there was no marriage at all between the parties. In G.G.Gulam Konkani Vs. A.Gulam Konkani it is rightly laid down that once it is admitted that certain marriage ceremonies were undergone and the wife was taken to the house of the bridegroom and that she resided there for sometime, for the purpose of proceedings under Section 125 of the Code, the marriage will have to be presumed to be a legal one.

(ii) PRESUMPTION OF MARRIAGE: Maintenance Provisions under the Code are aimed to serve a social purpose. Moral obligation is the originating source of this concept. Now the important question which attracts our attention is, whether the Court should order maintenance under the Code in favour of a wife, 'on the presumption of marriage'. Presumption which may be drawn from long continuous cohabitation of man and a woman as husband and wife. Their Lordships of the Supreme Court have pointed out in Gokal Chand Vs. Parvin Kumari that continuous cohabitation of a man and a woman as husband and wife and their treatment as such for a number of years may raise a presumption of

marriage. Justice M. Santosh of the Mysore High Court relied upon Gokal Chand decision in Vanajakshamma Vs. P. Gokal Krishna. The Orissa High Court speaking through Justice B.N. Dash in Anupama Pradhan Vs. Sultan Pradhan has observed that:

"a proceedings u/s 125 of the code is of summary nature and that the intricacies of the law are not required to be gone into and that where the man and woman lived together as husband and wife and treated as such by the community and the man treated the woman as his wife, marriage between them has to be inferred for the limited purpose of S.125 of the Code".

In Phoola Bai Joge Vs. Berro, Justice Chawla of the Madhya Pradesh High Court thought it proper to hold that Smt. Phoola Bai is the wife of Beero because they were living as husband and wife for at least 15 to 20 years. Beero also acknowledged Phoolabai as his wife by nominating her for CPF and Gratuity. The relatives of husband also treated them both as husband and wife. Thus in the words of Justice Chawla:

"The law further is that where man and woman were living together as husband and wife and the husband also acknowledged the woman to be his wife and relatives also treated them as husband

21. Ibid.

22. AIR 1987 Mys 305.


and wife, presumption arises that the woman is legally married wife". It has also been ruled in Savithamma Vs. Ramanarsinhaiah that the fact that a man and woman have lived for nearly twenty years as husband and wife and the woman has borne children which are acknowledged by the man as his own would raise a presumption that the woman was his legally married wife. But, at the same time, it must be noted that such presumption is always rebuttable. The Supreme Court in Gokal Chand has ruled that the presumption which may be drawn from long conhabitation is rebuttable. Therefore, as rightly pointed out in Savithamma if there is documentary evidence to rebut such presumption the woman cannot claim any maintenance for herself under Section 125 of the Code. The Mysore High Court in Vanajakshamma has opined that when the presumption has arisen from evidence mere total denial of the husband that he ever lived with the woman cannot rebut the presumption. Consequently, it is submitted that the socially oriented provisions of maintenance should be made available to the neglected and destitute woman in whose favour the presumption arises from long and continuous cohabitation that she is the wife of that man, that their relationship has come to be recognised by the relatives and society as such.

1. 1963 Cr.L.J. 131
2. AIR 1952 S.C 231
3. 1963 Cr.L.J. 131, Supra.
4. AIR 1987 Mys 305.
(b) MAINTENANCE TO DIVORCED WIFE : UNDER CHAPTER IX OF THE CRIMINAL PROCEDURE CODE:

Divorce means dismissal of matrimonial obligations which was fairly unknown phenomenon, under the old system particularly among Hindus, Christian and Parsis in India, has become a fashion of the day. The notion of union for life, eternal union or holy union is becoming a nine days union for sex, and union for matrrialistic consideration. The concept of marriage as sacramental union is fast with earning away and modern concept of marriage as a contract is emerging. Now in India divorce is allowed under the Hindu Marriage Act, 1955, the Parsi Marriage and Divorce Act, 1936, the Indian Divorce Act, 1869, Under Muslim Law Marriage is considered a contract, and divorce is allowed to a man from the very beginning. It is only in 1939 a Muslim lady is permitted to divorce her husband under the dissolution of Muslim Marriage Act, 1939.

Divorce is the biggest failure of marital life. It causes serious repercussions not only for the spouses but also for the society at large. Or one can say that Divorce which brings about the collapse of one's world may create a serious crisis in one's life also. One of the significant crises after divorce is the question of maintenance and in this aspect the effect of divorce is more severe for the wife than for the husband.

In India, when the Code of Criminal Procedure was passed in 1898, the provisions of maintenance to wife and
children were incorporated in Section 488 of the Code. When the new Code of Criminal Procedure was passed in 1973 by the Indian Parliament, the provisions of maintenance were rationalised. Chapter IX was incorporated in the Code consisting of Section 125 to 128.

As regards the wife's right to maintenance under the Code, two important changes have been brought about in the new provisions. The definition of 'wife' has been enlarged by adding Explanation (b) to Section 125 of the Code. Under the old Code of 1898, only wife of subsisting marriage could have claimed maintenance. Secondly, under 488 of the code of 1898, the wife could have claimed maintenance without proving that she was unable to maintain herself, now under Section 125 of the new Code, besides other conditions, she is required to prove that she is unable to maintain herself. Explanation (b) to Section 125(1) of the new Code of 1973, says the term;

"wife" includes a woman who has been divorced by, or has obtained divorce from, her husband and has not remarried".

Therefore, besides wife of a subsisting marriage, a divorced wife too can claim maintenance under Section 125 of the Code, if she fulfills the other condition laid down in the Section itself. However, the doors of Section 125 of the Code are closed to a Muslim divorced wife with the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986. 1

1. The provisions of this Act and other related provisions of maintenance of Muslim wife have been critically examined in the next chapter.
Though, Section 125 of the new code is couched almost in the same language as Section 488 of the old Code, but with the addition of Explanation (b) after sub-section (1) to Section 125, it has significantly changed the legal position of a woman after divorce. Justice Fazal Ali speaking for the Supreme Court in Zohara Khatoon Vs. Mohd. Ibrahim has very correctly pointed out that:

"Under clause (b), the wife continued to be a wife within the meaning of the provisions of the Code even though she has been divorced by her or has otherwise obtained a divorce and has not remarried".

This case was decided before the enactment of the Muslim Women (Protection of Rights on Divorce Act) 1986, therefore, the Supreme Court has allowed maintenance to a divorced Muslim lady, who had got divorced under the provisions of the Dissolution of Muslim Marriage Act, 1939.

It is pertinent to point out, that to grant maintenance to the divorced wife the factum of divorce should be successfully proved. In deciding whether there has been divorce or not between the spouses, recourse has to be taken to the personal law of the parties and if there is a custom of divorce that shall remain unaffected.


Section 29(2) of the Hindu Marriage Act, 1955.

Another important point to be noticed is that not only a wife who has been divorced by her husband, even a wife who has herself divorce is entitled to claim maintenance under Section 125 of the Code.

From the decisions of various High Courts, it is well settled now that a woman who has been divorced before the coming into force of the new Code on April 1, 1974, is also entitled to maintenance, if she fulfils other requirements.

In Mambekkattu Nanu Vs. M. Vasantha, the question before Mr Justice padmanabhan of the Kerala High Court was, whether a wife whose application for maintenance was disallowed during subsistence her marriage on the ground that she was living separately from her husband without reasonable cause and there was no neglect or refusal to maintain her on the part of the husband, can claim maintenance under section 125 of the Code after her husband obtained a decree of divorce, as divorced wife. The learned

1. Section 29(2) runs as follow:
"Nothing contained in this Act shall affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of Hindu Marriage, whether solemnized before or after the commencement of this Act."


Judge upheld her right to claim maintenance under Section 125 of the Code in view of the extended definition of the term 'wife' mentioned above.

The impact of this decision is very unfortunate. A 'wife', who was not entitled to maintenance as she was unjustified in living separately from her husband and there was no neglect or refusal on the part of her husband got decree of Divorce on the basis of her refusal to comply with the decree of restitution of conjugal rights. Perhaps she is being rewarded with maintenance allowed for breaking the matrimonial home. Therefore, it is submitted, the wife, own guilty disentitled her to maintenance during the subsistence of Marriage, should not be given privilege to get maintenance after Divorce.

-GUILTY DIVORCED WIFE: SHOULD SHE BE ALLOWED MAINTENANCE UNDER THE CODE:

According to the scheme of Section 125 of the Code, a wife is entitled to maintenance from her husband:

- if her husband has sufficient means,
- if he neglects her or
- if he refuses to maintain her,

and the wife is also unable to maintain herself. The right of wife to claim maintenance under the Code would come to an end, if she remarries or lives in adultery or if she voluntarily surrenders her right to maintenance.

Now, the question is, whether a divorced wife is supported to fulfill all the above mentioned conditions or not? It is evident that after divorce, the divorcee wife is not bound to stay or reside with the divorcee husband. If we critically analyse the above said conditions, we will find that some of them become non functional to the divorced wife. True, the conditions of 'husband having sufficient means' and that the wife is unable to maintain herself' are relevant and applicable to both i.e. the wife of subsisting marriage and divorcee wife. But what about other conditions? Whether the divorcee wife is also required to fulfill these conditions. Has she to prove that the husband has neglected her or refused to maintain her? If it is proved that the husband has neglected or refused to maintain his wife during the subsistance of marriage, the simple answer would be that after divorce the divorced wife will be entitled to maintenance. Where on the face of record, it is evident that the husband had neither neglected nor refused to maintain his wife, in such a case, whether wife will be entitled to maintenance under the Code? On the other hand, if the wife herself is guilty of leaving the matrimonial home without reasonable excuse or she herself was guilty of desertion, or cruelty or adultery and on that basis the husband had got decree of divorce, whether that guilty divorcee wife should be entitled to maintenance under the Code? In other words, should a guilty party be allowed to
take advantage of her own wrong?

Let us take one example. A girl was married to a scholar in Hindu literature. After marriage the wife abused the parents of the husband. She abused the husband too, called him an impotent in the presence of others. She levelled false allegations against her husband of having illicit relations with another young girl. The wife burnt the complete typed Ph.D. thesis of her husband which way yet to be submitted to the university. Now surely she is guilty of cruelty. The husband got divorce on the basis of cruelty committed by the wife. After the decree of divorce, the wife files application for maintenance under Section 125 of the Code. Should she be allowed maintenance? Should the husband be burdened with financial responsibilities for no fault on his part?

In Sridhar Vs. Kanak Sha, the Andhra Pradesh High Court allowed maintenance to wife under Section 125 of the Code, even though the husband got decree of divorce on the ground of non-compliance of the decree of restitution of conjugal rights passed in his favours. The Indore Bench of the Madhya Pradesh High Court in Mangilal Vs. Bitabai has also granted maintenance under the Code to a wife, whose husband got decree of divorce on the ground of

1. These are proved and established facts of Shanti Devi Vs. Raghav Prakash, II (1985) DMC 85(Raj.)
2. 1983 Cr.LJ No.C 47, see also Madhu Sudan Mishra Vs. State 1988, Cr.I.J 1247 (All);
3. 1988 Cr.LJ 1591
desertion by the wife. The same view is taken by the
Calcutta High Court in Bishwanath Saha Vs. Sikha Saha.
Justice Shamsuddin Ahmed observed;

"It is true that even though the husband has
obtained a decree of divorce against the wife on
the ground that she refused to live with him
without any sufficient reasons, even then she
(she-he) will have to suffer an order U/S 125
Cr.P.C. The erring party in such cases even
though the wife, the husband had to maintain her
for no fault of his own".

These rulings negate the Natural Law principle and rule of
equity that 'no one should be allowed to take advantage of
one's own wrong'. The law cannot be so harsh for the
husband.

A single Bench of the Bombay High Court has
considered the right of divorced wife whose marriage was
dissolved in favour of her husband on the ground of
desertion of her husband by her in Shantibai Saitwal Vs.
Jindas Baburao Saitwaland it was observed;

"Sub-Section (2) of Section 127 expressly
provided that where it appeared 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
was entitled to cancel the order or vary same.
In the instance case the decree of divorce
passed on the ground of desertion meant that the
husband had proved that the wife had left him
without any reasonable cause, and therefore, she
was not entitled to maintenance under Section
125 of the Code of Criminal Procedure".

1. 1986 Cr.LJ 1199, see also Sukumar ibar Vs. Anjali Basi
1983 Cr.LJ 36(Cal), see Velkutty Vs. Prasanna Kumari,
1985 Cr.LJ 1558(Red), Smt. Sukhwinder Kaur Vs. Sadhu
Prakash Wati, 1983 HLR 613(All);

2. 1985(2) Crimes 901 (Bom.)
In this case, the learned judge relied upon the Division Bench decision of its own High Court in Sharad Chander Satbhai Vs. Indubai Satbai, wherein it was held;

"Sub-Section(4) disentitles a wife to receive allowance in certain cases, one of there being "if, without any sufficient reasons, she refused to live with her husband". This sub-section governs the whole of Section 125. Now, in a case like the present one, when the Civil Court has determined the issue of desertion and held that the wife has left her husband without reasonable cause and against his wish and without his consent can it he said that she is still entitled to maintenance under Section 125 and not hit by sub-section (4)? It is plain and simple that she has refused to live with her husband without any sufficient reason and, therefore, disentitled herself to receive maintenance under S.125". 2

Therefore, when the Civil Court passes a decree of divorce on the basis of desertion by the wife, it is clear that the wife has abandoned the matrimonial home without sufficient cause and without the consent of the husband and against his wish. Thus this factum of desertion disentitles the guilty divorced wife to maintenance under the Code. Recently, a Single Bench of the Bombay High Court in Sugandhabai Vs. Vasant, 3 in disregard to the ratio of Division Bench decision in Satbhai allowed to maintenance to a divorced wife held guilty of desertion. It is submitted that learned Single Judge has unnecessarily disregarded the ratio of Division

1. 1978 Mah. L.J. 123
2. Emphasis added
3. 1992 Cr.LJ 1839, see also Sushila Namdeo Vs Namdeb, II(1991) DMC 570,(Bom.)
4. 1978 Mah.LJ 213
Bench decision of Satbahi. It is very pertinent to note that according to sub-section (5) of Section 125 of the Code, if 'the wife refuses to live with her husband without sufficient reason', the Magistrate can cancel the order of maintenance. Now, it is very interesting that the Court wants to say that even though a wife of subsisting marriage cannot claim maintenance under the Code on the ground of her refusal to live with her husband without sufficient reason yet she becomes entitled to maintenance on divorce granted in favour of her husband on the ground of desertion and the wife being guilty and responsible for breaking the matrimonial home. Explanation (b) of Section 125 (i) of the Code just extends the meaning to the term wife used in other provisions of the Code. It does not give any additional rights to divorced wife to claim maintenance. If a wife of subsisting marriage is disqualified from claiming maintenance on certain grounds, how can a divorced wife become entitled to maintenance with such a disqualification. No doubt, the provisions of maintenance under the Code are to prevent vagrancy and destitution but at the same time these provision are not to punish the husband, more so when he is an innocent.

Therefore, it is submitted that whenever and wherever the wife including the divorced wife is guilty of desertion or cruelty or any other matrimonial offence which

1. ibid
results in divorce in favour of the husband, that guilty wife should not be allowed to get the benefit of these provisions of maintenance under the Code. It will be in consonance with the true spirit of the maintenance provision of the Code. The Madras High Court in Sampath Kumar Vs.Subashini has rightly rejected the divorced wife's claim to maintenance under the code on the ground that the wife had not asked for any maintenance pendente-lite during the course of matrimonial proceedings, the wife had not shown any neglect or refusal to maintain by the husband. Justice Divid Annoussamy then held therefore, this is not a fit case for an order under Section 125 Criminal Procedure Code. The learned judge sketched a true picture of maintenance provisions by observing;

"What the respondent(divorced wife) should have done is to ask for matrimonial Court itself to grant maintenance alongwith the decree of Divorce if she was interested in maintenance. But, even subsequent to the order, if she is of opinion that maintenance is necessary, she can still approach the matrimonial Court .... under S.25 of the Hindu Marriage Act 1955 for getting maintenance". 2

(ia) CAN DIVORCE WIFE 'LIVE IN ADULTERY': Now let us examine this aspect under our present consideration from another angle. Suppose a wife is living in adultery. Can she claim maintenance under Section 125 of the Code. The law is crystal clear that in view of sub.section(4) of Section 125 of the Code, suuch adulterious wife will not be entitled to

1. 1986(1) HLR 28
2. Emphasis supplied
receive the maintenance allowance from her husband under this Section. But, now suppose she continues to live a life of promiscuous behaviour after divorce. It is a fact that according to law she cannot be held guilty of adultery, as she is divorce and only wife whose marital tie subsists can commit the offence of adultery. Hence, a significant question which arises whether such divorced adulterous wife will be entitled to claim maintenance under the Code?

In Y. Mangetayaru Vs. Y. Seshavatran, it was contended on behalf of the divorcee wife that, "after divorce the question of committing the offence of adultery does not arise as she is no more the wife'. Justice G. Radhakrishna Rao of the Andhra Pradesh High Court examined the provisions and case law on the point. In support of her claim, the wife in this case relied upon Mariyuma Vs. Ibrahim, wherein it was observed by the Full Bench of the Kerala High Court that;

"The effect of the Explanation is evidently to read the term 'wife' in Chapter IX of the Code as meaning not only the wife as generally understood but also a woman who has been...


2. M. Alavi Vs. T.V. Safiq, I(1992) DMC 621 (ker.), wherein it is held that wife after divorce cannot be held guilty for adultery.


4. AIR 1978 Ker. 231
divorced but who has not remarried. It may be noticed that Section 125(1) deals with the obligation of a "person" and not of a husband or of a father or of a son. The scope of the Explanation is not to create a jural relationship between the divorced woman and the erstwhile husband. No new obligations outside the scope of the Code is sought to be imposed either on the divorced woman or her erstwhile husband by reason of the Explanation. The object of the Explanation is only to enable such a divorced woman to claim maintenance from her erstwhile husband until her remarriage. The very object of the provision in Section 125 of the Code is to provide for a minimum obligations on the part of a person to maintain his wife, children, parents and his divorced wife who is not remarried under certain circumstances".

Mr Justice G.Radhakrishna Rao did not prefer to apply the distinctions as made out by the Kerala High Court in the above decision. The learned judge thoroughly analysed the various aspects and then observed in unequivocal terms that;

"The Full Bench also considered the effect of the provisions of Section 125 (4) and 125 (5) of the Code. A woman whose marital tie does not subsist cannot be guilty of adultery much less can she be said to be living in adultery. She may live a promiscuous life, but that would not render her guilty of adultery, for 'adultery' is a term that denotes an offence against the institution of marriage. It is only under the inclusive definition of 'wife' in Section 125(4) of the divorcee is entitled to claim. When the 'wife' includes 'women' who has been divorced the incidents that accrued to the term 'wife' also must follow. A divorcee cannot take advantage of the inclusive definition of 'wife' and can claim maintenance even though she was living in adultery after the divorce to the knowledge of one and all. The other incidents and after the liabilities that have to be attached to the term 'wife' shall also follow in the event of claiming maintenance from her former husband. A divorcee cannot commit an offence of adultery as such, but if we take into consideration the inclusive definition and if we give her the status of wife for the limited purpose of claim, I do not find any difficulty to extend the same analogy to the offence that
has been committed by her which may attract the ingredients of adultery, if she was not divorced. If the divorcee has to be treated as a wife, her living in adultery after the divorce also has to be taken into account. There need not be a specific provision that the divorcee is not entitled for maintenance, if she lives in adultery. What consideration has to be taken into account by applying Section 125, 126 and 127, Cr. P.C. with regard to wife also have to be applied in the case of wife who claims the benefit or the advantage that accrued to her after the divorce by virtue of Explanation (b) to Section 125 Cr. P.C. The distinction that has been made by the Kerala High Court (F.B.) cannot be applied. When the inclusive definition is there and the right to claim arose under that inclusive definition and the wife claimed right on that basis, the offences which she committed will generally fall if she was treated as a wife also have to be taken into consideration. 1

Thus, the Legislature, as rightly pointed out by Mr. Justice Rao, never contemplated that a benefit which a wife is not entitled, to normally, would be granted to the divorcee under the provisions of Section 125 of the Code. What normally could not have been granted in the normal course to a wife,

1. Emphasis added
could not be expected to be granted to a divorced wife in whose favour a limited benefit has been conferred under the inclusive definition of Section 125(1)Explanation (b) of the Code.

From the critical analysis of the provision of section 125 of the Code and the judicial authorities, we can conclude that if a wife is guilty of matrimonial offences of desertion, cruelty, adultery, etc., which result in divorce, the benefit of section 125 of the Code should not be given to such spouse who is responsible for breaking the matrimonial home. A wife should not be rewarded for her matrimonial misconduct. This is also in consonance with nature law principle that no one should be allowed to take advantage of his or her own wrong mony. The maxim of equity says that he who seeks equity must come with clean hands.
MAINTENANCE TO THE WIFE OF ANNULLED MARRIAGE_ A PLEA TO ALLOW TO 'EX-WIFE' THE BENEFITS OF BENEFICIAL PROVISIONS OF MAINTENANCE UNDER THE CODE AND TO DISCARD THE DOCTRINE OF 'LEAGALLY WEDDED WIFE': Divorced wives have been made eligible to claim maintenance under the provisions of the Code by adding Explanation(b) to Section 125(1) of the Code, at the time of passing the new code in the year 1973. Under matrimonial statutes, besides divorce, the spouses have been given the right to claim decrees of nullity also. The parties to the marriage having gone through the ceremonies of marriage according to their customs or rites got the status of husband and wife. This marriage tie can be untied only by a decree of divorce, which can be passed by the Court, if any of the grounds as enumerated under the relevant provisions of the matrimonial statute applicable to them exists. The wife of such marriage after divorce is termed as divorced wife.

Sometimes a boy and girl enter into the marriage tie. Their marriage is solemnised according to customary rites and ceremonies. They live as husband and wife. They may even be blessed with a child. But their marriage may

1. See sections II and 12 of the Hindu Marriage Act 1955, Section 30 of the Parsi Marriage and Divorce Act 1936, Section 18 of the Indian Divorce Act, 1869.
be void or voidable if the parties are living as husband and wife, and if the husband, who has sufficient means, neglects or refuses to maintain, unless their marriage is declared null and void then what? The Kerala High Court has very rightly held in Gabriel Antony Vs. Thressya Gracy that the parties continue to enjoy the status of marriage and the Magistrate exercising jurisdiction under Section 125 of the Code should allow maintenance to such a wife as he is not empowered to decide the question of validity of marriage.

Similarly, Justice Patil of the Kasrnatka High Court has also discussed the provisions of annulment of marriage under the Hindu Marriage Act, 1955 vis-a-vis the right of the wife of such disputed marriage in Rudramma Vs. H.R. The judge held in unequivocal terms that the Magistrate must allow the application of maintenance, under Section 125 of the Code of the wife, whose marriage is disputed by her husband as being void under the Hindu Marriage Act. Giving reasons for the said ruling, he observed:

"It appears to me that merely by reason of the fact that the first wife is living the second marriage will not be null and void; because the expression ‘spouse’ as used in S.5(i) of the Hindu Marriage Act means a lawfully married wife or husband. Therefore, it necessarily follows, before deciding the validity or otherwise of the second marriage, the solemnisation of the

2. 1987 Cr.L.J. 677.
Firstly, because such questions are decided by Special Matrimonial Courts constituted under the law in a regularly instituted suit; (ii) secondly, because such questions may also arise on a contention raised by the husband or the wife regarding the violation of the conditions in Cls (iv) and (v) of S.5 of the said Act. When such contentions are raised several aspects like customs and usages governing the parties to the marriage which have also necessarily to be proved before establishing the violation of the conditions of valid marriage arise for decisions and they cannot properly be decided in a summary proceedings like this. (iii) thirdly, because the Criminal Court is not called upon to go into such complicated questions of validity of marriage which are to be decided by the Civil Court, therefore in cases under S.125 Cr.P.C. proceedings under S.125 Cr.P.C. can proceed under S.25 Cr.P.C. proceedings in summary, but such proceedings are not called upon to go into such complicated questions of validity of marriage which are to be decided by the Civil Court, therefore in cases under S.125 Cr.P.C. proceedings under S.25 Cr.P.C. can proceed under S.25 Cr.P.C. proceedings in summary, but such proceedings are not called upon to go into such complicated questions of validity of marriage which are to be decided by the Civil Court, therefore in cases under S.125 Cr.P.C. proceedings under S.25 Cr.P.C. can proceed under S.25 Cr.P.C. proceedings in summary, but such proceedings are not called upon to go into such complicated questions of validity of marriage which are to be decided by the Civil Court, therefore in cases under S.125 Cr.P.C. proceedings under S.25 Cr.P.C. can proceed under S.25 Cr.P.C. proceedings in summary, but such proceedings are not called upon to go into such complicated questions of validity of marriage which are to be decided by the Civil Court, therefore in cases under S.125 Cr.P.C. proceedings under S.25 Cr.P.C. can proceed under S.25 Cr.P.C. proceedings in summary, but such proceedings are not called upon to go into such complicated questions of validity of marriage which are to be decided by the Civil Court, therefore in cases under S.125 Cr.P.C. proceedings under S.25 Cr.P.C. can proceed under S.25 Cr.P.C. proceedings in summary, but such proceedings are not called upon to go into such complicated questions of validity of marriage which are to be decided by the Civil Court, therefore in cases under S.125 Cr.P.C. proceedings under S.25 Cr.P.C. can proceed under S.25 Cr.P.C. proceedings in summary, but such proceedings are not called upon to go into such complicated questions of validity of marriage which are to be decided by the Civil Court, therefore in cases under S.125 Cr.P.C. proceedings under S.25 Cr.P.C. can proceed under S.25 Cr.P.C. proceedings in summary, but such proceedings are not called upon to go into such complicated questions of validity of marriage which are to be decided by the Civil Court, therefore in cases under S.125 Cr.P.C. proceedings under S.25 Cr.P.C. can proceed under S.25 Cr.P.C. proceedings in summary, but such proceedings are not called upon to go into such complicated questions of validity of marriage which are to be decided by the Civil Court, therefore in cases under S.125 Cr.P.C. proceedings under S.25 Cr.P.C. can proceed under S.25 Cr.P.C. proceedings in summary, but such proceedings are not called upon to go into such complicated questions of validity of marriage which are to be decided by the Civil Court, therefore in cases under S.125 Cr.P.C. proceedings under S.25 Cr.P.C. can proceed under S.25 Cr.P.C. proceedings in summary, but such proceedings are not called upon to go into such complicated
him for maintenance leaving the wife to establish her status as a wife in a Civil Court. The right course to be followed, it appears to me is; On proof of solemnisation of marriage between the applicant and the respondent with essential customary rites and ceremonies, the other requirements like neglect and refusal having been established, the Magistrate who is empowered and conferred with jurisdiction to provide maintenance to a wife unable to maintain herself should award maintenance to the wife leaving the husband to establish the invalidity of marriage in a competent Civil Court as pointed out in the case of Palmerino Vs. Mrs.Palmerino That seems to be the proper course; because the sole object in enacting these provisions of maintenance as incorporated in Chap.IX of the Cr.P.C. is to provide cheap and speedy remedy and to prevent vagrancy of a wife unable to maintain herself and any order of maintenance made by the Magistrate is liable to be cancelled or varied, as the case may be, in consequence of any decision of a competent Civil Court".

The Sikkim High Court speaking through A.C.Justice A.M.Bhattacharjee has also held in P.B. Bista Vs.Santa Bista that under Section 488 of the Cr.P.C. 1898 (Code of 1973 was not extended to the state of Sikkim), the Magistrate is not required to go into the validity of marriage which has been proved to have taken place infact. Thus, according to the learned judge, it is not only the 'legally wedded wife' but wife in fact can also claim maintenance under the Code.

Now, the crucial question which merits our attention is that, where a competent matrimonial Court has already granted a decree of nullity, whether the wife of such marriage is entitled to claim maintenance under section 125
1. AIR 1927 Bom. 46(28 Cr.L.J.51).
2. 1984 HLR 281.
of the Code? Such a wife cannot be called technically a divorced wife. Sometimes, she is termed as defacto wife, illegitimate wife or ex-wife, but by whatever name she may be called, one thing is certain that she had to lose her maidenhood believing herself to be the wife of that person with whom she had undergone marriage ceremonies.

Unfortunately, the approach of the juridiciary towards her right to maintenance under the Code is too technical. Not only the High Courts even the Supreme Court has held that a women whose marriage is null and void is not entitled to claim maintenance under the Code. Therefore, this approach of the judiciary calls for an indepth instnirsical examination.

While discussing the object and nature of the proceedings under the Code, we have seen that the judiciary has repeatedly observed that the maintenance provisions under the Code contain social welfare provisions which act as means of preventing vegrnacy and destitution. The provisions are intended to fulfil a social purpose by compelling a man to perform his moral obligation. The judiciary has repeatedly held that the maintenance

provisions of the Code should be interpreted liberally to further the interests of the society and these must be construed to achieve the basic objects of these provisions as stated above.

On the other hand, unexpectedly, the judiciary has interpreted these maintenance provisions to the disadvantage of that woman who had not only gone through the ceremonies of marriage but also lived as wife, and given birth to a child. Her marriage is void on certain specified technical grounds. For no fault of hers, she is made to suffer by interpretation given to the term 'wife' by the judiciary. The judiciary has taken the stand that the 'wife' of annulled marriage is not entitled to maintenance under the Code because only a 'legally wedded wife' is entitled to claim maintenance.

Unfortunately the rule of 'legally wedded wife' has been accepted by the Supreme Court in Yamunabai Vs. Anantrao and Bukulbai Vs. Gangaram, decided on the same day. Justice L.M. Sharma speaking for the same Division Bench considered the question as to whether the expression 'wife' used in S.125 of the Code should be interpreted to mean only a 'legally wedded wife'. Rejecting the forceful and substantive arguments that the term 'wife' in Section 125 of the Code should be given a wider and extended meaning so as to

2. 1(1988) DMC 210 per Rangenath Mistre an L.M. Sharma, JJ.
include therein not only a lawfully wedded wife but also a woman married infact by performance of necessary rites or following procedure under the law, the learned judge denied the relief of maintenance to the wife observing:

"The marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eyes of law and she is not entitled to the benefit of §125 of the Code".

The Supreme Court rejected the plea of estopel put forth by the wife that she had not been informed about Anantrao's first marriage. Another plea of the wife that Anantrao had treated her as his wife, also did not find favour with the Apex Court. It has been rightly commented about this decision that the maintenance jurisprudence being developed by some High Courts in favour women who have given themselves in marriage without complete form, under ignorance and innocence comes to a halt. And we are back to square one.

The decision of the Supreme Court in Yamunabai has been followed by various High Courts. In all these decisions

1. Emphasis supplied
2. Dr. R.D.Anand, Let the maintenance jurisprudence have a p 173 at 183.
3. Supra.
the High Courts reiterated that only a 'legally wedded wife' is entitled to maintenance under section 125 of the Code and therefore, ex-wife or defacto wife cannot claim maintenance.

It is submitted that the Supreme Court, even after the enactment of new Code of 1973, has given a very restricted and technical interpretation to the word 'wife' used in Section 125 of the Code. It was very rightly urged before the Bombay High Court in Bajirao Vs. Tolanbai that:

"The narrow construction put in the word 'wife' in Section 125 would cause injustice and grave hardship and lead to manifest contradictions; particularly in view of the attempts of the legislature to improve the lot of discarded married women and the well known fact that most of such women are helpless and do not have any source of income".

But, these arguments did not find favour with the Division Bench in Bajirao and it rejected the application of the second wife filed under Section 125 of the code, being wife of annulled marriage.

But, a Division Bench consisting of Dharmadhikari and Paranjik, JJ., of the same High Court did not agree with the decision of Bajirao in Yammunabai Vs Anantrao. It

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2. 1980 Cr.L.J. 473.
3. Ibid p.480.
4. Ibid.
discarded the view that a women whose marriage was declared null and void is not a legally wedded wife' and thus not entitled to claim maintenance Under Section 125 of the code.

This Division Bench, while making referring order to the Full Bench has rightly emphasised the importance of the Supreme Court decisions in Bhagwan Dutt Vs. Kamla Devi, Tahira Vs. Ali Hussain and Zohra Khatoon Vs. Md. Ibrahim. Wherein, the Appex Court high lighted the object of S.125 of the Court saying:

"While enacting section 125 of Code there was distinct departute from the old Code and the present code had widened definition of the term 'wife' and to some extent overruled the present law of the parties so far as proceedings for maintenance under section 125 of the Code were concerned".

The said Bench, therefore felt that the term 'wife' as appearing in Section 125 of the code should be broadly construed and not merely restricted to a 'legally wedded wife' and for the purpose of claiming maintenance it should be sufficient if she proves that her marriage was solemnized after following the prescribed ceremonies under the personal law and that she has been treated as wife by the person from whom maintenance was claimed and by the public as such.

It is unfortunate that the Full Bench comprising Chandurkar Rege and Gadgil, JJ., did not find themselves in agreement with the views of the referreing, Judges The full Bench clinched to the rule of 'legally wedded wife'. They preferred to define the 'wife' as legally wedded wife'.

1. 1975 Cr.L.J 40.
2. 1979 Cr.L.J. 151.
obviously to the disadvantage of the woman. They could not
deem it fit to include ex-wife or defacto wife within the ambit
of the term 'wife'. They did not realise that the
Legistlature has used the term 'wife' and not 'legally
wedded wife' or 'Married wife'.

Still more shocking and unfortunate is the fact that
even the Supreme Court has affirmed the view of the Full
Bench in the case, reported as Yamunabai Vs. Anantrao.1

It must be pointed out that in most of cases the
problem of maintenance to ex-wife arises where her marry
is declared null and void on the ground of her husband
already having a wife living at the time of said marriage.
It can be safely claimed that in most of such cases, the
aggrieved wife of second marriage did not have the
knowledge, of the first marriage of her husband in such
cases the agreed woman has been made to go through the
marriage ceremony and to lose her maidenhood under the
belief brought out by false pretence that she was lawfully
wedded wife. Undoubtedly, her marriage is void, but should
she be denied the right to maintenance under the code?
Hardly, any blame can be laid at the door of the wife on
that account.

It is pertinent to point out here that the judiciary
has allowed the Hindu wives of annulled marriage to claim
maintenance Under Section 24 and 25 of the Hindu Marriage

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1. 1988 Cr.L.J. 793, see also Bakul Bai Vs. Gangaram, Supra.
2. Under Section II read with section 5(1) of the Hindu
Marriage Act, 1955.
Justice K.L. Laheri of the Gauhati High Court in Boli Narayan Vs. Siddeshwari, while upholding the right of an ex-wife to maintenance under section 125 of the code has very rightly observed:

"A short as well as long look at section 125 of the Code makes it clear that it is a measure of social justice to ensure protection to wives, children and parents. It falls within the sweep of the Article 15(3) and 39 of the Constitution and is a core of the Fundamental duties enshrined in Article 51 and legislature inspiration is drawn from the Preamble of the Constitution which provide for securing social justice to all the Code words printed must be explicated to enable the provision to fulfill its social function which is the generating force for enacting the provisions.

The learned Judge discarded the rule of 'legally wedded wife' and applying a interpretation having social relevance ruled that:

"A woman who comes to the life of a man gives herself to the man, takes the family life of the man and the man uses her as such, recognizes her as his wife, must comes within the fold of the term 'wife' declaration of the status by the woman are enough to bring her within the preview of S.125. A marriage may be valid void or voidable nonetheless for it is a marriage it follows, therefore that a void or voidable marriage does not disentitle the wife to maintenance".

His Lordship observed that a wife and wife of void marriage are equally entitled to maintenance under section 125 of the Code. It is important to note that the judgement of Boli-Narayan has neither been referred nor discussed by

1. Please refer to the discussion under Hindu Wife's Right to Maintenance under the Hindu Marriage Act, 1955.

2. 1981 Cr.L.J. 674, in 1989, the Gauhati High Court held in Krishna Kant Vs. Kanchan Bala, II(1989) DMC 33 that Bolinarayan, decision is not good law in view of the S.C decision in Yamunabai Vs. Anatrao, supra.

3. Emphasis supplied.

4. Supra.
the Supreme Court in Yamunabai.

Justice K.L.Srivastva of the Madhya Pradesh High Court, though upheld the denial of benefit of section 125 of the code to a wife of void marriage in Ambaram Vs.Reshambai yet certainly realised the fate of those unfortunate wives of annulled marriages. He observed with heavy heart:

"It is true that the lot of a woman who does not know about the previous marriage of the man and enters into marriage with him can better be imagined than described, but the Court can do precious little in the matter and the appeal must lie to the Legislature. However, one may wish that the case of such a woman deserved a sympathetic treatment".

But, it must be noted that the learned judge had to reject the ex-wife claim to maintenance in view of the Supreme Court decision in Bakulbai case. One fails to understand, if court had realised the need to protect the right of the wife of annulled marriage, why did it invoke and insist on the doctrine of 'legally wedded wife' The provisions of Section 125 are too clear and precise to admit of any doubt, wherein the word used is 'wife' and not 'legally wedded wife'.

On the other hand, it is interesting to note that in Lata Kamt Vs.Vilas, the Division Bench consisting of G.L.Oza

1. II(1988) DMC 181, 1989(2) HLR 456, wherein the High Court relied on the Supreme Court decision in Bakulbai, supra.
2. 1988(2) HLR 456.
3. Emphasis supplied.
and S.R. Pandia, JJ., of the Supreme Court has brought the 'decree of nullity' within the ambit of 'decree of divorce' as per the scheme of the Hindu Marriage Act 1955. In this case, the Apex Court was required to interpret Section 15 and 28 of the Hindu Marriage Act, while Section 28 of the Act deals with 'Appeal from decree and orders', Section 15 deals with 'Divorced persons who may marry again'. The question before the Supreme Court was, whether Section 15 governs the spouses of divorce decree only or it will cover the spouses whose marriage is dissolved by a decree of nullity under Section 11 and 12 of the Hindu Marriage Act. The learned Bench of the Supreme Court pointed out that the legal meaning or effect of both these decrees i.e. of divorce and nullity is the same viz.,

"that by intervention of the Court the relationship between two spouses has been severed either in accordance with the provisions of Sec.12 or in accordance with the provisions of Section 13 of the Hindu Marriage Act". 2

The Bench also observed that:

"It could not be doubted that where the marriage is dissolved under section 11, 12 or 13 by grant

1. I(1989) DMC 549.

2. Section 15 reads; Divorced person when may marry again: when a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal, having been presented or an appeal has been presented but has been dismissed it shall be lawful for either party to the marriage to marry again."
of decree of nullity or divorce, the relationship is dissolved and or in any way is brought to an end."

Consequently, the Supreme Court brought the spouses of the decree of nullity at par with the spouses of the decree of divorce, and made section 15 of the Act applicable to the spouses of the decree of nullity also. In short, we can say that the ratio of the Supreme Court judgement is that word 'divorce' includes 'nullity' too. Now, if we apply the ratio of Lata Kamat, then undoubtedly, the term 'divorced wife' will also includes the wife whose marriage has been dissolved by a decree of nullity. If a wife, whose marriage is dissolved by a decree of nullity, can get the benefit of section 15 which categorically deals with 'Divorced Persons when may marry again' and 'decree of divorce' how can she be denied the social oriented relief of maintenance under Section 125 of the Code?

Therefore in the light of the Apex Court's decision in Lata Kamat and in view of the text, context and object of section 125 of the Code it would not be unfair to assert that the 'wife' whose marriage is dissolved by a decree of nullity, (may be known as ex-wife, defacto wife or illegitimate wife) is certainly entitled to maintenance

1. Emphasis added.
2. Supra.
3. Ibid.
under the Code. Otherwise, denting the right of maintenance to an ex-wife in the evening of her life, who has submitted herself to the pleasure of a man, lived as wife, and may even have given birth to children, would certainly be an antithesis to the object of Section 125 of the Code as well as the ratio of the Supreme Court’s decision in Lata Kamat. The construction put on the word wife in Yamunabai and other High Court decisions is so narrow that it causes injustice and hardship to the wife of annulled marriage. It is submitted that the section 125 of the Code being a piece of beneficial and social legislation should be construed liberally so as to benefit the neglected and destituted wife, wives. Therefore, the word ‘wife’ should not be strictly and technically interpreted to mean only ‘legally wedded wife’. The doctrine of ‘Legally wedded wife’ has no place in section 125 of the Code. Where it is proved that marriage has been solemnised by performing ceremonies prescribed under the personal law of the parties, and the wife has been treated as such by the person from whom the maintenance is being claimed and they were living as husband and wife, public having treated them as such and the wife is not taking advantage of her own wrong in any way, she should be treated as ‘wife’ for all purposes of claiming maintenance under section 125 of the Code. Thus, where the

1. Supra.
2. Supra.
wife of second marriage had the knowledge of his husband first marriage, such ex-wife, will certainly be not entitled to maintenance under the Code as he is guilty of ruining the other woman's matrimonial home, hence she cannot take advantage of her own wrong. But the innocent ones must be provided with maintenance. The judiciary must discard the doctrine of 'legally wedded wife'. It is also our submission that there is no need to make an amendment to Section 125 of the Code, to specifically bring ex-wife within its perview. The judiciary itself must rise to the occasion and, through a creative and socially inspired interpretation so modify. The meaning of the term 'wife' as to include, for the purpose of claiming maintenance, all wives, divorced wives and the wives whose marriage is dissolved by a decree of nullity.

5. CONDITIONS REQUIRED TO BE FULFILLED TO CLAIM MAINTENANCE UNDER THE CODE OF CRIMINAL PROCEDURE, 1973: As discussed in the preceding pages neither the right of the wife to claim maintenance is absolute nor the liability of the husband is unlimited under coded criminal procedure 1973. The wife's right to maintenance has been circumscribed and before she could claim maintenance under the Code, she has to fulfill certain conditions. Some of these are conditions precedent and some are conditions subsequent. Now, we will examine these conditions or impediments imposed by the provisions of chapter IX of the Code.

(a) 'UNABLE TO MAINTAIN_ A CONDITION PRECEDENT: The first
qualifying condition for the wife to become eligible to claim maintenance under the Code is that she must be 'unable to maintain herself'. Thus, under Section 125 of the Code, maintenance allowance cannot be granted to every woman who is neglected by her husband or husband refuses to maintain her, but it can only be granted to the wife who is unable to maintain herself. It is pertinent to point out that under the Old Code of 1898, no such condition was attached to the wife's right, though this condition was attached to the child’s right to claim maintenance under the Code. The expression 'unable to maintain' has been introduced in the provisions of Section 125 of the Code of 1973. Such expression was not used in the corresponding Section 488 of the Code of Criminal Procedure, 1898. The Supreme Court has very lucidly explained the position regarding this condition-precedent in Bhagwan Dutt vs. Kamal Devi as follows:

"A comparative study of the provision set out above would show that while in Section 488 the condition 'unable to maintain itself' apparently attached only to the child and not to the wife, in Section 125, this condition has been expressly made applicable to the case of wife".

Explaining reasons for the insertion of this condition it


was further observed by Their Lordship:

"Any other construction would be subversive of the primary purpose of the section and encourage vindictive wives having ample income and means of their own to misuse the Section as a punitive weapon against their husband".

But, it must be noted that we must not construe the phrase ‘unable to maintain herself’ to mean that the wife should be an absolute destitute and should first be on the street, should beg and be in tattered clothes and then only she will be entitled to move an application under Section 125.

Therefore where the wife is earning a small amount which enables her merely to get two square meals a day she cannot be said to be able to maintain herself Where wife is maintaining herself by selling ornaments and borrowing money from friends and relatives, she will be entitled to maintenance under Section 125 of the Code.

The decision of Justice Gulab C.Gupta of the Madya Pradesh High Court in Rewati Bai Vs. Jogeshwar is very historic and illustrative of the meaning and scope of the words, ‘unable to maintain herself’. Facts of the case reveal that a husband possessing 17 acres of agricultural

3. S.A. Kaiser Vs. Noor Saham, 1980 Cr.L.J. 611 (Cal.)
land earning about Rs. 20,000 p.a. deserted his wife aged about 50 years after 40 years of living together. The wife filed an application for maintenance under Section 125 of the Code in 1988. In support of her allegation in maintenance application, she gave a statement in the ex parte proceedings that "Main Mazaddori Kar Apana Pet Bharti Hoon" (she somehow maintain herself by working as a labourer). The judicial Magistrate acting upon this statement dismissed her application on the ground that she was 'unable to maintain herself' was not proved. The revisional Court of Session Judge upheld the order of the trial court. Hence she filed an application under Section 482 of the Code invoking inherent power of the High Court to quash order of the Judicial Magistrate as approved by the Session Judge. Justice Gupta of the High court very meticulously analysed the concept of 'unable to maintain herself' and then very correctly concluded:

"Now if a lady living for 40 long years in such circumstances is thrown out without providing for her maintenance, she die; if she does not do anything to survive. If under such compelling circumstances, she works as a labourer, can it be said that she is possessed of means to maintain herself? Her statement that 'Main Mazaddori Kar Apana Pet Bharti Hoon' does not show her ability and capability but indicates her compulsion to survive, what else could be the reason for already advanced age of 50 years to accept working as labourer."

While considering the order of the learned Magistrate to be suffering from a patent illegality, the High Court set

1. Emphasis supplied.
aside the orders and directed the husband to pay maintenance of Rs. 350 p.m. with costs. Mr. Justice Gupta has also observed that:

"The phrase 'unable to maintain herself' if read in context of the opening sentence to this section would mean the means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to somehow survive". 1

Sometimes, the wife may be maintained by her parents or relatives. But this cannot amount to an inference that she is able to maintain herself. Justice H.N. Kapoor of the Allahabad High Court has very correctly summed up in Abdul Salim Vs. Smt. Najima 2 that:

"A woman, no doubt has to depend on some of her maternal relatives for her maintenance when she leaves her husband’s house. She can be maintain for some time by her relatives. But that alone will not be sufficient what is necessary is that she herself should be in a position to maintain herself and that it should not be much below the status which she was used to at the place of her husband".

Justice B.N. Behera of the Orissa High Court has appreciated the above approach in R. Behera Vs. M. Behera 3 and then observed:

"I would respectfully adopt the view of H.N.Kapoor J. merely because a woman in distress has to depend on others for having a shed to take shelter or in order to avoid starvation she takes to living on wages or runs from market to

1. Emphasis supplied.
2. 1980 Cr.L.J. 232.
market for the sale of some grains of food articles to earn a very small profit to have her food to save her life, it cannot be said that she is not 'unable to maintain herself' within the meaning of Section 125 of the Code". 1 Consequently, staying with parents or being maintained by near relatives or earning a small amount cannot be said to imply that wife is able to maintain herself. Even, where the wife is possessed of some agricultural property, it may not be sufficient for her maintenance and she will be entitled to maintenance under Section 125 of the Code. 2

Now, let us turn to another very important aspect which is termed by the judiciary as 'potential earning capacity of the wife'. Many a time the wife including divorced wife who files an application for maintenance Under Section 125 of the Code has potential to earn, but actually she is not earning. The question is what effect, the potential earning capacity of the wife would have on her right to claim maintenance under the Code. The judiciary has not taken a uniform approach on the question. Some High Courts have expressed that 'potential earning capacity' is not a relevant consideration for deciding whether the wife is able or unable to maintain herself. Justice S.Z.Hasan of the Allahabad High Court has observed in Shravan Kumar Vs. Usha Devi, 3 that:

1. Ibid. p. 637.
3. 1985 (2) HLR 513; see also Buvaneshwari Vs.Ramaakrishnan, I (1989) DMC 446(MAd.).
"The words 'unable to maintain herself' have nothing to do with the potential earning capacity of the wife".

Justice Dharmadhikari of the Bombay High Court ruled further in Vimal Vs. Sukumar Amma that:

"The expression 'unable to maintain only' cannnotes that the wife has no other means or source to maintain herself. It has nothing to do with potential earning capacity."

On the argument that the potential income should be taken into consideration the learned judge observed:

"Then the whole provision will become unworkable and will result in defeating the very object of the legislature. It will involve rovering and endless enquiry about her physical ability, capacity as well as avenues and opportunities available to her for earning her livelihood. It is obvious that this was never intended by the Legislature".

The judiciary has taken the approach that maintenance under Section 125 of the Code cannot be denied to the wife on the ground that she was refused to earn though she is educated and capable of earning. In Malan Vs. Balurao, it was contended before the Division Bench of the Karnataka High Court that 'as the wife had studied up to S.S.L.C. and as she did not suffer from physical or mental disability she must be held to be able to earn. Rejecting these arguments the Bench ruled:

"Ability to earn requires something more than a fit state of mind and body. It requires

2. 1981 Cr.L.J. 184; see also Abdul Manaf Vs. Salima, 1979 Cr.L.J. 172(Kart.).
opportunity to earn, education, experience and financial push and pull. If these are not available to an able bodied person then woman capable physically or mentally she may be, she should be considered as a person who is not able to earn. Now a days it is difficult even for double Graduates to get employment and so, the wife who is now about 38 years old cannot be expected to be employed anywhere".

Similarly, where the wife is an M.A in two subjects and has served as teacher on temporarily basis, and where a wife is a trained nurse these factors are not sufficient to disentitle her from claiming maintenance under the Code. Justice B.L. Yadev of the Allahabad High Court has observed in Ravi Gopal Upadhyay Vs Urmila Devi that even though the wife is M.A., B.Ed but she was unemployed, she was unable to maintain herself. Hence she is entitled to maintenance Under Section 125 of the code.

It is true that the Judiciary has allowed the wife to claim maintenance under the Code, even though she has potential earning capacity or she is able to earn, but at the same time Justice Yadev in Ravi Gopal Upadhyay has rightly pointed out.

"No doubt while awarding amount of maintenance no luxury should be allowed and only the bare necessities of life should be considered particularly, keeping in view the income and standard of the husband".

4. Ibid p.312-313.
Justice Gulab C. Gupta in Rewati Bai Vs. Jogeshwar, has also observed that:

"Though the level of living required to be maintained is not clarified in this provision it has to be held to be ensuring supplying of food, clothes and shelter to the deserted wife and children. She herself should be able to maintain status not below that she enjoyed in her husband's house".

Thus, after the marriage the status of the wife for maintenance is always judged from the status of her husband and never from the status of her brother or others or maternal relations with whom she may be compelled to reside. About the factors, which the Court should take into consideration for awarding the maintenance amount to wife the Supreme Court has observed in Bhagwan Dutt Vs. Kamla Devi that:

"The object of these provisions being to prevent vagrancy and destitution, the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family. The need and requirement of the wife for such moderate living can be fairly determined, only if her separate income, also, is taken into account together with the earning of the husband and his commitments".

It is very pertinent to point out that though a wife capable

1. 1991 Cr.L.J. 40 at p.41.
2. Gokarnabai Vs.L.D. Rathood, I(1985) DMC 417 (Bom.)
4. Emphasis added.
of earning when refuses to earn, fullfils the qualifying condition and is entitled to claim maintenance under Section 125 of the Code, still her refusal to earn will certainly affect the amount of maintenance to be awarded by the Court. M.S.Nesargi, J., of the Karnataka High Court has examined this aspect in Abdulmunaf Vs. Salima, and summed up as follows:

"The fact that she has refused to earn for herself may be taken into consideration, while considering the quantum of maintenance that the husband is liable to contribute towards her maintenance, as is the view expressed by the Supreme Court. But, merely because she has refused to earn does not mean, that she is not at all entitled to maintenance". 2

Therefore, in the opinion of the learned judge when a wife, being educated and being a normal healthy person, has not taken care to earn anything for herself, that fact will disentitle her to the full amount that she has claimed. Consequently, refusal to earn by a wife who is otherwise capable of earning will surely be a relevant factor in determining the amount of maintenance though it will not absolutely disentitle her to claim maintenance under Section 125 of the Code.

(b) CONDITIONS SUBSEQUENT FOR THE CLAIM OF MAINTENANCE: The condition precedent for the wife to become eligible to claim maintenance under Section 125 of the Code as discussed in

1. 1979 Cr.L.J. 172 at 175.
2. Emphasis supplied.
the preceding pages that she is 'unable to maintain herself'. if she qualified this condition, her claim to maintenance is further based on other conditions viz:

- that the husband has sufficient means,
- that he neglects to maintain her or
- that he refuses to maintain her.

(i) SUFFICIENT MEANS: Only a husband having 'sufficient means' may be ordered by the Court to pay maintenance amount under Section 125 of the Code. If the husband does not possess sufficient means, he cannot be burdened with the orders of providing maintenance to his wife. Now, the crucial point is about the meaning and scope of the word 'means'. While defining the term 'means' some of the High Courts have invented the doctrine of 'able bodied person'. Therefore, even if the husband is not actually having means but if being an 'able bodied person' is capable to earn, he can be burdened with the order of maintenance under Section 125 of the Code. An able person's ability to earn is sufficient to bring the husband within the ambit of "means". Thus, the term "means" in Section 125 does not signify only visible or tangible means such as movable or immovable property, real property in the shape of income, revenue or a definite employment, but it will include the 'capacity to earn' or 'potential earning'. An able bodied person, though not earning in reality, is presumed to have been earning, thus having 'sufficient means' for the purpose of Section 125 of the Code. In such a case the Courts can pass an order against him awarding
maintenance to the wife.

A Division Bench consisting of B.C. Verma and Dharmadhikari, JJ., of the Madhya Pradesh High Court after reviewing the case law on the point, in Durga Singh Lodhi vs. Prembai, supported the concept of able bodied person's capacity to earn in the following words:

"Means does not signify only visible means, like real property in the shape of income, revenue, or estate or a definite employment. It includes capacity to earn money. A healthy and able bodied person, but without any visible or real property must be held as having means to support his wife or child. Once a person has capacity to earn, he cannot escape his liability to maintain under S.125(i)."

Their lordship relied on Full Bench decision of the Rangoon High Court, in Maung Tin vs. Mr. Hamin, wherein it was held that sufficient means is not confined to pecuniary resources and Madhya Bharat High Court decision in Prabhulal vs. Parwatibai, wherein it was ruled that mere minority or the fact that the husband does not work cannot come in the way of granting maintenance to the wife. The relevant factor to be ascertained is the earning capacity of the husband in case he is compelled to work. An able bodied person must be

1. 1990 Cr.L.J. 2065, see also BasantKumari vs. Sarat Kumar, 1982 Cr.L.J. 485, Smt. B.Veragan vs. M.S.Kumar, ILR (1963) Cut. 415; T.Buvaneshwari vs. V.Ram Krishanan, I(1989) DMC 269 (Mad) and also inadvertently reported at p.446.

2. In Kandaswami Cheety, (1926) 27 Cr.L.J. 350; emphasis added.

3. AIR 1933 Rang. 138, 34 Cr.L.J. 815, This view was shared by the Nagpur High Court in Abdul Wahab vs. Surabai, (1936) 37 Cr.L.J. 86.

held as having sufficient means to maintain and it will always be for such a person to prove to the contrary. After referring these decisions Justice Verma finally created the presumption as follows:

"The presumption should be that such an able bodied and healthy person has capacity to earn. The presumption should be such an able bodied healthy person is possessed of sufficient means and it is for him to show that by accident, disease or the conditions of labour market or otherwise he is not capable of earning anything." \(^1\)

The Division Bench overruled its own Single Bench’s decision reported as Prihar Vs Binabai\(^2\), wherein it was observed that maintenance order cannot be enforced against a person who was not possessed any property except cooking utensils and thus non-possesion of any tangible property, a real estate or more visible income entitles a person to avoid payment of maintenance allowance awarded under Section 125(i).

The Delhi Court in Chander Prakash Vs Shila Rani\(^3\) went to the extent of saying that an able bodied young men must be presumed to be capable of earning sufficient money so as to be able to reasonably maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to family

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1. Emphasis added.
Chief Justice I.D. Dua placing burden to proof on the husband further observed:

"It is for such able bodied person to show to the Court cogent grounds for holding that he is unable for reasons beyond his control to earn enough to discharge his legal obligation of maintaining his wife and child." 1

Justice S.R. Bhargava of the Allahabad High Court has even ruled in Khem Chand Vs. State 2 to the effect that a labourer husband cannot be exonerated from payment of maintenance to the wife on the ground that his income is meagre. In R. Behera Vs M. Behera 3 B.K. Behera J., of the Orissa High Court while upholding the concept and presumption that an able bodied person has 'sufficient means'. If he has capacity to earn' observed:

"Notwithstanding the fact that a husband is an insolvent or a professional beggar or a minor or a monk, he must support his wife so long as he is able bodied and can eke out his livelihood." 4

In Mohammad Ayyub Vs. Zaibul Nissa 5 Justice Yashoda Nandan of the Allahabad High Court opined that it is not the 'actual

1. Emphasis supplied.

2. I(1990) DMC 38.

3. 1983 Cr.L.J. 125, 1982 HLR 632, see Prabhu Dayal Vs. Parwati Bai, 1952 Cr.L.J. 868(M.B.) where boy aged 19 was held liable to pay maintenance.


5. 1974 Cr.L.J. 1237.
earning capacity' but 'potential earning capacity of the husband', which should be taken into consideration by the Magistrate at the time of awarding maintenance. Under the Code. The learned judge felt that there may be cases where an able bodied and qualified person may not earn anything because he is either too lazy to put to use his resources.

Some of the High Courts have taken a very realistic and bold approach. In 1973, though Justice B.B. Gupta of the Allahabad High Court in Chevalier v. Ela Ram Prasad has not directly discarded the concept of able bodied person and capacity to earn but refused maintenance to the wife under the Code on the ground that a boy aged 16 studying in school cannot be presumed to have sufficient income. Justice Gupta ruled:

"As regards the ability to earn, the fact that the applicant was being educated and was student of class VIII put it out of question that applicant should have taken to some manual labour after school hours or before that for the sake of earning to provide for his wife's maintenance.

Justice Gupta has also opined in this case that it is settled law that the 'means or income of the father of the husband would be irrelevant for the purpose of fixing the liability of the husband to maintain his wife.'

2. Decision under Sec. 488 of old Code of 1898.
3. See also Faimudabai Vs. Abdul Karim, II(1985) DMC 219 (Bom.).
S.S. Ganguly of the Calcutta High Court in Dasarathi GhoshVs. Anuradha Ghosh has categorically denounced the concept of 'able bodied person presumed to be capable of earning', thus having sufficient means with reference to section 125 of the Code. Dissenting from Chander Prakash decision of the Delhi High Court, Justice Ganguly held in unequivocal terms saying:

"It must be pointed out that there is really no such presumption in law and that such a presumption cannot also be spelt out from the language of the S.125 Cr.P.C".

Explaining further his Lordship observed:

"Marriage is the normal state in this country and people who habitually live below the poverty line (their number is quite substantial) and even beggars marry in the country. Ordinarily such people cannot even maintain themselves in a proper way. Marriage does not endow them with any ability not only to maintain their own selves but also their wives in proper way. In that view of the matter it is difficult to understand why from the very fact a person is able-bodied, it is to be presumed that he is in a position to pay sufficient maintenance to his wife. Whether in fact he is such a position or not. That will be going against the provision of the section itself which only saddles the husband with the burden of paying maintenance to his wife when he has sufficient means and yet neglects to do so".

This decision is well reasoned. It is based on the true construction of the provisions of Section 125 of the Code.

Under this section only that husband can be burdened with

1. 1930 Cr.L.J. 61, 1930(2) MLF 165.
2. AIR 1968 Del. 174; 1968 Cr.L.J. 1153.
3. Emphasis supplied.
4. Emphasis supplied.
maintenance amount who has 'sufficient means' not 'means alone'. If we interpret the word 'means' to say that every able bodied person is presumed to have capacity to earn, it is correct to the extent that he may be presumed to have earned for his survival or his own living. Section 125 allows maintenance to the wife only if her husband has 'sufficient means' which means, he must have something more than, what he requires for his own survival. Therefore while deciding the factor of sufficient means, of the husband, the realities are not be ignored. It is submitted that Section 125 of the Code must be interpreted in the right perspective and it should not be construed so as to lay down the law that even though the husband has no 'sufficient means' the maintenance can be ordered from him, just because he is an able bodied person.

(ii) NEGLECTED OR REFUSED TO MAINTAIN: The next condition is that the husband must have neglected or refused to maintain his wife. Therefore, even if the husband has 'sufficient means; if there is no proof of neglect or refusal to maintain the wife, the husband cannot be burdened with maintenance order. The basis for an order of maintenance under Section 125 of the Code is, of course the proof of neglect or refusal to maintain. In the words of Justice KrishnaIyer, Section 125 requires, as a sine que non for

1. Laisran, (1965)2 Cr.L.J. 785.
It is important to note, having regards to the expression 'neglects or refuses' occurring in Section 125(1), that the neglect or refusal must be in praesenti, that is at the time of the proceedings before the Magistrate. Thus, from the plain perusal of Section 125(1) of the code, it is clear that an order for maintenance can only be passed against the husband who has sufficient means and only on proof of neglect or refusal by him to maintain his wife who is unable to maintain herself. Neglect or refusal, thus constitute the very foundation of the Magistrate's discretionary jurisdiction to order maintenance. The provision requires as a sine qua non for its application neglect or refusal by the non-applicant. Consequently, it is only neglect or refusal to maintain which goes to furnish cause of Section/or ground for a claim of maintenance".

The Madras High Court meticulously explained the meaning of these two expressions 'refuse' and 'neglect' in M. Poonambalam Vs. Saraswati.

"The legislature has advisedly used two words 'neglect' and 'refuse'. 'Refuse' means failure to maintain when asked to do so, while 'neglect' means a failure on the part of the party bound to maintain, even in the absence of a demand. A husband, therefore, without refusing to maintain his wife may still be guilty of neglecting to maintain her. When there is avoidance or

3. 1957 Cr.L.J. 1282, AIR 1957 Mad 693.
disregard of duty whether from headlessness, indifference or wilfulness, it is case of 'neglect'. The term 'neglect' includes disregard of duty wilfully as well as unintentionally. A person is said to 'refuse' when he denies or declines to do what is asked to him. 'Refusal' is always a wilful and deliberate act. On the other hand the word 'neglect' imports an omission accompanied by some kind of culpability in the sense of a blameworthy conduct. Neglect is not always synonymous with omission. A person neglects who is remisses in paying attention to or in discharging duty towards another. 'Neglect' is therefore, more than mere commissio without fault. It is an omission accompanied by some kind of censurable conduct on the part of the husband. But a husband cannot be said to have neglected or refused to maintain his wife, who voluntarily lives apart from him.

The incorporating of the words 'upon proof of such neglect or refusal' immediately after clause (d) in Section 125(1) makes it explicit that wife must furnish proof of that fact, even if husband absents himself and does not consent, and the Magistrate is required to record a finding on that Act. Therefore, where the evidence led by the parties unmistakably shows that the wife on her own accord left the house, then it cannot be said that the husband had neglected or refused to maintain his wife and she will be entitled to maintenance.

The words neglect and refusal have wide ramifications.

2. J.M. Dutta Vs. State, 1977 All. C.C. 258, see also Surjit Singh Vs. Smt. Rajendra Kaur, 1990 Cr.L.J. NOC 137 (All.).
Neglect or refusal to maintain may be by words or conduct. It may be express or implied. On the peculiar facts of the case, the court can presume neglect or refusal if the husband in fact is not maintaining wife where the husband neglects or refuses to maintain his wife. Courts can pass an order of maintenance even though the husband is willing to maintain his wife, provided the Magistrate finds that there are 'just grounds' for passing such an order.

Justice Chinnappe Reddy of the Andra Pradesh High Court in Chand Begum Vs. Hyderbeg, has observed:

"Ordinarily 'neglect or refusal' may mean something more than mere failure or omission. But where there is a duty to maintain mere failure or omission; may amount to neglect or refusal, in the circumstances of a case.

His Lordship further elaborates by giving examples as:

"A husband who makes it difficult for the wife to live with him and who fails to maintain her when she lives elsewhere 'neglect or refusal' to maintain the wife. A husband may render it difficult for the wife to live with him by his conduct. Physical cruelty is not necessary".

Justice Reddy gave examples of child's neglect saying that mere failure to maintain a child who has no will or volition of its own is neglect or refusal to maintain.

Justice G.B.Singh of the Lucknow Bench of the Allahabad High Court in Mithlesh Kumari Vs.Bindhawasani, has also observed that:

"neglect or refusal can be inferred from words

1. 1972 Cr.L.J. 1270.
and conduct of the husband. If there is justification for refusal to live separately, 'neglect' can be inferred.

Therefore, neglect or refusal depends upon the appreciation of facts, evidence and circumstances of each case. Where the wife herself left matrimonial house and husband made sincere efforts to bring her back, it was held in *Amar Kaur Vs. Hari Singh* by B.S. Yadav, J., of the Punjab & Haryana High Court that under such circumstances, because the husband is not guilty of desertion, therefore, he has not neglected to maintain her. Hence, she is not entitled to maintenance under Section 125 of the Code.

The Madras High Court in *J. Sampath Kumar Vs. Subhashini* has held that when the wife has not asked for maintenance pendentiel during the course of matrimonial proceeding and even prior to that the parties have been living separately, her case for maintenance under Section 125 of the Code is not a fit case because it cannot be said that there was any neglect or refusal to maintain on the part of husband.

It is pertinent to note that to claim maintenance under Section 125 of the Code, it is not necessary to prove cruelty or desertion by the husband. What is required is the

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1. 1983 HLR 103.

2. See also Smt. Rajanti Vs. Dr. Phool, 1990 Cr.L.J. NOC 128(Raj.).

3. 1986(1) HLR 28, Dr. Diwan disagree with this decision, see Law of Maintenance in India, supra, p.126.
proof of neglect or refusal to maintain only.\(^1\)

In *Tulsidas Vs. Smt. Shantiban*,\(^2\) the Court refused to grant the decree of restitution of conjugal rights in favour of the wife as she failed to prove desertion and neglect on the part of husband. The High Court of Gujrat speaking through Justice V.H. Bhaisavia held that under such circumstance, the wife will not be entitled to maintainence under Section 125 of the Code.

A question whether 'It can be said that the husband is neither refusing nor neglecting to maintain wife, if he is paying her an amount which is not enough to meet the two ends? or which is not compatible with her needs, came for consideration before a Division Bench of Bombay High Court in *Isak Chanda Vs. Niamathinya*, Justice Dharmadhikari speaking for the Division Bench answered the question saying:

"If only a paltry amount is paid to the wife with which she is not able to meet her needs and genuine requirements then it is nothing but subjecting her to destitution and vagrancy. That will obviously amount to neglect or refusal to maintain her.\(^4\)

In the instant case, the husband was only paying an paltry amount of Rs.30 p.m. to the wife. When the wife filed application for maintenance under Section 125 of the Code, divorce was pronounced by the husband. The Court took this

\(^1\) Munibai Vs. Sukhdev, 1990 Cr.L.J. 646 wherein it approved the Shanibai decision, 1984 MPWN 125.
\(^2\) 1(1991) DMC 397.
\(^3\) 1980 Cr.L.J. II80.
\(^4\) Emphasis supplied.
conduct of the husband into consideration too. The Division Bench ruled that it is impossible to give inflexible interpretation or meaning to the word 'neglect or refusal' to maintain' as used in Section 125 of the Code. Obviously the said question is one of fact and will depend upon the facts and circumstances of each case. In this case though the husband was paying Rs. 30 p.m. to the wife, yet the Court concluded that he has neglected and refused to maintain his wife. The High Court upheld the award of Rs. 200 p.m., to the wife as maintenance under Section 125 of the code by the Session Court.

There is another illustrative decision on the question under consideration. In Daniasram Vs. Saraswati Bai, the wife was forced to live separate, because the husband whose income was about 5000 p.m. initially paid Rs. 100 p.m. to wife from 1952 onwards. In about 1966, it was raised to Rs. 200 and later in 1969 to Rs. 300. The wife filed the present petition under Section 125 of the Code demanding Rs. 500 p.m. as maintenance on the ground that 'she had become debilitated in body' required female help and medical treatment and that she needed more money in view of the growing cost of living. The husband contested this petition mainly on the plea that since he was paying some amount towards her maintenance there was no neglect or refusal to

1. See also Danitram Vs. Saraswati, 1978 Cr.L.J.806.
2. 1978 Cr.L.J.806, see also Ram Chandra Giri Vs. Ram Surati, 1983 Cr.L.J. 79.
maintain on his part which would attract Section 125 Criminal Procedure Code. Justice Sambasice Rao of the Andhra Pradesh High Court in this case framed the question: when some sort of allowance is being paid to the wife by the husband, is she precluded from claiming maintenance under Section 125 Criminal Procedure Code? Can the husband take shelter under the fact of his paying some amount to the wife to content that there is no neglect or refusal to maintain within the meaning of Section 125 Criminal Procedure Code? Justice Rao, after reviewing the case law and the object of Section 125 of the Code emphasised by the Supreme Court in Bhagwat Dutt decision, answered the question in the form of another question:

"Could it be said that the husband has not been neglecting or refusing to maintain his wife, if he had been paying her a mere pittance, something which was insufficient to maintain herself and which was inconsistent with her needs and at the same time with the income of the husband?"

The learned judge rightly opined that when the Court is approached, on amount of maintenance, it must build a nexus between the reasonable requirements of the wife to maintain herself and the resources of the husband and the needs of his other dependant who have claim on him. Finally it was observed by Justice Rao.

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"Therefore, a mere payment of some amount to the wife does not take away the case from the ambit of S.125 Cr.P.C. Unless the amount paid is sufficient to meet her basic necessaries of life, when the husband can afford to pay more, then it is clearly, in my opinion, 'neglect or refusal to maintain the wife' within the meaning of S.125 Cr.P.C." 1

In this case, the learned judge considered the payment of Rs.300 p.m. by the husband to the wife as insufficient, even to meet half of her basic needs, therefore, the judge concluded that the husband has been neglecting or refusing to maintain his wife and in the circumstances of the case, she was held entitled to the maximum fixed under Section 125 Criminal Procedure Code viz.Rs. 500 p.m.

Taking into consideration the present level or prices of essential commodities and other amenities as also facilities, Justice G.C. Gupta, of the Madhya Pradesh High Court ruled in Ku.Saba Vs. Syed Mohd. Fazil, that Rs. 300 p.m. maintenance (in this case to a daughter) cannot be any stretch of imagination be characterised as excessive. Moreover, insistence of the non applicant to pay only Rs. 50 p.m. means that he was refusing and otherwise neglecting to provide maintenance, as required under law. What has to be appreciated is that an amount of maintenance granted under Section 125, Criminal Procedure Code is expected to provide for a standard of life, wherein the beneficiary is able to keep his body and soul together. This takes within itself

1. Emphasis supplied, p.808.
not only the expenses of food and clothing, but also the expenses involved in meeting other necessities of life.

Now, as far as standard of proof and burden of proof is concerned, it depends upon the nature of proceedings and we have earlier noticed that the Courts have treated the proceedings under Chapter IX of the Code to be of different nature viz., Criminal quasi-criminal, Civil and Quasi Civil. But all these characteristic or nature have been attributed to the maintenance proceeding mainly to give benefit of these socially oriented provisions to the destitute wife. It has been observed by Justice Tated that 'the proceedings under Section 125 of the Code for maintenance are not essentially criminal proceedings and the standard of proof required to prove the guilt of the accused in criminal cases cannot be applied to a petitioner under Section 125 of the Code for maintenance. 1

It is also well settled now that the rule of pleadings has not to be strictly enforced in an application under Section 125 of the Code, therefore, mere omission to plead that the husband has neglected or refused to maintain her, itself will not disentitle her from claiming maintenance. 2

6. QUANTUM OF MAINTENANCE UNDER THE CODE. MONTHLY RATE NOT EXCEEDING FIVE HUNDRED RUPEES IN THE WHOLE: Under Section 125(1), the Magistrate is required to fix

1. Shivji Vs. Radhabai, 1985(I) HLR 417 at 419 (Bom.)
maintenance amount at monthly rate not exceeding Rs.500, as
he thinks fit. Therefore, the Magistrate has the discretion
to fix the amount of maintenance under Section 125(1)
subject to the limitation of Rs.500/- p.m. but he cannot
make an order at the progressively increasing rate. If
necessary, the rate may be altered from time to time under
Section 127 of the Code. The order of maintenance under the
Code can be for money only and order directing annual
payment in the kind of paddy is not proper. Moreover, the
rate cannot be fixed on an abstract and hypothetical things
such as capacity to pay.

It is pertinent to point out that the words ‘in the
whole’ immediately after ‘not exceeding five hundred rupees’
signifies that only a sum of money not exceeding Rs. 500/-
p.m. should be ordered by the Magistrate and no other
payment in the shape of medical expenses, house rent or
fees, etc., should be ordered to be paid. The Magistrate
cannot classify the amount under different heads i.e. so
much so for medical and so much so for clothing etc.

Another important point is that ‘in the whole’ does

   Narayya, ILR(1883) 6 Mad. 283.
2. Annapurna Vs. Satrughana, AIR 1960 Ori. 94.
3. Lasiram Vs. Khaiden, AIR 1968 Manipur 49, there is no
   such case reported) Dr. Diwan wrongly cited the case LM
   Ibrahim, AIR 1968 Manipur 94 decided u/s 146 Cr.P.C.
   Rattan Lal Dhiraj Lal also cited wrongly p.89 F.N. 15.
not mean in all. Therefore the ceiling of Rs. 500 is not for all claimants in the proceedings taken together. Ceiling of Rs. 500 is meant for each claimant. If wife and son or daughter files application under Section 125 of the Code, the Magistrate, on the fulfillment of other conditions can award Rs. 500 p.m. each to individual applicant. A full Bench of the Bombay High Court in Prabhavati Vs. Sumatilal has pointed out that the sum specified is not compendious but separate. Justice N.C. Tulukdar of the Calcutta High Court, after reviewing the case law on the subject, has very lucidly held in Md. Basir Vs. Noor Jahan Begum.

"I hold that in order to give proper effect to the words 'in the whole' as used by the legislature in S. 488(1) of the Code of Criminal Procedure, the same cannot be restricted to mean the ceiling of rupees five hundred in the case of all the claimants in a particular proceedings in as such as the said construction is clearly bad and repugnant, attributing redundancy to the Legislature while incorporating the words "in the whole on a consideration therefore of the language of S. 488(1) of the Code of Criminal Procedure and also in the light of the rules relating to the interpretation of Statutes it appears that the words "in the whole" as used in S. 488(1) of the Criminal 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 taken together but the sum total of all the different items of maintenance relating to a single claimant eligible to maintenance.

In Ramesh Chandra Vs. Veena Kaushal, the Supreme Court has

3. 1971 Cr.L.J. 547.
4. 1979 Cr.L.J. 3.
also the occasion to discuss the meaning of the words 'in
the whole' occurring in Section 125(1) of the Code. Justice
Krishna Iyre speaking for the Court, approved the above said
decisions of rabhavati\textsubscript{1} and Md.Basir\textsubscript{2} and opined that
these decisions have made sociological approach to conclude
that each claiment for maintenance, be he or she, wife
child, father or mother, is independently entitled to
maintenance up to a maximum of Rs.500/-. His Lordship then
observed:

"Indeed, an opposite conclusion may lead to
absurdities. If a woman has a dozen children and
if the man neglects the whole lot and in his
addiction to a 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
cannot award more than Rs.500/- for all of them
together? On the other hand, if each filed a
separate petition there would be maximum of
Rs.500/- each awarded by the Court. We cannot
therefore, agree to this obvious jurisdictional
inequity by reading a limitation of Rs.500/-
although what the section plainly means is that
the Court cannot grant more than Rs.500/- for
each one of the claiments. '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
solemnities and, more than all is obvious"\textsuperscript{3}.

Recently, the Andhra Pradesh High Court has followed the
Supreme Court decision of Ramesh Chander\textsubscript{4} in Syed Iqbal

1. 1954 Cr.L.J. 17, AIR 1954 Bom. 547.
2. 1971 Cr.L.J. 547.
3. Emphasis supplied.
4. 1979 Cr.L.J. 3.
Hussain Vs Nasamunnissa Begum.

The next question which arises for our consideration is whether a Court can grant more amount than craved for? Justice J.S. Sekhon of the Punjab & Haryana High Court has ruled in Sanjay Malhotra Vs. Usha Malhotra that Court cannot give more relief than the one craved for. In the present case the wife claimed Rs.1000/- p.m. in her original application under Section 125 of the Code for herself and her two minor sons. The session Judge enhanced this amount to Rs.1200/- p.m. Justice Sekhon reduced this amount to Rs.1000/-p.m. observing that the award by the Court is not legally justifiable. Where the circumstances of the case justify the enhancement of maintenance allowance, the legislature had itself provided in Section 127 of the Code that Court can be approached for enhancement of maintenance allowance. Thus, the Court itself cannot give more relief than one craved for in the application.

(a) A PLEA TO RETAIN THE CEILING BUT TO RAISE THE LIMIT: It is very pertinent to point out that sometimes the ceiling of Rs.500/- negates the very object of Section 125 of the Code. In this area of high prices, Rs.500/- p.m. as maintenance allowance may be non-existance particularly where the husband’s income is in five or six figures per month. Justice A.S. Qureshi of the Gujrat High Court has very strenously

pleaded for the raising of the amount, in *Dharmishthaben Vs. Hasmukhbai*, saying:

"As regards the quantum of maintenance allowance, there is a limit of Rs.500/- which the Court can allow under Section 125 of Criminal Procedure Code. It is strange that this amount has remained the same over decades although the cost of living has gone enormously. There is an urgent need that this amount be suitably raised by a proper amendment by the Parliament".

The ceiling of Rs. 500 was fixed in 1955 in the old Code and was retained in the new Code of 1973. The Law Commission of India itself has opined that the ceiling of Rs.500/- p.m. could hardly be said to be relevant any more after a passage of more than 30 years. One view was that the ceiling should be raised from 500/- p.m. to 4500/- p.m. on the basis of price index. In 1955, the price index was 105 whereas in 1988 it was 972 i.e. 9 times more than in 1955. Taking into account, the ceiling was argued to be raised to nine times more, i.e. 4500/- p.m. thus to raise the ceiling taking into account the inflation and the rise in cost of living. The second opinion was to do away with the ceiling altogether, leaving it to the Court to determine the quantum of monthly allowance required to be awarded from case to case depending upon the facts and circumstances of each case. The Commission favoured the second opinion. But it would be more appropriate to retain

2. Emphasis supplied.
3. One Hundred and Thirty Second, Report, para 3.4.
the ceiling. Unfetted discretion to the Magistrate under section 125 is not desirable. However, there is urgent need to raise the limit and it would be more practicle to relate it to the price index.

(b) -DATE FROM WHICH MAINTENANCE ALLOWANCE IS PAYABLE AND DESIRABILITY OF RECORDING REASONS: Sub-Section (2) of Section 125 of the Code is unambigous on the question of date from which the Magistrate can order to pay the maintenance allowance. Under this sub-section (2) if the Magistrate has the discretion to order the payment of maintenance allowance either

- from the date of order or
- from the date of application for maintenance
  but in such a case the Magistrate has to make specific order to that effect.

Thus, where the Court omits to specify the date from which the maintenance allowance is payable, Section 125(2) clearly lays down that it would be payable from the date of order. In other words, where the Magistrate intends to order the payment of maintenance allowance from date of application, he has to make order to that effect specifically. But the Magistrate has no jurisdiction to award maintenance prior to the date of application. It is well settled in catena of cases.

The recent decision of a Division Bench consisting of P.C. Pathak and S.K. Chawla JJ., of the Madhya Pradesh High Court in Krishan Jain Vs. Dharam Raj Jain, makes an illuminating reading on the provisions of Section 125(2) of the Code. Justice Pathak speaking for the Court, thoroughly examined the questions relating to the subject under our present consideration. The first question which was discussed by Justice Pathak was,

"Whether recording of reasons is sine qua non for awarding maintenance from the date of application".

The Bench referred to the decision in Lachhmani Vs. Ramu, Justice wherein M.D. Bhatt had held as under:

"Sub-Section(2) of Section 125 shows that such allowance has to be normally payable, from the date of the order. In the alternative it could be equally ordered from the date of the application for maintenance. Reading the sub-section, it clearly shows that the grant of allowance has normally to be from the date of order alone; and in case, this normal rule is not intended to be followed, then the Court concerned, may well grant the allowance from the date of the application, but such order should be backed by some reason, to support the same".

Agreeing with the view of Justice Bhatt in Lachhmani, Justice R.C. Shrivastva, in Mohd. Inayatulla Khan Vs. Smt. Salma Bano, has held as under:

1. 1992 Cr.L.J. 1028.
2. Cr.REV.No: 405/82 decided on 10.11.82 (M.P.).
3. Emphasis added.
4. Ibid.
"There can be no dispute on the point that ordinarily payment of maintenance under S.125 of the Criminal P.C. has to be ordered not from the date of the application but from the date of the order".

Overruling both the decisions of Lachhmani and Mohd. Inayatulla, Justice Pathak observed that:

"A plain reading of sub-section (2) of S.125 shows that the allowance is payable from the date of order, where the Court omits to specify the date from which it is payable. The Court has power to make it payable from date of application See Sampat Kumar Vs. Shanti Devi, 1986 MP L.J. Note 4. Thus it is open to the Court to allow the maintenance from the date of order or from the date of application".

Regarding recording of reasons, Justice Pathak posed the question:

"Whether, it is essential to record reasons, if the allowance is made payable from the date of application, which implies reasons need not be recorded. If the same is allowed from the date of order".

In answer to this question, it was held on the basis of Section 354(b) of the Code that:

"In our opinion, reasons have to be recorded in both the situation" 4.

Now, it is interesting to note that while Justice Bhatt in Lachhmani's case 5 opined that reasons are to be recorded only where the maintenance is allowed from the date of

1. Supra.
2. Supra.
3. Krishan Jain, Supra, p.1031 para II
4. Emphasis added.
5. Supra.
application, Justice Pathak has ruled that reasons have to be recorded in both these situations.

Another question considered in Krishan Jain was:

"Whether the 'date of order' in sub-section(2) of S.125 could also be the date of revisional order?

Justice V.D.Gyani of the M.P. High Court in Gafoor Ahmed Vs.Amanabai has allowed maintenance to the applicant from the date of revisional order. Facts of this case reveals that trial Court refused maintenance of the wife. Revisional Session Judge reversed the order of trial Court and awarded maintenance to wife from the date of application without recording any reasons. In revision in the High Court, Justice Gyani upheld the award of maintenance to the wife, but regarding the date from which maintenance is to be paid it was ruled:

"So far as the question of making the order retrospective, the learned Sessions Judge in his order has not indicated any reasons for doing so. No doubt, it is within the discretion of the Court making the order of maintenance to award a sum either from the date of the application or from the date on which the order is passed. In this case, the trial Court had dismissed the application of the revisional Court, has made the order of maintenance, making it retrospective in effect in such matters. It is expected of the revisional Court to take a realistic view of the matter as the proceedings, at times, consume considerable time before an order is made retrospective in effect, at times results in great deals of hardship. To avoid this, the Court should consider awarding of interim maintenance, which has not been held to be awardable by the Supreme Court, but if such interim maintenance is not asked for and awarded at least the revisional court should in the event...

1. Supra.
of making the order retrospective in effect, record reasons for doing so, least it results in not merely a great deal of hardship to the husband but also deprives forums of granting the grounds of reason on the basis of which a retrospective maintenance order is passed. As in this case, no reasons are indicated, the ends of justice would be sufficiently met if the order is made effective from the date it was made by the learned Sessions Judge.\(^1\)

Overruling this decision in Krishan Jain,\(^2\) Justice Pathak held that the Magistrate has no discretion to allow maintenance from a third date i.e. date of revisional order as carved out by Justice Gyani.

It is submitted that the Division Bench in Krishan Jain,\(^3\) has taken too technical approach. There is no need to give reasons in both the situation. It is nothing, but to strain the plain words of the sub-section. It is an attempt to insert something, which the Legislature never intended. On the plain reading of sub-section(2), a more beneficial interpretation would be, as rightly pointed out by Justice W.l.Bhatt in C.M.Manai Vs. Esther Pachikara,\(^4\) that

- The Court may specifically direct the order to take effect from the date of application
- The Court may also direct the order to take effect from the date of order.
- A Court may omit to mention the date from which the maintenance order is to take effect. Hence, where the order is silent on this point, it should be payable from the date of order.
- It cannot be said that whenever a Court gives a specific direction either may, it must be supported

1. Emphasis added.
2. 1992 Cr.L.J. 1028.
3. Ibid.
4. I(1983) DMC 409 (Ker.).
Thus, it is within the discretion of the Court to make order effective from date of order or date of application, there being only one rider that where an allowance is allowed to be payable from the date of application, it must be so specifically ordered by the Court.

It has been rightly observed by Justice Gyani that Section 125, having a social purpose, its various clauses in their interpretation must receive a compassionate expense by the Court in its generous jurisdiction, a broader perspective and application of facts and their bearing on essential ingredients must govern the ultimate verdict not chopping little logic or tinkering with the niceties of interpretation and technicalities of law.

A study of following judgement, shows that the Court have taken functional and social relevance approach towards the interpretation and implementation of sub-section(2) of Section 125 of the Code.

In *Hemibal Vs Kundibai* the opposite party was found to have behaved badly, so as not to deserve any sympathy or consideration, it was held that the maintenance should be awarded from the date of application. The Calcutta High Court granted, and rightly too, the maintenance from the

1. Gafoor Ahmed, Supra, p.392
2. AIR 1940 Sind 220.
date of application, where the wife maintains herself and children by selling ornaments and collecting funds from the relations. In Makundum Vs. Nargis Ban, the wife and the child has been neglected. The Court awarded maintenance from the date of application.

To sum up, we may submit that Magistrate should exercise this discretion judiciously and the provisions should be constructed liberaly and beneficially to the applicant while deciding the date from which the maintenance is to be granted. Where the Court feels that delay in order is caused due to the prolong tactic of the non-applicant, it should allowe maintenance from the date of application. The Law Commission of India has suggested the amendment in Section 125(2) 'so as to provide that the amount of maintenance shall be payable from the date of the making of the application by the claiment'. With due respect, it is submitted that there is not need for such an amendment. In our opinion, if such an amendment is allowed, it will curtail the discretion vested with the Magistrate. Many a time, the non-claiment is in no way responsible for the delay in the disposal of the proceedings. It may be on the part of applicant or the Court itself. Thus, responsibility of delay in the order cannot be laid at the door of the non-claiment in all cases. We have seen earlier, the provisions

2. 132'nd Report, para 3.5.
of maintenance under the Code are not to punish the non-claimant. As pointed out in the Law Commission Report itself, that the maintenance proceedings often take 3 to 4 years for its disposal. Now, take the one example. For no fault of the non-claimant in delay of the order, the Magistrate allowed Rs. 500/-p.m. as maintenance allowance from the date of application. The Court passed order after 4 years from the date of application. Thus, the no-claimant will have to pay Rs. 24,000 as arrears besides Rs.500/-p.m. regularly in future. Even today, for majority of people in India, payment of Rs.24000/- at a time of is not an easy task but difficult one. Viewing the question from another angle, it must be significant to consider as to why the claimant has not asked for interim maintenance under Section 125 of the Code or in case of wife and child, why the maintenance has not been claimed under Matrimonial Law. Non-effects on the part of applicant should not result in harassment to the non-claimant. Consequently, it is submitted that the present provisions of sub section(2) of Section 125 are very beneficial. The discretion should remain with the Magistrate. He should allow maintenance from the date of order or application, as the justice and circumstances of each case demands, but the order must be

1. Ibid.

for the benefit of destitute applicant.

(c) DURATION OF ORDERS: Regarding duration of order, the Supreme Court has held in Bhupinder Singh Vs. Daljit Kaur, that:

"(A)ny defence against an order passed under S.125 Cr.P.C. must be founded on a provision in the Code. Section 125 is a provision to protect the weaker of the two parties, namely the neglected wife. If an order of maintenance has been made against the deserter it will operate until vacated or altered in terms of the provisions of the code itself. If the husband has a case under S.125 (4), (5) or S.127 of the Code it is open to him to initiate appropriate proceedings. But until the original order of maintenance is modified or cancelled by a higher Court or is varied or vacated in terms of Section 125(4) or (5) or 127, its validity survives. It is enforcable and no plea that there has been cohabitation in the interregnum or that there has been a compromise between the parties can hold good as a valid defence" 2.

Therefore, the Supreme Court ruled that a statutory order can ordinarily be demolished only in terms of the statute. Once a maintenance decree is passed it remain executable for a sum payable under the decree unless and until the decree is modified on a proper application under Section 125 of the Code.

7. ORDER OF INTERIM MAINTENANCE UNDER SECTION 125 OF THE CODE OF CRIMINAL PROCEDURE, 1973: Whether the Magistrate can make interim order of maintenance or not under section 125 of the Code, was examined by the Apex Court in Savitri

2. Emphasis added.
The Division Bench consisting of Venkatramaiah and Mishra, JJ., though realising that there is no direct provision in Section 125 of the Code which authorizes the Court to pass interim order of maintenance yet answered the above question in the affirmative mainly on the principle embodied in the maximum Ubi-aliquid conceditur, conceititure etid sine quo res ipsa esse non potest, wherein anything conceded, there is conceded also anything without which the thing itself cannot (exist). Their Lordship observed:

"When anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms to be also done, than that something else will be supplied by necessary intendment."

The learned Bench even laid down that such an interim order of maintenance can be passed by the Magistrate on the basis of affidavits being filed by or on behalf of the applicant concerned stating the grounds in support of the claim of interim maintenance. He can insist on doing so as to satisfy himself that there is a prime-facie case of making such an order.


order. It was even further held that such an order may also be made in an appropriate case ex-parte pending service of notice of the application subject to any modification or even an order of cancellation that may be passed after the respondent is heard. It is submitted that the Supreme Court has to make such a decision due to the fact that even maintenance proceedings under Section 125 take years for the final disposal of the application. But who is to be blamed for that? Courts or Parties. It is true that this decision will certainly help the destitute claimants. It would have been better, if, instead of importing such a ‘power by necessary implication’ to award interim maintenance for which there is no provision under the Code, the Apex Court had issued directions to the Magistrate Courts to decide the application for maintenance under Section 125 within a time limit, say 4 to 6 months. The Supreme Court itself held many a time that the object of Section 125 is to provide a summary and speedy remedy. Is it desirable to lay down that the interim orders are to be made in summary speedy proceedings, more so when there is no specific provision to that effect and maintenance provision under chapter IX are considered as a complete Code in itself? After the judgement of the Supreme Court in Savitri Vs. G.S. Rawat almost in all cases the applications for interim maintenance are being

made. The Punjab and Haryana High Court held in Sumer Chand Vs. Sandhura Ram 1 that the application for interim maintenance is separate matter and it has to be disposed of separately much earlier than the final orders in the main case. Mr. Justice Ujjagar Singh has further held in this case that by an order of interim maintenance, the rights of the parties are affected and decided finally in respect of that subject matter, therefore, by no stretch of imagination such an order can be called an interlocutory order, hence revision against such an order is maintainable. In Vinod Kumar Sikka Vs. Smt. Vandana,2 it was held that it is not necessary that the Court should grant the same amount as he has granted as interim maintenance at the time of final disposal of the application filed under Section 125 of the Code. It is within the jurisdiction of the Magistrate to increase such amount, but where the Magistrate had fixed the interim maintenance after taking into all the relevant facts and circumstances and later on no additional evidence was recorded by the trial Court for enhancement of maintenance allowance, the Punjab & Haryana High Court has recently held in Ramesh Kumar Vs. Sushma3 that under such circumstances, the trial Court was not justified in making enhancement in its final order of maintenance. Where an original application

1. 1987 Cr.L.J. 1396.
of the wife under Section 125 is dismissed, the interim maintenance cannot be granted to such a wife on an application filed under Section 482 of the Code. Recently, the Madhya Pradesh High Court in Naresh Chandra Vs. Mrs Reshma Bai held that even an illegitimate child is entitled to interim maintenance under Section 125 of the Code. But, P.N.S. Chonchan, J., has very rightly observed in this case that the Supreme Court decision in Savitri case is no authority for the proposition that even in the absence of facts necessary to constitute valid marriage interim maintenance may be awarded to the spouse. It was further held by his Lordship that the issue of interim maintenance must be decided on the basis of material available on record and not on the hypothesis of material likely to be added at the time of parties evidence. V.S. Kokja, J., of the Madhya Pradesh High Court also held recently in Purushottam Vs. Jayanti Bai that the question of necessity to grant interim maintenance is essentially a question to be decided on a prima-facie assessment of the position of both the parties before the Court, Mr. Justice Kokje in another case Usha Baghel Vs. Dr. R.B.Singh rejected the claim of the

3. Supra.
wife for interim maintenance as she had made a vague and general statement about her income and she had not controverted the allegation made that she was engaged in business. His Lordship also rejected the claim of interim maintenance of the child observing that from the material on record, it was clear that there was no case for grant of interim maintenance for the daughter, who was admittedly of more than five years of age, because the non applicant father was ready to take her in custody and to maintain her.

Harmohinder Kaur Sandhu, J. of the Punjab & Haryana High Court in recently reported case Nirmal Dass Vs. Usha Devi rejected the contention of the husband that interim maintenance could not be allowed from the date of application without recording reasons for the same. In another recent case, Rattan Singh Vs. Sharda the Punjab & Haryana High Court, the grant of interim maintenance under Section 125 of the Code at the rate of 500/- p.m. was challenged in revision on the ground that the Magistrate had yet to ascertain the total means of the husband and whether wife was at all entitled to maintenance moreover husband was maintaining the infant daughter born out of this wedlock, Justice G.B.Garg reduced the interim maintenance from Rs. 500/-p.m. to Rs.400/- p.m. only.

EXECUTION OF MAINTENANCE ORDER AND CONCEPT OF 'SUFFICIENT CAUSE' AND 'JUST GROUND': SUB-SECTION (3) OF S.125 OF THE CRIMINAL PROCEDURE CODE, 1973: The real importance of the relief of maintenance under the Code lies in Sub-Section (3) of S.125 of the code. In comparison to the Civil remedy of maintenance, either under Matrimonial statutes or other Acts, the remedy of maintenance under the Code is considered speedy and summary. The object of maintenance provisions under the Code is emphasised by saying that: it is 'a mode of preventing vegrancy or at least preventing its consequences'. The provisions are intended to avoid vegrancy by providing a speedy remedy by a summary procedure. The relevant provisions as to the execution of maintenance order passed under S.125(1) of the Code are incorporated or enacted in Sub-section (3) of Section 125. It will be more beneficial to reproduce the provisions of Sub-section (3) of Section 125 here, the text of which is as under:

Section 125(3):

If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant to imprisonment for a term which extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the
recovery of any amount due under this section unless application be made to the court to levy such amount within a period of one year from the date on which it became due.

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation:

If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(a) ANATOMY OF SUB SECTION(3): On the plain reading of this sub-section(3) the following propositions emerge

- that this sub-section(3) comes into operation when a person against whom order of maintenance has been passed fails to comply with such order.

- without sufficient cause.

- For every breach of the order the Magistrate may

  - issue a warrant

  for such levying the amount due in the manner provided for levying fines, and

  - may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or untill payment if sooner made.

- that the application for the recovery of amount due can be made by the claimant

- within one year from the date on which it becomes due
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- only then Court can issue warrant

- that at the time of execution of maintenance order, the husband can made offer to maintain his wife on the condition her living with him. The wife can refuse to live with him on just grounds. If the Magistrate is satisfied of just ground, non-withstanding of such offer, he can make order.

- that husband's contracting second marriage or keeping a mistress is itself a 'just ground' for wife's refusal to live with him.

The scheme of Section 125 of the Code reveals that its sub-section(1) and(2) are in the nature of the proceeding prior to a decree of the Civil Court, whereas sub-section(3) may be compared to proceedings in execution of such a decree. Thus, the object of sub-section(3) is only one and that is enforcement of maintenance order passed by the Court.

Another most significant aspect of sub-section(3) of Section 125 is that at the time of execution and enforcement of maintenance order under this sub-section, the correctness of the order cannot be challenged and the Magistrate cannot be called upon to reconsider or to go once again into those very questions, which could have been raided or which were decided at the earlier stage under sub-section(1) or(2) of Section 125.


2. Ratilal Vs. State, 1971 Cr.L.J. 611.


Therefore, the plea which was not taken when maintenance order was passed cannot be considered during enforcement of such order. In *Gulshan Ali, Vs. Smt. Muntaz Fatma*, during execution proceeding it is stated that wife is employed since 2/1/2 years, meaning thereby that she was in employment when decree itself was passed. Justice M.Wahajuddin of the Allahabad High Court held that:

"When that is the position and matter was not agitated in course of the proceeding under Section 125, Cr.P.C. then it will not be open to urge that plea, except by way of seeking modification and cancellation of the maintenance order, which is possible only under Section 127, Cr.P.C.".

A Division Bench of the Allahabad High Court in *Mehrunnisa Vs. Noor Mohammad* has made a detailed judgment on the subject under present consideration. H.N.Seth, J., speaking for himself and for justice YashodaNandan has ruled very lucidly that:

"In reply to an application under sub-section(3) to Section 488 (corresponding S.125(3) of new code) only such cases can be urged which were not the subject matter of challange or context when the order under Sub-section(1) and (2) were made and if on facts a plea which was open to the husband at the time when he contested the claim of his wife, but was not so raised by him, is advanced at the time when she applies for a warrant of execution, it cannot be considered under Sub-section(3)".

It is submitted that to provide the relief of maintenance under the Code in a speedy ways the above quoted decisions are in consonance with that object. Denial to raise the plea.

2. 1971 Cr.L.J. 453.
at the time of enforcement of maintenance order under Sub-section (3) of S.125 which could have been raised under Section 125(1) or (2) would certainly defeat the delay in the dispensation of social relief.

It must be pointed out that under Sub-section (3) of Section 125, the execution proceeding can be started, if any person who is ordered to pay maintenance allowance fails without sufficient cause to comply with such order. Even where such an order is lawfully made on the basis of compromise, it may be enforced in the manner provided by sub-section (3) of Section 125 of the Code. Justice Bakshi has rightly held in Hashim Hussain Vs. Rukaiya Bano that when the condition of the compromise were not complied with then the wife was entitled to apply for execution of the order under S.125(3) and the Magistrate would be deemed to have jurisdiction to enforce its complainsce by issue of warrant.

(b) SUFFICIENT CAUSE: To attract the provisions of sub-section (3) of Section 125 of the Code, there must be an order of maintenance passed against the husband, and he must have failed to comply with such an order and his failure is without 'sufficient cause'. Therefore, it is open to the husband by way of defence to show sufficient cause why the

1. N.E. Vasudevan Nair Vs. Kalyani Amma, 1970 Cr.L.J. 1173 (Ker.)
2. 1979 Cr.L.J. 1143 (All.)
order should not be executed. When the husband pleads sufficient cause, the Magistrate is bound to consider the sufficiency of the cause alleged and he may refuse the execution, if he is satisfied that the cause is sufficient. The phrase sufficient cause is sub-section(3) of Section 125 shows that the Magistrate should use a judicial discretion after looking to all the circumstances of the case. Justice C.Honniah of the Mysore High Court in Kantappa Vs. Sharanamma, while tracing the historical prospective observed:

"Sub-section(3) refers to the enforcement of the order passed under sub-section(1). The word 'fails without sufficient cause' were substituted 'wilfully neglects' by Act 18 of 1923, as the interpretation to the later words led to difficulties. The legislature has deliberately used this expression obviously intending that the Magistrate before whom the matter comes up should be in a position to use his judicial discretion having regard to all the circumstances and that such judicial discretion should not be fettered or limited by any definite rules. Now non-payment without sufficient cause is sufficient".

But, it is pertinent to note that 'sufficient cause' must be substantial one. A bare statement by the husband that he is unable to pay arrears of maintenance cannot be considered a sufficient cause. But a compromise can be pleaded as 'sufficient cause' under Section 125(3) for not complying with the order made under Section 125(1) of the Code. 4

2. 1967 Cr.L.J. 783.
3. ILR 195 Punj. 1096.
Now, let us examine critically a very important question that whether the phrase 'fails without sufficient cause' includes the raising of the pleas which are mentioned in Sub-Section(4) of Section 125 of the Code? To be precise, can a husband plead as sufficient cause in the execution proceedings under sub-section(3) that his wife has been living in adultery since the date of order? or should Magistrate consider this plea of the husband at the stage of enforcement of maintenance order under sub-section(3)?

We may made it clear that under sub-section (4) of Section 125 it is laid down that, "No wife shall be entitled to receive an allowance from her husband under this section, if she is living in adultery, or if without any sufficient reason, she refuses to live with her husband or if they are living separately by mutual consent".

Some Courts sustain the view that the words 'fails without sufficient cause' can not be stretched to include contentions/pleas stated in sub-section(4) of Section 125. Therefore, the plea of 'living in adultery' cannot be heard by the Court under sub-section(3) of Section 125 of the Code. It is argued by those supporting this school of thought that if a husband is allowed to raise the plea of living in adultery, it would amount to challenging the order of maintenance and would be a refusal and not a failure to

comply. If it is accepted that sub-section(4) covers sub-section(3), it would defeat the very purpose of Section 125. For any cause that existed at the time when the order was passed, it is not open to the husband to have the same reason considered by the court again under sub-section(3). The courts suggested that if any of the causes mentioned in sub-section(4) arose after the maintenance order was passed in favour of the wife, then the course open to the husband is to apply for concellation of the maintenance order under sub-section(5).

The second view is that plea of unchastity of the wife subsequent to the order of maintenance can be raised by the husband at the time of enforcement of order of maintenance under sub-section(3) and it is not necessary for the husband to file a separate application under sub-section(5) of section 125 of the Code to get the order cancelled. This approach is more reasonable. Where husband plead the defence of unchastity of wife, and the Magistrate prima facie sees substance, he should consider such plea.

In 1992, a Division Bench consisting of M.L. Pends and A.D. Mane, JJ., in D.B. Govel Vs. Sau K.D. Govel has

1. The Calcutta High Court took the contrary view on the point, see Mehrunnisa Vs. Mohammed, 1971 Cr.L.J. 453.
taken another very realistic approach. Their Lordship observed:

"Where the husband is able to prove that he has no means to pay, obviously, the exercise of powers under sub-section(3) of Section 125 of the Code by the Magistrate would be unwarranted".

The Division Bench approved the proposition laid down in earlier single Bench decision in Abdul Aij Ansar Vs. Jubedahai that 'under sub. section(3) of Section 125 of the Code, the expression without 'sufficient cause to comply with the order' conveys that even while proceeding to direct recovery under sub-section(3) of Section 125 of the Code or for sending the defaulter to prison, the trial Magistrate must give opportunity to show cause why he should not be sentenced. It is only when the defaulter fails to show sufficient cause the Magistrate may direct recovery by sentencing him imprisonment. But, in the event the husband proves that he has no means to pay even at the time of passing an order under Sub. section(3) of Section 125 of the Code, the Magistrate will not be justified in exercising his powers under sub. section(3) of Section 125 directing the detention of the defaulter.

In D.B. Govel's case during the proceedings the husband received the amount of pension, provident fund etc. on his superanuation and the said amount is deposited in Bank account and the same has been attached by the wife. In these circumstances the Division Bench rightly opined that

1. 1992(1) Cri.L.J.835
2. Supra
the petitioner husband cannot even urge that he has sufficient cause in not complying with the order nor can it be said that he has not means to pay the maintenance amount. The Division Bench upheld the detention order of the husband issued by the learned judge of the family Court but with the direction that 'the said arrest warrant should not be executed in case the amount is paid by the husband.

(c) MODES OF EXECUTION ISSUE OF WARRANTS VIS-A-VIS SENTENCE OF IMPRISIONMENT: In case, a person, ordered to pay maintenance under sub-section 1 of Section 125 fails to make the payment without sufficient cause the Magistrate has been empowered to realise it under sub-section(3) of Section 125 of the code. This sub-section(3) provides two specific modes for the execution of maintenance order as follow:—

(1) the issue of warrant for levying the amount due in the manner provided for levying fines.

The manner of realisation of fines in given in Section 421 to 424 of the Code. Under Section 421 of the Code, the Court can issue a warrant for realisation of the amount by attachment and sale of any movable property of the defaulter. Alternatively, the Court can issue a warrant to the collector of the District authorising him to realise the amount as arrears of land revenue from the movable or immovable property or both, the offenders. Section 422 dealt with effect of such warrant Section 423 enumerates the

1. For text of these sections, please see appendix.
procedure as to execution of warrant for levy of fine issued by a Court in any territory to which this Code does not extend. Section 424 deals with the suspension of execution of sentence of imprisonment.

(ii) Sentence the defaulter to imprisonment for a term which may extend to one month or until payment if sooner made for the whole of any part of each month's allowance remaining unpaid after the execution of the warrant.

Presently, one thing is well settled that 'before a Magistrate proceeds under sub-section(3), he must be satisfied first, that the amount remains unpaid and secondly that the husband has no sufficient cause for non-complying with such maintenance order'. The crucial question for our consideration is that whether the Magistrate before issuing warrant is to give an opportunity to the defaulter to show cause why warrant should not be issued? This question is answered in affirmative by Justice J.U.Mehta of the Gujrat High Court in Naleshkumar R.D.Vs.state wherein his Lordship held:

"The phraselogy used in sub.section(3) shows that before the issuance of the warrant on the application made by the wife for non-complineance of the order, the learned Magistrate must give an opportunity to the husband to show that there was sufficient cause for non-compliance of the orde." 3.

1. Sardar Beg Sahib Vs.Sidhani Bai, 1987 Cr.L.J. 1779 (Mad) In Labh Singh Vs.Punjab Kaur, AIR 1941 Laah. 360 it was held that the order of the Magistrate in attaching immovable property is illegal. Warrant should be issued to Collector, See also Kundal Lal Vs. Bhano, (1962) 64 PLR 563.
3. Emphasis added
In Pradip Kumar Bhowmik Vs. Minu Bhowmick, Justice T.N. Singh of the Gauhati High Court after reviewing the decisions of the High Court of Allahabad, Kerala, wherein these courts have emphasised the issue of show cause notice before issuing warrant, observed:

The consequences of an order under sub-section (3) of S.125 are for reaching and of penal nature exposing him to a situation wherein he may be deprived of his personal liberty. In such cases therefore, the requirement of reasonable opportunity cannot, under any circumstances, be dispensed with. Any other view, would be violative of Art. 21 of the constitution.

In Padmavathi Vs. Kalyan Rao, it was realised that provisions of sub-section (3) of S.488 of Code (old) did not in so many words require that a prior notice before passing an order there under has to be issued to the husband, but the High Court opined that such a requirement was implicit in that sub-section. Justice S.K. Kader of the Kerela High Court in K. Nithiyanandan Vs. B. Radhamani7 followed its own High Court decision reported as Appukutunn Vs Savithari8 wherein it was held that it is only consistent

1. 1985 Cri.L.J.1802
5. Emphasis supplied.
7. 1980 Cr.L.J. 1191.
8. 1974 Ker LT 17.
with the principles of natural justice that a notice should be issued before drastic steps are taken against a person. The Madras High Court in Sardar Beg Vs. Sidhani Bi also opined that 'opportunity of showing cause should be given'.

But, the Rajasthan High Court took a contrary view. Justice N.C. Sharma in Gobind Sahai Vs. Prem Devi has stated that 'there is no express provision for issue of any notice to the petitioner' i.e. husband. A Division Bench of the Calcutta High Court comprising Justice P.B. Makharji and Justice A.N. Das in Moddari Bin Vs. Sukhdeo Bin dissented from the Mysore High Court decision in Padma Vati discussed above. But, it is important to note that the Division Bench dissented only to extent that notice is implicit in sub-section(3) itself. On close examination of the judgement, one can fairly conclude that the Bench itself has viewed that there may be cases when the requirement of notice could be dispensed with on the peculiar facts and circumstances of the case. Their Lordship observed:

"What is implicit of required is the Magistrate's satisfaction of the means of the offender to comply with the order for maintenance So, long as

1. 1987 Cr.L.J. 1779.
2. 1988 Cr.L.J. 638.
3. 1967 Cr.L.J. 335.
4. 1962 Cr.L.J. 706.
the Magistrate is satisfied on the material before him actual notice to the husband requiring him to comply with the order of maintenance is, in our view, uncalled for under the provisions of S.488(3) of the Code".1 (Corresponding to S.125(3) of new Code).

Therefore, in the opinion of the Division Bench where there is a sufficient material before the Magistrate to come to the conclusion that there are sufficient means and the offender is wilfully neglecting to comply with the order of maintenance, it will be misinterpretation to hold that as a rule of law, Magistrate will have to issue a notice of show cause, where the husband on appearing before the Magistrate did not offer any such sufficient cause for non-complying with the order of maintenance, the Magistrate is well justified in non-issuing the notice of show cause.2 The Division Bench in Maddari Bin3 has also opined that:

"No doubt in an appropriate case the Magistrate will be free to issue notice to show cause or to hold an enquiry if he finds that it is necessary to discover whether the offender has sufficient means or not".4

Undoubtedly, sub-section(3) of Section 125 does not specifically require to issue a notice of show cause to the husband. We do agree that where the Magistrate is totally satisfied from the material on record and other

1. Emphasis supplied.
3. 1967 Cr.L.J. 335.
4. Emphasis added.
circumstances of the case that the defaulter is wilfully non-complying with the order of maintenance, he may issue the warrant without issuing a notice of show cause. But this does not mean that in every case, as a rule of law, the Magistrate should issue the warrant without issuing a notice of show cause. It is not the intention of the provision of sub-section(3) that the Magistrate before passing an order under sub-section(3) need not be satisfied that the person failed without sufficient cause to comply with the order of maintenance, because that is explicitly mandated by the said provision whereby reasonable opportunity is postulated. Therefore, it will be in the interest of justice and in consonance with the spirit of the provision of S.125(3) that the magistrate should issue a notice of show cause before issuing the warrant except where the dispensation of notice may be justified on the peculiar facts and circumstances of the case. This is the minimum requirement of the rules of Natural Justice, which we must respect.
SECTION 125(3) VS SECTION 421 OF THE CODE: Now, let us discuss an other important aspect of the execution order. It has already been discussed earlier that the Magistrate may realise the maintenance amount in the manner provided for levying fines. The manner of realisation of fine is given in Section 421 of the Code. This section envisages two modes for the execution of the order viz. under Section 421(1) (a), the court can issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender under Section 421(1) (b), the Court can 'issue a warrant to the collector of the District, authorising him to realise the amount as arrears of land revenue from the movable or immovable property or both, of the defaulter'.

It must be noted that the Court can take action against the defaulter 'in either or both' of the above said ways. But, where the Court issues warrant of attachment under Section 421(1) (a) the warrant could be executed only against the property of the person against whom the order of maintenance has been passed and secondly, that could be affected by attachment and sale of the movable property. If court intends to realise the amount from movable and immovable or only from immovable property, it should take recourse to Section 421(1) (b) of the Code. Therefore, attachment of immovable property under Section 421(1) (a) would not be legal.
The key question which arises is, that whether it is permissible for the Magistrate to attach the salary of the defaulter, while executing the maintenance order under Sub. Section (3) of Section 125 of the Code? Different High Courts have expressed divergent views on it viz. The Allahabad High Court in Mazahar Abbas Vs. Sakeena, the Andhra Pradesh High Court Re-Yarasuri L.M. and Ahmed Pasha Vs. Wazid Unissa, the Karnataka High Court in K.V. Rudraiah Vs. B.S.M. Gangamma, the Punjab & Haryana High Court in Madhav Kumar Anand Vs. Sudesh Kumari, have taken the view that salary of the defaulter employee is movable property, hence, the same can be attached under Section 421(1) (a) of the Code. The principles emerging from the aforesaid decisions may be adequately summed up, as that (i) the salary of the person can be attached under Section 421(1) (a) itself, (ii) that the salary is a tangible corporeal property, (iii) that the term movable property should be given a wide interpretation and salary cannot be excluded from this category.

1. 1986(1) HLR 464
2. 1986 Cr.LJ 1846, wherein Ahmed decision, infre, was relied upon.
3. 1983 Cr.LJ 479
4. 1985 Cr.LJ 707
5. II(1984) DMC 45, 1984, Cr.LJ NOC 175
The second view has been expressed by the High Courts of Rajasthan in *Gobind Sahai Vs. Prem Devi, Goa,* Daman Diu in *Ali Khan Vs. Hajrabi,* Calcutta in *Smt. Renuka Paul Vs. Dharendhira Nath Paul,* and recently in *Md. Jahangir Khan Vs. Manormam Bibi.* These High Courts have taken the view that the salary of the husband cannot be attached because, firstly the future salary of the husband is not available for seizure and secondly it does not belong to the husband because he cannot be said to have earned his future salary.

Justice N.C. Sharma in *Gobind Sahai,* noted that the Judicial Magistrate, in the present case, had passed a recurring or running order assuming that the petitioner would commit a breach of the order in future as well. On this his Lordship emphatically observed:

"This could not be done by the Judicial Magistrate because in view of the express language of S.125(3) for very breach of the order the Judicial Magistrate has to issue a warrant for levying the amount due in the manner provided for levying of fines. It may be that with respect to the future period the petitioner may himself voluntarily pay the maintenance amount.

1. 1988 Cr. LJ 638, see also *Baldevi Vs Ram Nath* 1955 Cr.LJ 621

2. 1981 Cr.LJ 682

3. 1974 Cr.LJ 171, a case decided u/s 386 (1)(b) of the Old Code.

4. 1992 Cr.LJ 83

5. See also *U. Ba Thang Vs Ma Aye* AIR 1932 Rang.94; *Maung Soe Vs Ma Thein Khin,* AIR 1934 Rang.82; *Rajindra Nath Ghosh Vs Brojabala Ghose,* AIR 1956 Cal.135;

6. 1988 Cr.LJ 638
to avoid the sentence of imprisonment which is the consequence of non payment of the whole or any part of each month’s allowance”.

There is a very interesting but important decision rendered by the Orissa High Court in Surekha Mrudangia Vs. Ramahari Moudangia. In this case, Mr Justice K.P. Mahapatra has examined almost all the decisions mentioned above taking a contrary view. Interestingly, the judge finds it ‘difficult to differ from the view expressed by the Rajasthan, Calcutta and Mysore High Courts to the effect that future salary is not tangible corporeal property available for seizure’, but at the same time he preferred to observe:

"Only when the salary becomes payable and takes the shape of tangible corporeal property it can be attached for realisation of arrear as well as current maintenance according to the provision of S.125 (3) read with S.421 (1) (a) of the Code”.

Again the learned judge further emphasized that the view of the Rajasthan High Court expressed in the case of Gobind Sahai Vs. Prem Devi also appears to be reasonable, because unless the husband makes default without sufficient cause to comply with the order of maintenance the Magistrate does not acquire jurisdiction to issue warrant of attachment of the salary after it has become due’.

On the contrary view taken by the Andhra Pradesh High Court in Re-yarasuri and Ahmed Pasha case Justice

1. 1990 Cr.LJ 639
2. ibid,p642 para 4
3. 1988 Cr.LJ 638
4. 1986 Cr.LJ 1846
5. 1983 Cr.LJ 479
Mahapatra opined that in these decisions the legality and propriety of the view that future salary is not tangible corporeal property had not been discussed. His Lordship was of the opinion that the learned judges in these two decisions were swayed away more with the consideration that S.125 is a beneficial provision which is designed to save a deserted wife from destitution.

Thereafter, justice Mahapatra preferred to appreciate the decision of N.D.Venkatesh, J. of the Karnataka High Court in the case of Rudraiah K.V. Vs. Muddagangamma D.E. and opined that Justice Venktesh in this decision has taken a practical view and 'middle course', which does not offend the earlier view of the Rajasthan, Calcutta and Mysore High Courts, nor the other view expressed by the Andhra Pradesh High Court. But, the real position is that on the question that 'future salary is not tangible corporeal property' Justice Venkatesh had himself observed that;

"I am unable to agree with him, and , with due respect the decision in Baldevi (1955 Cri. L.J. 621 Raj.)".

It is true that Justice Venkatesh has floated a new concept of 'dormant warrant' in Rudraiah, where in it was observed;

"The warrant issued under cl.(a) becomes effective the moment the salary accrues due to the person concerned or when the money becomes payable to him and until then the direction contained in the attachment warrant remain dormant. In this view of the matter, it cannot be said that the salary payable to an employee

1.1985 Cr.LJ 707
2.ibid at p.709
is not amenable for a levy warrant issued under Cl.(a) referred to above".1

This concept of ‘dormant’ has been supported by Justice Mahapatra in Surekha case as ‘middle course’. His Lordship has also opined that:

"If during any particular month maintenance is paid the writ of attachment shall remain dormant. In any case for default, unless salary become payable to the husband at the end of the month the writ of attachment of salary shall continue to remain dormant so as to revive at the end of the month".2

The Andhra Pradesh High Court in Ahmed Pasha, which was later on followed by the Karnataka High Court in Rudraiah, has made reference to Section 60 of the Civil Procedure Code, 1908 and observed that ‘a person who has obtained an order of maintenance under Section 125 should not be placed in a position worse than that of money lender or a Bank who had a right under Section 60 of the Civil Procedure Code to get the future salary of an official attached.’ It must be noted that Section 60 of C.P.C. provides a civil remedy. Section 421(i) (b) has also made provision to realise the maintenance amount as arrears of land revenue from the movable or immovable property or both of the defaulter. The Calcutta High Court has discussed these provisions in detail in decision of Renuka Paul Vs.Dharendra Nath Paul.

1. Emphasized added
2. 1990 Cr.LJ 6392-A Emphasis added.
   2a. Emphasis added.
3. 1983 Cr.LJ 479a even started the judgement with following
4. 1985 Cr.LJ 707
5. 1974 Cr.LJ 171
wherein it was observed that attachment of salary by the Magistrate was invalid for non conformance of sub. section (1) (b) Section 386(1) (b) of the old Code of 1898 which is analogous to Section 421 (1) (b) of the new Code of 1973 enjoins that a warrant to the Collector of the District may be issued in this behalf by the Magistrate to realise the amount by execution according to the Civil process. Under the provisions of sub. section (3) where the Court issues the warrant to the District Collector such warrant shall be deemed to be a decree and the Collector is to be deemed a decree holder within the meaning of the C. P. C. It follows, therefore that all the provisions of the CPC as to execution of decree shall apply accordingly. Therefore, if the Magistrate intends to attach the salary, he has to follow the procedure as laid down under Section 421(1) (b) read with the relevant provision of Civil Procedure Code regarding execution of money decree. We must take note of the well known observations of Lord Roche that;

"Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden".

Recently, a Division Bench of the Calcutta High Court comprising Manoj Kumar Mukherjee and Amulya Kumar Nandi in Md. Jahangir Khan Vs. Mrs. Mansoora Bibi, examined the question under our present consideration thoroughly. Mr

1. Nazir Ahmed Vs Emperor, 37 Cr.LJ 897 (P.C.)
2. 1992 Cr.LJ 83
Justice A. K. Nandi very meticulously analysed the provisions of Section 125(3) vis-a-vis Section 421 of the Code and his Lordship rightly held:

"..... Section 421(1) (a) contemplates attachment and sale of movable property. So a movable property which is not capable of both attachment and sale cannot suffer an order under clause (a), In our opinion, the word 'and' does not mean 'or'. This is the Legislature intent. In this connection, we may turn to the provisions contained in Section 60 of the Code of Civil Procedure. Section 60(1) reads as "The following property is liable to attachment and sale in execution of a decree, namely lands, houses or other buildings, goods, money, bank notes...." Provision reads as "Provided that the following particulars shall not be liable to such attachment or sale, namely, (i) salary .... It is true that in clause (1) the words 'attachment and sale' have been used they refer to money and bank, notes also which cannot be subjected to sale. But the provision refers to other objects or articles also which can be sold. But while proviso refers to different articles and also salary the expression "attachment or sale" has been used".1

Thus, his Lordship held that the Magistrate cannot attach the salary under Section 421 of the Code. The Bench categorically dissented from the 'dormant' synthesis made in Surekha Vs. Ramahari.2

The 'dormant' concept propounded in Surekha Murdhangia Vs. Ramhari appreciated as it runs contrary to the provisions of Section 125(3) as well as Section 421(1) (a) of the Code. Moreover it is doubtful whether salary can be treated as movable property. A simple test to determine

1. Emphasis added
2. 1990 Cr.LJ 639
28.1990 Cr.LJ 639
the nature of property is the offence of theft. Only the property which could be subjected to theft is movable property. Can the future salary be subject to theft? Surely not. Money or cash in the hands of a husband can be movable property but not the future salary. Secondly, Section 421(1) (a) makes provisions 'for attachment and sale of any movable property'. Attachment and sale are two ingredients of this clause(a). Therefore only that movable property can be attached which can be sold. As salary is that movable property which cannot be sold, hence it cannot be attached. Undoubtedly, the existing procedure to execute the maintenance order is cumbersome and unsatisfactory. There is an urgent need to amend Section 125 vis-a-vis Section 421 of the Code. and it is high time that an effective simple and speedy procedure should be laid down in Chapter IX by the Legislature for execution of an order of maintenance. Section 421 to 424 of the Code basically deals with 'levy of fine'. Therefore, the procedure for execution of maintenance order should be incorporated in Chapter IX of the Code itself, keeping in view the nature as well as object of the said chapter.

ii) SENTENCE THE DEFAULTER TO IMPRISONMENT: The first recourse which the Magistrate can take under Section 125(3) vis-a-vis Section 421 of the Code for the execution of

1. Justice Mahapatra has made similar observation in Surekha, Supra
maintenance order has been discussed critically in the preceding pages. Let us critically examine the second mode provided for the execution and enforcement of maintenance order under Section 125(3) of the Code. This mode of execution is provided in sub-section (3) of Section 125 of the Code, whereby the Magistrate may also sentence the defaulter to imprisonment for a term which may extend to one month, or until payment, if sooner made, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant. Some of the legal propositions, which emerge from the provisions of Section 125(3) may be stated as follows:

- That the Magistrate has the power to sentence a defaulter to imprisonment.
- That such an imprisonment can be up to one month or until payment, if sooner made.
- That sentencing person to jail is a mode of enforcement.

It is pertinent to point out that section 125(3) confers a very extraordinary power on the Magistrate to send a person to jail for the failure to pay the maintenance amount. Therefore, it requires caution and circumspection on the part of the Magistrate and he must examine this discretion judicially with due care and caution because it affects the liberty of a citizen.

Justice S.K. Kader has very emphatically pointed out in K. Nithiyananandan vs. B. Radhamani that:

"An extraordinary power has been given to a Magistrate under Sub-section (3) of S. 125 to
sentence a person to imprisonment although he has not committed any offence or has not been found guilty of any offence and convicted in any case. It is only because he failed without sufficient cause to comply with an order awarding maintenance that he is sent to jail. Therefore, this sub-section should be construed strictly and within the permissible limits in favour of the person who has to be sent to jail depriving his liberty”.

The provision of Section 125(3) should be interpreted. Keeping in view the above considerations.

As noted earlier, under sub-section (3) of Section 125, the Magistrate is empowered to execute and enforce the maintenance order passed under sub-section (1) of Section 125 of the Code in two ways. This sub-section (3) provides that if any person ordered to make a monthly allowance for the maintenance of his wife, child or parents fails without sufficient cause to comply with the order, the Magistrate may for every breach of the order:

- issue a warrant for levying the amount due in the manner provided for levying fines, and
- may sentence such person for the whole or any part of each monthly allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment, if sooner made.

It is pertinent to note that according to above provisions, the amount of maintenance awarded is deemed to be fine, for the purpose of execution and enforcement. Section 421 to 425 of the Code deals with levy of fine. Section 421(1) of the Code contains two clauses (a) and (b). These clauses

1. Ibid at p. Emphasis is supplied
(a) and (b) lay down two methods by which, the Court passing the sentence of fine may recover the amount levied as fine;

(a) by issuing a warrant of attachment and sale of any movable property belonging to the offender;
(b) by issuing a warrant to the Collector of the District, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter.

The perusal of Section 421(1) reveals that there are two methods for levying fines and the Court is empowered to take action for the recovery of fine in either or both of the above stated ways. Therefore, the Magistrate is not compelled to have recourse to clause (b), when the warrant issued under clause (a) of Section 421(1) has failed, because execution of warrant does not mean successful execution but it also includes unsuccessful execution of warrant yielding no fruit.

So, it is the discretion of the Court to take recourse to either of these clauses (a) or (b) or to take recourse to both the clauses (a) and (b).

Now, the most significant question which needs

1. In Bellam K.B.R. Vs Bellamkonda R. 1961 Cr.LJ, it was held that under Section 421(1)(a) warrant can be executed only against the property of defaulter and that too by seizure and sale of movable property. Where the Court seeks to attach a share in movable property it can only be done so by an order to the Collector under Section 421(1)(b), so that the provisions of Civil Procedure Code, be made applicable in execution of that order, which will be deemed to be a decree under Section 421(3).

3. Om Parkash Vs Vidhya Devi, 1992 Cr.LJ 658 (P&4)
consideration is whether it is binding on the Magistrate to take recourse to both kinds of warrants envisaged by Clause (a) and (b) of Section 421 before sentencing the person to jail under Section 125(3) of the Code, Mr Justice Kader, while discussing the provisions of Section 421 vis-a-vis Section 125(3) of the Code, in K.Nithiyananadan Vs. B.Radhamani observed;

"Two modes are prescribed under Section 421 of the code for recovery of the arrears of maintenance due as if it were a fine levied. The court can either issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the defaulter or issue a warrant to the collector of the District, authorising him to realise the amount as arrear of land revenue from the movable or immovable property, or both, of the defaulter".2

It is surprising that when the judge himself analysed the provisions of Section 421 so lucidly as above, and specifically used the words 'either' and 'or' he preferred to observe further:

It is only after the Magistrate has exhausted the two modes prescribed under Section 421 of the Code and still fails to recover the arrears of maintenance due that he can sentence the person who committed the default to imprisonment as enjoined under Section 125(3).3

Thus, according to Justice Kader, before a Magistrate can sentence the defaulter he has to apply both methods prescribed under clause (a) and (b) of Section 421 (1) of the Code, which is clearly a misconstruction of Section

1.1980 Cr.LJ 1191

2. Emphasis added

3. Emphasis added.
421(1). The first part of Section 421(1) itself categorically used the words 'in either or both of the ways'. Therefore, it is inappropriate to conclude that the Magistrate is bound to exhaust both the modes laid down in Section 421 (1) of the Code. It was rightly observed by the Division Bench consisting of P.B. Mukherjee and A.K. Das, JJ., of the Calcutta High Court in Moddari Bin Vs. Sukhdeo Bin that:

"Having regards to the language 'either or both of the following ways' it is plain that the Magistrate is not compelled to start the (b) method when the (a) method which he had adopted previously had failed before he could sentence a defaulter".2

Another significant question which needs close examination is whether the Magistrate can sentence a defaulter at the first instance itself under Section 125(3) without issuing a warrant in accordance with the provisions of Section 421 (1) of the code? Is it a condition precedent that the Magistrate must exhaust the modes laid down under Section 421(1) (a) and (b) before resorting to the mode of sentencing a person to jail?

The Andhra Pradesh High Court speaking in P. Ataullah Vs. Monunisa Begum has discussed this question. The judge took the view that no illegality was committed by the Magistrate even though he passed the sentence of

1.1967 Cr.LJ 335
2. at p.340 Emphasis added.
3.1984 Cr.LJ 1522
imprisonment without issuing warrant for the levy of the amount of maintenance due, Justice Reddy observed;

The Next submission of the learned counsel is that under S.125(3) in the first instance a warrant to levy the amount as fine should be issued and the sentence of imprisonment can be passed only if the amount remains unpaid after the execution of the warrant. S.421 Cr.P.C. (1974) provides the procedure for issuing a warrant for levy of fine. In the instant case, no such warrant has been issued but the order of the learned Magistrate shows that the husband who appeared in the court in response to a notice admitted that the amount has not been paid and he has also no representation to make. Under these circumstances no useful purpose would have been served by issuing warrant. In this view of the matter it cannot be said that the order of the lower Court is illegal.

It is very important to note that the courts has not based its judgement on any provision of law, but on the facts of the case. In Bhura Vs. Gomati bai, Justice M.D. Bhatt of the Madhya Pradesh High Court upheld the order of Magistrate sentencing the husband to imprisonment for his default in making the maintenance amount without first issuing distress warrant for levying the amount due. But, on the critical study of the judgement, it becomes evident that Justice Bhatt maintained the Magistrate’s order ‘in the peculiar circumstances of the case’. The facts of this case reveal that husband was evading his appearance in the Court, which could become possible only through non-bailable warrant. On his appearance in the Court, he refused point blank to pay maintenance amount stating ‘that he had no

42.ibid pp.1523-1524
agricultural land of his own and that he had no other property and that he earned his living only by making bidis. Due to this recalcitrant attitude of the husband, the judge preferred to sentence without issuing warrant for the levy of fine. But at the same time, Justice Bhatt himself held that.

"It is, no doubt, true that the normal rule is, at first to try to seek enforcement of the order by issuing distress warrant in the manner provided in the Code for levying fines".1

His Lordship only opined that it is not mandatory rule and exception may be made. Again in 1990, a Division Bench of the Madhya Pradesh High Court comprising B.C. Verma and D.M. Dharmadhikari examined the provision of Section 125(3) of the Code in Durga Singh Vs. Prembai. Now, the question is whether the decision of Bhure Lal Vs. Gomati was affirmed in Durga Singh Vs. Prem Bai by the same High Court. It is true that the Division Bench do make reference to Bhure Lal Vs. Gomati in para 3 of the judgement but on close examination it becomes evident that the Division Bench has neither approved nor disapproved of the decision of Bhure Lal. The

1. Emphasis supplied.
2. 1990 Cr.LJ 2265
3. 1981 Cr.LJ 785
4. Supra
5. 1981 Cr.LJ 785
6. ibid
The basic question which the Division Bench posed was:

"Can a person, suffering an order for payment of maintenance under S.125(1) Cr.P.C. with no property whatsoever, be sentenced to imprisonment on his failure to pay monthly maintenance allowance even after issuance of a warrant for levy of such amount".1

The Division Bench discussed in detail the meaning of the word 'means' used in Section 125(1) of the Code and the rule of 'able bodied person's capacity to earn'. Coming back to the point under our present consideration, from the reading of the judgement, the ratio of the decision is explicit that before sentencing a defaulter to imprisonment, the Magistrate is required to issue a warrant for levy of maintenance amount due. The above posed question by the Bench, itself, made this conclusion clear wherein the situation visualised is, 'even after the issuance of a warrant'. Again Justice B.C. Verma speaking for the Bench observed in unabiguous terms that;

"The order under S.125(1), Cr.P.C. is enforceable by issuance of a distress warrant in the manner provided in the Code for levying fines. If, in spite of such a warrant, the monthly allowance awarded under S.125(1) remains unpaid an order for imprisonment as provided under S.125(3) may be passed".2

Mr. Justice Verma even started the judgement with following observations:

Section 125(3) of the Code of Criminal Procedure provides for the consequences resulting from non-compliance of the order passed under S.125 (1), Cr. P.C., directing payment of maintenance allowance (sic) where a person under such obligation to pay maintenance allowance fails,

1. Emphasis added
2. Emphasis added
without sufficient cause, to comply with the order granting maintenance, a warrant for the recovery of the amount may be issued on an application made to the Court to levy such amount within a period of one year from the date it become due. If despite such a warrant the maintenance allowance is not paid, the person may even be sentenced to imprisonment."\(^1\)

From the above quoted portions of the judgement there remains no room for doubt that in view of the Division Bench the Magistrate can sentence the defaulter only after issuing of the warrant for levy of maintenance amount due.

Same conclusion would surface from a through examination of the Full Bench decision in Karson Ramji Chawda Vs. Pani Bai Karson Chawda. Sometimes this decision is also quoted to say that sentence can be imposed straight away without issuing of distress warrant which is not the factual position.

In this case, at the first instance the Magistrate issued a warrant for attachment of property and the defaulter was imprisoned only when the warrant could not be executed as the husband had no property. Moreover, the question under our present consideration was not raised directly, as rightly pointed by Justice S.K.Kedar in K.\(^4\)Nithiyandan Vs. B.Radhamani also.

A Divisional Bench of the Calcutta High Court in

1.Emphasis added
2.1958 Cr.LJ 351; AIR 1958 Bom.99
3.See Moddari Bin Vs Sukhdeo Bin, 1967 Cr.LJ 335
4.1980 Cr.LJ 1191 (Ker.)
Moddari Bin Vs. Sukhdeo Bin, while interpreting 'expression 'after the execution of the warrant', observed that;

"No doubt before the execution of the warrant the Magistrate cannot sentence the defaulter".2

Mr Justice P.N. Bakshi of the Allahabad High Court has stated in Iftekhar Hussain Vs. Hameeda Begum that a plain reading of Section 125(3) indicates that two alternatives have been provided therein for the recovery of arrears of maintenance. The first is issue of warrant and the second is by sending a defaulter to prison. His Lordship further observed;

"To my mind, out of the two methods which have been prescribed for recovery, which I have enumerated above, the first method must be adopted first i.e. recovery by attachment and sale of the property of the defaulter should be resorted to initially and if such recovery proceedings fail to satisfy the amount due to the wife, then alternative method of sending the husband to imprisonment for recovery of arrears due should be resorted to".4

Mr Justice G.K. Mishra of the Orissa High Court has rightly opined in Jagan Nath Vs. Puranmashi, that the issuing of warrant for attachment, and body warrant simultaneously is not in accordance with Law. His Lordship observed;

"It would thus be apparent that in the first instance warrant of attachment of movable and

1. 1967 Cr.LJ 335, see also Jagannath Patra Vs Purnamashi, 1968 Cr.LJ 335.

2. Emphasis supplied

3. 1980 Cr.LJ 1212

4. Emphasis added.

5. 1968 Cri. L.J. 335; AIR 1968 Ori. 35.
immovable property would be issued the properties would be sold and applied for the discharge of the arrear due, and if on such steps being taken the arrear of amount still remains unpaid, it is open to the Magistrate to issue a body warrant and not until then".1

His Lordship after examining sub-section(3) finally held;

"On the aforesaid analysis the case must go back to the Learned Magistrate. He would in the first instance issue warrant of attachment of the properties for recovery of arrears of maintenance for a period of one year preceding the date of application. If the properties attached and sold do not satisfy the arrear due, it is open to the learned Magistrate to issue a body warrant".

Interestingly, a Single Judge Bench of the Orissa High Court in Bhakta Bhuyan Vs. Savitri Bhuya held that;

"the issue of warrant is not a condition precedent to the jurisdiction of the Magistrate to sentence the petitioner husband".

Intriguingly, though for this above conclusion justice V.Gopalaswamy in his judgement relied on the decision of K.R. Chawda Vs. State of Bombay, P. Atullah Vs. Momnisa Begum and Bhure Vs. Gomati Bai, all discussed in the preceding pages, but surprisingly his Lordship failed to take notice of his own High Court decisions rendered by Justice G.K.Mishra in Jagannath Vs. Puranmashi, Wherein Mr

1. ibid p.336 Emphasis added.
2. I(1991) DMC 542
3. AIR 1958 Bom.99
4. 1984 Cr.LJ 1522(A.P.)
5. 1981 Cr.LJ 789 (A.P.)
6. 1968 Cr.LJ 335, AIR 1968 Ori.35
Justice Mishra has categorically held that in the first instance issue of warrant for the recovery of arrears of maintenance is necessary. It is possible that his decision was not referred to at the bar, but it is doubtful whether it is a valid excuse for the judge to come to a contrary conclusion on a point of law already laid down by his own High Court. It is very interesting to note that Justice V. Gopalaswamy has relied on the decisions in *Moddain Bin vs. Sukhdeo Bin* and *Kashmira Singh vs. Kartar Kaur* on the point of 'one month sentence' but preferred to ignore both on issue of warrant. In both these decisions a Division Bench of the Calcutta and Single Bench of the Rajasthan High Court respectively held in clear terms that at the first instance the Magistrate is to issue the warrant and if it remains unexecuted only then he can sentence the defaulter to imprisonment. The decision of *Orissa High Court in Jagannath vs. Puranmashi* was lateron relied upon by the Punjab & Haryana High Court in *Karnail Singh vs. Gurdial Kaur*. Mr Justice Pritam Singh Pathar pointing out the significance of the words 'for the whole or part of each months allowance remaining unpaid after execution of the warrant', observed;

"These words will have no meaning if it was the intention of the Legislature that even without recourse to a warrant of attachment, a

1. 1967 Cr.LJ 335, AIR 1967 Cal.136
2. 1988(2) Crimes 44; II(1988) DMC 532
3. 1968 Cr.LJ 335
4. 1974 Cr.LJ 38
warrant of imprisonment can be ordered. What is contemplated is that in the first instance warrant of attachment of property to satisfy the demand of arrears should issue (sic) and only if the whole or any part of it remains unpaid after execution of the warrant, imprisonment can be ordered. Therefore, the issue of a warrant of attachment and sale is condition precedent to the issue of a warrant for imprisonment." 1

Infact, in the view of Mr Justice pathar, the warrant for arrest directed to be issued without first having recourse to attachment and sale of the property of the defaulter is illegal. Recently, J.S.Sekhon, J., of the same High Court again ruled in emphatic terms in Om Parkash Vs. Vidhya Devi that a bare glance through Section 125(3) leaves no doubt that the Magistrate may sentence a defaulter only after the execution of warrant for levying the amount due. In this case, before parting with the judgement the judge was constrained to remarks that the husband appears to be a callous sort of person as he failed to pay even half of the maintenance allowance to his wife and daughter. His Lordship further observed that 'although he deserves no sympathy yet all the same in view of the legal position, there is no option but to accept this petition and quash the impugned order of trial court awarding sentence without issuing warrant for levying the maintenance amount due in accordance with Section 421(1) of the Code. Therefore, as rightly held by Justice Kader, of the Kerala High Court and Justice

1. Emphasised added
2. 1992 Cr.LJ 658
3. K.Nithiyanandan Vs. R.Radhamani, 1980 Cr.LJ 1191 at 1194
Pritam Singh Patar of the Punjab & Haryana High Court that
the issue of warrant for the levy of the amount due is a
condition precedent to sentence the defaulter to
imprisonment. It may also be noted that in sub. section (3)
of Section 125 the word use is 'and' and not 'or'. It is
pertinent to point out that in the Criminal Procedure Code
of 1861, the Word used was 'or' and when the Code of 1898
was passed the word 'and' has been substituted in place of
'or'. Thus, the powers conferred on the Magistrate should be
exercised in the manner and sequence indicated in
sub. section (3) of Section 125 of the Code. In view of the
phraseology used in Section 125(3), though the Magistrate is
empowered to execute and enforce the maintenance order by
two methods yet he must follow these in the order laid down
in sub. section (3) itself. In the first instance, the
Magistrate must issue a warrant for the recovery of
maintenance amount due as laid down under Section 421 of the
Code. If that process or method fails, only then he should
take the harsh step of sentencing the defaulter to
imprisonment.

ONE MONTH SENTENCE: Under sub. section (1) of Section 125 of
the Code, the Magistrate is empowered to order a person to
make monthly allowance for the maintenance of indigent
applicants and according to sub. section (3), if any person

1. Karnail Singh Vs. Gurdial Kaur, 1974 Cr.LJ 38
2. Shiv Vir Singh Sengar Vs State, 1982 All.Cr.R.444
fails to comply with the orders of the Magistrate to pay maintenance allowance without sufficient cause, such Magistrate may issue warrant for levying the maintenance amount due in the manner provided for levying fines and may sentence such person for the whole or any part of each month’s allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made.

The perusal of sub-section(3) reveals that the maximum sentence of imprisonment of one month is relatable to a period of the arrear for one month, which means that a default of one month may result into one months imprisonment and no more. If payment of maintenance amount is made sooner, the one month imprisonment may be cut short accordingly.

Now, the important question is that if a person fails to pay the maintenance allowance for more than one month, then can the imprisonment be for as many months as the default continued or for a maximum period of one month only? In other words is the total sentence of imprisonment limited to one month or can the defaulter be sentenced to one imprisonment for each month’s default?

In an old Bombay High Court decision Pander Mahadu, it was held that maximum sentence of one month’s imprisonment only can be passed for non-payment of all accumulated arrears. No other Court has taken this view. In 1.(1895) Unrep. Cr.P.C.801
Bhakta Bhuva Vs. Savitri Bhuva, it was contended on behalf of defaulter husband that 'under Section 125(3) Criminal Procedure Code the maximum sentence that the Magistrate could have passed is only for a period of one month'. Justice V. Gopalaswamy disallowed the said contention observing that the argument that, 'the maximum period of imprisonment that can be ordered is only one month is not tenable'. Almost all the High Courts in India hold the view that the Magistrate is empowered to sentence the defaulter to one month's imprisonment for each month's maintenance allowance remained unpaid. The maximum one month is with reference to each month's or part of each month's allowance. In other words default of one month is punishable by one month's imprisonment and no more. If the default is more than one month then the imprisonment can be for as many months of default.

It is pertinent to point out that the expression one month does not mean that the Magistrate is bound to award one month sentence of imprisonment to the defaulter for one month's default. The wording 'may extend to one month' makes it clear that the Magistrate is entrusted with


a discretion to award maximum one month's imprisonment for the default of one month, therefore, he can award even less than one month sentence for one month default. Considering one month imprisonment for one month default as severe, the Andhra Pradesh High Court awarded 9 days sentence of imprisonment in one case and one week in another case, in respect of each months default, The Bombay High Court ordered 15 days sentence of imprisonment for each month of arrears off maintenance amount due. In Chandrikaban Vs. State of Gujrat, the trail Court sentenced the defaulting husband to 15 days imprisonment per each month of four months arrears of maintenance and on second application by wife, the Magistrate awarded 10 days imprisonment per month of seven months arrears. On revision filed by husband, the Session Judge reduced the period of imprisonment and also held that both the above sentences to run concurrently. Mr Justice B.S. Kapadia of the Gujrat High Court set aside the order passed by the Session Judge and did not agree with his reasoning for reduction in imprisonment that 'if the period of imprisonment is reduced perhaps he would earn money and pay to the wife'. Justice Kapadia held that;

"It may be otherwise also, if he is kept in the jail for a long period within the permissible limit under Section 125(3), then the defaulting husband against whom the order is passed and/or

1. G.Pratap Reddy Vs Vijayalakshmi, 1982 Cr.LJ 2365 and Atullah Vs Maimunissa Begum, 1984 Cr.LJ 1528, respectively
2. K.R.Cjowda Vs State of Bombay, AIR 1958 Bom.99(F.B.)
3. I(1989) DMC 35 per Justice B.S.Kapadia
any of his relative may come and pay up the arrears of maintenance amount".

The reasons advanced by the High Court do not seem to be sound. The Session Judge has taken a very realistic and socially oriented approach which should have been accepted by the High Court. Curtailing a person’s liberty in speculation seems to be bad in law.

The Himachal Pradesh High Court speaking through Justice T.U. Mehta, has rightly held in Agya Ram Vs. Pushpa, that ‘where immovable property of the husband is attached for non-compliance with the order for payment of maintenance to the wife no order for imprisonment of the husband can be made unless the property attached is sold because so long as the property is not sold, it is not possible to know how much amount of maintenance was remaining unpaid for which imprisonment could be ordered’. The same view is taken by Justice P.N. Bakshi of the Allahabad High Court in Iftekhar Vs. Hameeda Begum.

LIMITATION OF ONE YEAR FOR THE RECOVERY OF ARREARS OF MAINTENANCE VIS-A-VIS SENTENCE OF IMPRISONMENT FOR MAXIMUM 12 MONTHS:

The first proviso to sub-section (3) of Section 125 is intended to prevent a person entitled to maintenance from being negligent and allowing arrears to pile up until

1. 1978 Cr.LJ N.O.C.43 wherein 1968 Cr.LJ 335(Ori.) and 1974 Cr.LJ 38(P&H) were relied upon.

2. 1980 Cri. L.J. 1212.
their recovery would become a hardship or an impossibility.

It is important to note that in the said proviso there is no reference to limitation of sentence. The proviso reads:

"that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the court to levy such amount within a period of one year from the date on which it becomes due".

This proviso in clear and unambiguous terms lays down that the Magistrate cannot enforce arrears of maintenance amount of more than one year. Justice David Annoussamy of the Madras High Court has observed in Sardar Beg Sahib Vs. Sidahni Bai that;

"Whatever amount has become due before one year prior to the date of application cannot be recovered by way of warrant".

The High Courts are almost of unanimous view that the above quoted proviso to sub-section (3) of Section 125 of the Code enacts that no warrant shall be issued for the recovery of any maintenance amount due under this section.


2. 1987 Cr.LJ 1779, Dr. Diwan Das inadvertently stated this decision to be of Delhi High Court, see Law of Maintenance under p.131 and see also foot note 43 at p.192.

unless application is made to the Court to levy such amount within a period of one year from the date on which it becomes due. Thus the period of limitation is one year. Any arrear falling beyond one year is barred by limitation.

But, where an application is made within one year from the date when maintenance amount becomes due, but amount could not be realised and where application is dismissed for default another application made subsequently for the same purpose is held to be within the time limit.

A recent decision of the Andhra Pradesh High Court in Tokkalapally Laxoamma Vs. Tokkalapally Rangaiah calls for a more close examination. At the outset, it is essential to note that sub-section(2) of Section 125 provides for awarding of maintenance from the date of order or from the date of application, if the Court so chooses. It is also to be noted that the proviso of sub-section(3) of section 125 puts an embargo against issue of warrant for recovery of the amount due, if the application therefor is not made within one year from the date on which the amount became due. The facts of this case reveal that the wife filed an application for maintenance under Section125(1) on 9.6.1977. The trial Court allowed application on 9.12.1988 granting

1. Jagat Bandhu Sadhu Supra
3. 1992 Cr.LJ 266
the maintenance at Rs. 180 p.m. from the date of application. That order has become final. In pursuance of this grant, the wife filed an application under section 125(3) on 9-1-1989 for execution of maintenance order and recovery of the past maintenance for the period from 9.6.1977 i.e. date of application to 1.2.1988. It is to be noted that the wife filed execution application on 9.6.1989, within one year from the date of order on the maintenance application made on 9.12.1988. The trial Court rejected her claim of maintenance amount from 9.6.77 to 1.2.1988 being beyond the period of one year. Therefore, the point for consideration in the present case is that on what date the maintenance amount becomes due i.e. on the date of order (9.12.1988) or date of application (9.6.1977) as the maintenance to the wife is granted from the date of application. In other words, whether wife is entitled only to recover accumulated past maintenance amount of one year amount from 9.6.1977 i.e. date of application from which the Court granted the maintenance? To be precise, whether the application under Section 125(3) for realisation of the maintenance amount granted is barred for the period beyond one year, though execution application is filed within one year from the date of grant of maintenance. Justice Bhaskar Rao, after examining the provision of Section 125(3) and the expression 'became due' observed:

"Maintenance amount becomes due if only an order is made granting maintenance. It is from such date on which it become due that period of one
Therefore, in the instant case, the maintenance amount becomes due on the date it is granted by the Court, vis. 9.12.1988, and application under Section 125(3) to realise the maintenance amount, filed on 9.1.1989 is very much within one year from 9.12.1988.

Examining the question from another viewpoint, Justice Rao held;

"Viewing the question from another angle, it is to be noted that a reading of S.125(3), Cr. P.C. makes it clear that the Court is empowered to grant maintenance either from the date of its own order or from the date of application for maintenance. This power would get rendered negatory if the past maintenance is limited to one year in terms of the first proviso to S.125(3), Cr.P.C. The section as a whole has got to be given a harmonies interpretation".¹

The judge set aside the order of trial Court refusing the realisation of the maintenance for the period from 9.6.1977 to 1.2.88. Similarly, in Gupteshwar Pandey Vs. Ram Piari the application for maintenance under Section 125 was filed in the trial Court on 27th April, 1959 the order granting maintenance of Rs. 75 p.m. from the date of application was made on 5th Dec. 1960. The wife filed execution application under Section 125(3) on 10th May, 1961 for the realisation of maintenance amount accumulated from 27th April, 1959 onwards. The husband assailed the validity of these execution proceedings on the ground that the claim for the maintenance sought to be realised from the husband has

¹Emphasis added

²1971 Cr.LJ 774, AIR 1971 Pat.191
become barred by limitation. A Divorce Bench comprising Justice G.N. Prasad and Justice S. Wasiuddin of the Patna High Court while rejecting the plea of the husband emphasized the amount of maintenance could have become due only after the order had been passed. The Bench held:

"It cannot reasonably be maintained that the amount had become due even before the claim of maintenance had been allowed by the Court. It cannot be the intention of Legislature that the amount of maintenance should become barred by limitation simply because the order contemplated by sub-section (1) of Section 488 (Section 125 (1) of new Code) has been passed more than one year after the date of the original application. The Maintenance became due, although with effect from back date, only when the order of the 5th December, 1960 was passed.

In the instant case the period of one year was computed from the date of order i.e., 5th December, 1960 and as the execution application was filed on 10th May, 1961, the Bench held it well within the period of one year envisaged in the proviso to sub-section (3).

These decisions certainly laydown a good law and are of the functional relevance to social justice. Thus, where the past maintenance is accumulated beyond one year and the claimant is not responsible for its accumulation, the Court can enforce the payment of the whole accumulated amount. As in the instant case, where without any fault or negligence on the part of the claimant, the maintenance amount got accumulated i.e. because the Court granted maintenance from the date of application which worked out to a period beyond one year, the Court should enforce the payment in whole.

1. See also Ram Narayan vs Smt. Manaki, 1972 All.Cr.R 484
It must be noted that if the claimant herself or himself is negligent, the Court cannot jump the statutory provisions of the proviso to sub-section (3) of Section 125. The facts of Gobind Sahai Vs. Prem Devi reveal that the trial Court passed the order on November 22, 1984 granting maintenance to the wife and child with retrospective effect i.e. from March 21, 1984 the date of filing the application for maintenance under section 125(1) by the wife. The order became final. The wife filed execution application under Sub Section (3) of Section 125 in the Court of the Magistrate on December 12, 1985. Justice Navin Chandra Sharma of the Rajasthan High Court, observed; "This application was clearly beyond one year from the date on which the arrears up to Nov. 20, 1984 could be issued by the Magistrate. He could only issue warrant for the levy of the maintenance amount which had become due with effect from Dec. 21, 1985 because only in that respect the application of the non-petitioner presented on Dec. 12, 1985 was within limitation".

One point to be noted is that the High Court took the date of order i.e. Nov. 22, 1984 from which the maintenance amount becomes due, even though the maintenance is granted retrospectively from the date of filing of an application for maintenance i.e. March 21, 1984. Because the wife was negligent in filing application for the realisation of maintenance amount under sub. section (3) of section 125, as she made the execution application only on Dec. 12, 1985 i.e. beyond one year from the date when maintenance amount became due (Nov. 22, 1984). In other words, she was supported to have filed the execution application before Nov. 21, 1985.
22,1985 i.e. within one year from the date when the maintenance amount became due. As she was not delayed due to any legal process, the High Court rightly refused her maintenance amount for eight months i.e. from March 21, 1984 to November 20, 1984.

Another important question is as to the limitation period. Whether it stated when the revision against the order of the Magistrate is filed? Whether from the date of order of Magistrate or from the date of decision of the revisional Court? This point was examined by Jayachandra Reddy, J., of the Andhra Pradesh High Court in P. Ataullah Vs. Memunisa Begum. His Lordship observed in unambiguous terms that if a revision is filed against the order of the Magistrate, the matter becomes final only by virtue of the order of revisional Court. Therefore, when an application for the recovery of maintenance amount is filed within one year from the date of the order passed by the revisional Court, it is well within time limitation. The decision in P. Ataullah's case is relied upon by Justice N. D. Patnaik of the same High Court in Pokala Brahmainat Vs. Pokala Padma.

Here is another point on which the judiciary has conflicting views. In P. Ataullah's case, it was argued on behalf of the husband that after the order of maintenance

1. 1984 Cr.LJ 1532
2. ibid
3. 1991 Cr.LJ 607
4. 1984 Cr.LJ 1532
passed by the Magistrate, even though revision was filed, in the absence of any stay, nothing prevented the wife and child from filing an application under section 125(3) earlier. Justice Reddy rejected this plea, observing:

"But for the purpose of limitation of one year, the Court cannot ignore the fact that the matter was pending by way of a revision and the order of maintenance became final only on the dismissal of the revision".

But, G.B. Patnaik of the Orissa High Court took the contrary view in Bimla Devi Vs. Karna Mulia. The brief facts of the case are the wife filed application for maintenance under Section 125(1) on 24.6.1977 and the Magistrate allowed the same by an order dated 24.4.1978. Against this order the husband carried revision to the Session Judge and the judge dismissed the same on 13.9.1979. Thereafter, the wife filed an execution application under Section 125(3) on 14.11.1979. The trial judge by the impugned order has limited the claim of the wife to a period of one year from the date of filing of an application i.e. upto 14.11.1978.

The Magistrate opined that the amount 'became due' on 24.4.1978, the date of order itself and as the wife filed execution application under Sub.section(3) of section 125, on 14.11.1979, she was held entitled to past maintenance amount of one year prior to the date of filing of the application, getting support from a single Bench decision of own High Court in Jagan Nath Patra vs. Puranmashi Saraf, Justice

1.11(1985) DMC 200, 1985(2) HLR 239, wherein the courts differs from the view, taken on the point in Maniben Vs Manibhai Supra
2.AIR 1968 OrI.35
Patnaik upheld the order of the trial Court and observed;

"No doubt, section 125 is a beneficial provision intended to help the wife being saved from destitution in a case where the husband neglects or refuses to maintain the wife and therefore ordinarily, a liberal interpretation to the said provision can be given, but not at the cost of violence to the express language used in the provision. The provision to Sub. Section (3) of section 125 of the Code in clear and categorical terms puts an embargo on the power of the Magistrate to issue any warrant for recovery of the amount due unless the application is made to the Court within a period of one year from the date on which it became due".

The same view is taken by Justice P.N. Bakshi of the Allahabad High Court in Iftekar Hussain Vs. Hameeda Begum. The view of the Orissa High Court seems to be more reasonable and in consonance with the true spirit and object of Section 125 of the Code. If there is no stay, a wife should approach the Court for the realisation and enforcement of her maintenance amount. It is rightly opined 'if a person awarded maintenance sleeps over the order and does not care to enforce it within one year, then the implication is that there is either no vagrancy or the claimant is so negligent that she does not deserve the sympathy of the Court'. Moreover, it has been repeatedly held by the judiciary that maintenance provisions under the Code are not penal but aimed to prevent destitution and vagrancy.

1. 1980 Cr.L.J. 1212 at 1213.
1. Dr. Diwan, Law of Maintenance in India, p.131
MAXIMUM 12 MONTHS SENTENCE OF IMPRISONMENT: Let us examined another aspect of the expression 'One year' As discussed, earlier the Court can sentence the defaulter to one month’s imprisonment for each month’s maintenance allowance remained unpaid. The crucial question which arises for consideration is, what could be the maximum sentence of imprisonment to the defulter under sub-section (3) of Section 125 of the code? In an old case reported as Pandu Mahadu, the Bombay High Court took the view that the maximum sentence of one months imprisonment only can be passed for non-payment of all accumulated arrears. On a bare glance of the provisions of sub-section(3) of Section 125 of the Code, it is amply clear that the defaulter can be sentenced upto one month’s imprisonment for the whole or any part of each month’s allowance remaining unpaid. If the payment is made sooner, the sentence of imprisonment is to be cut short accordingly. It is evident from the expression 'may extend to one month or until payment if sooner made. But the Magistrate can in no case imprison a person for unspecified period.

At present most of the High Courts have taken the

1. (1895) Unrep. Cr.C.801; Se also (1887)00 ILR 9 All.240; Zaw Ta Vs Emperor. 15 Cri.LJ 434.
2. Kantappa Vs Sharanamme, 1967 Cr.LJ 783
view that if the period of default is more than one month
then the sentence of imprisonment can be for as many months
of default subject to a maximum of 12 months. The courts have
fixed the maximum period of 12 months sentence on the basis
of the first proviso to sub-section(3) of section 125 of the
Code. Since the said proviso provides that no warrant can
be issued for recovery of amount due unless an application
has been made to the Court within one year from the date on
which it becomes due, the arrears can be accumulated only for
one year and no more. Therefore, the Magistrate can
sentence the defaulter to a maximum of 12 months
imprisonment and no more. Giving reasons for such
a proposition, Justice Mukharji of the Calcutta High Court,
observed in Moddari Bin vs. Sukhdeo Bin that;

"The whole idea is to provide a speedy and expeditious remedy. The idea is not to permit
unnecessary accumulation of maintenance for the simple reason that maintenance is a current
necessity and is not to be used for making a claim in lumpsum after long delay". 2

Thus, imprisonment for 24 months was held, illegal in Pokala
Brahmaniat vs. Pokala Padma by Justice N.D. Patnaik of the
Andhra Pradesh High Court. Similarly, when there were
arrears of maintenance for 37 months and the trial judge
directed the husband to undergo sentence of imprisonment
for 37 weeks i.e. at the rate of one week per month,
Justice Jayachandra Reddy of the Andhra Pradesh High Court

1. Ibid
2. para 14, p.339
3. 1991 Cr.LJ 607
in Ataullah Vs. Memunisa Begum reduced the sentence of imprisonment to 12 weeks because imprisonment can be awarded only for 12 months default.

Surprisingly, earlier Justice Jayachandra Reddy in G. Pratap Reddy Vs. Vijaylakshmi has observed that it is permissible under Section 125(3) to sentence the defaulter to 20 months imprisonment for 20 months default. But at the same time he said;

"However, imprisonment for 20 months is rather severe. It is accordingly reduced to a term at the rate of 9 days in respect of each month in total 180 days".

Thus, impliedly the learned judge upheld the sentence for the arrears accumulated for 20 months i.e. beyond 12 months. It is more intriguing that Justice Jayachandra Reddy did somersault later on in Ataullah's case without even referring to G.Partap Reddy case. His Lordship held in Ataullah decision that in view of the proviso to sub-section (3) of Section 125, sentence only for 12 months default can be imposed. It is desirable that the learned judge should have taken note of his own earlier decision.

Justice P.N.Bakshi of the Allahabad High Court has taken a very interesting but unexpected approach in Iftekhar

1. 1984 Cr.LJ 1522 dt. 28-11-83
2. 1982 Cr.LJ 2365 dt. 20-4-1982
3. Supra
4. Supra
5. Supra
The judge opined in this case that for the purpose of recovery of accumulated arrears of maintenance for more than 12 months, the Court can enforce the realisation of arrears of 12 months only, prior to the date of application filed under Section 125(3) of the Code. But amazingly, Justice Bakshi took the view that there is no such limitation prescribed in Sub-section (3) of Section 125 which limits the power of the Magistrate to sentence the defaulter to imprisonment for the whole or any part of each month’s allowance remaining unpaid. His Lordship concluded:

"In other words, though the property of the defaulter can be attached and sold for the realization of arrears of maintenance for a maximum period of one year from the date of application, yet the defaulter can be sentenced to imprisonment for recovery of arrears, which may be extended beyond this period".

It seems to be a total misconstruction of the provisions of Section 125(3) of the code. If a defaulter cannot be compelled to pay arrears of more than 12 months, how can he be sentenced for more than 12 months, more so when a bare glance at Section 125(3) makes it explicitly clear that the maximum sentence of one month imprisonment can be imposed for the default of each month allowance remaining unpaid. There does not exist any rational basis for holding that the Magistrate can sentence the defaulter to imprisonment for more than 12 months. The object and nature of maintenance proceeding under the code is not to penalise the person.

1.1980 Cr.LJ 1212
2. Emphasis added
The power of sentencing the defaulter should be used as a mode of enforcement and not as a mode of penalisation.

On the other hand, some of the High Courts have taken a very healthy approach. Section 125(3) empowers the Magistrate to sentence the defaulter 'for the whole or any part of each month's allowance remaining unpaid to imprisonment for a term which may extend to one month or until payment, if sooner made'. The expression 'may extend to one month' entrusts the Magistrate with a discretion. He can award maximum one month imprisonment for each month's default and secondly he is also not bound to award one month sentence of imprisonment in each and every case. The Magistrate is expected to exercise this discretion judicially in the interest of justice in accordance with the facts and circumstances of each case. Therefore, the approach of Justice P.B. Mukherje deserves appreciation when he observes in Moddari Bin Vs. Sukhdeo Bin that the Magistrate can make an order for six months imprisonment for nine month default'. The Full Bench of the Bombay High Court in Karsan Ramji Chawda Vs. State upheld, and rightly so, an order of the Magistrate sentencing the husband to be imprisoned for a term of 15 days in respect of each month for which the allowance remained unpaid. Thus, imprisonment of two months for 4 months default was held legal.

1. 1967 Cr.LJ 335(Cal)(D.B.)
2. AIR 1958 Bom.99(FB)
The Rajasthan High Court speaking through N.C. Jain, J., in Kashmir Singh Vs. Kartar Kaur held that there does not appear any illegality or infirmity in the order of Magistrate awarding imprisonment only for six months although he could have ordered imprisonment to the extent of 11 months as 11 months maintenance was due. Tukol J., of the Mysore High Court reduced the sentence awarded by the Magistrate Antha Vs. Lakshmi while agreeing with the submission put forth by the husband that the Magistrate should have used his discretion in determining the period of sentence instead of inflicting the maximum sentence, the learned judge observed;

"I also agree that the maximum period of one month for each default is somewhat severe". Justice Tukol reduced the period to fifteen days for each default. As the default was held to be for eleven months, he sentenced the husband to five and a half months imprisonment.

In all the above decided cases, the judges have taken a very practical and socially oriented approach. The Magistrate must exercise the discretion judiciously and certainly he is not bound to inflict the maximum sentence of one month’s imprisonment for each month’s default.

It is not necessary that there should be separate warrant in respect of each term of imprisonment for one

1. 1988(1) HLR 161, 1(1988) DMC 532
2. 1969 Gi.LJ 572
month. In other words where arrears have been allowed to accumulate, the Court can issue one warrant and impose an accumulative sentence of imprisonment.

As for as the nature of imprisonment whether simple or rigorous, is concerned, the High Courts are of the view, and rightly so, that it is the discretion of the Magistrate which he must exercise judicially keeping in view the facts and circumstances of each case. Where a person having means contumaciously disregard the maintenance order of the Court, he may be sentenced to suffer rigorous imprisonment. A Division Bench of the Calcutta High Court while discussing the provisions of maintenance under the Code rightly held in Moddari Bin Vs. Sukhdeo Bin that:

"Having regards to the language of the statutory provision sentence is not limited either to simple imprisonment or to rigorous imprisonment. In fact, it does not say whether it should be simple or rigorous".

Justice M.C. Jain of the Rajasthan High Court upheld the sentence of simple imprisonment for six months under Section 125(3) awarded by the trial Court in Kashmir Singh Vs. Kartar Kaur. Therefore, it is the discretion of the


2. J.F.Thakore Vs K.h.,Dipsinghji, AIR 1955 Bom.108

3. 1967 Cr.LJ 335 at 337-38 wherein the Bench relied upon Emperor Vs Beni, AIR 1938 All.386 Queen Empress Vs.Narain (1887) ILR 9 All.240.

4. I(1988) DMC 532, 1988 (1) HLR 161; See also Bhakta Bhayan Vs Savitri Bhuya I(1991) DMC 542(Ori.)
Magistrate either to sentence the defaulter to rigorous or simple imprisonment under Sub-section(3) of Section 125 of the Code.

Sentence of imprisonment does not wipe out the liability to pay the Maintenance arrears payable under Section 125 of the Code.

A most significant question of law is raised before the Division Bench of the Supreme court consisting of M.P. Thakkar and S. Nathrajan, JJ., in Kuldip Kaur VS. Surinder Singh. The question was;

"Whether detaining the husband in jail for failing to pay the arrears of maintenance would be tantamount to satisfaction of the order of maintenance passed in her favour even though the arrears of maintenance allowance remains unrecovered in fact".

In other words, whether the liability to pay maintenance stands discharged by sentencing the husband to imprisonment? Mr. Justice M.P. Thakkar speaking for the Bench answered the question in the negative. His Lordship held that the 'liability cannot be taken to have been discharged by sending the person liable to pay the monthly allowance to jail'.

Surely, this decision of the Supreme Court would have far reaching consequences. It needs a deeper and closer examination. The brief facts of the case are that the


2. This decision of the Supreme Court is related on by the High Courts in Ashok Yshwant Samant Vs Smt. Suparna Ashok Samat, 1991 Cr.LJ 766.
Metropolitan Magistrate, Delhi awarded maintenance allowance at the rate of Rs. 200/- p.m. to the wife and Rs. 75/- p.m. to the son vide his order dated July 4, 1981. The wife moved an application for execution of the order for maintenance in order to recover the arrears of maintenance to the tune of Rs. 5090/-. In the course of enforcement of the order or maintenance dated 17.1.1982, the husband was sentenced to suffer simple imprisonment for one month.

The Supreme Court’s judgement noted that ‘the wife prayed for the recovery of the arrears, whereupon the Metropolitan Magistrate rejected her prayer on the ground that her claim of arrears stood satisfied upon the husband having been sent to jail’. According to Justice Thakkar, ‘the wife who wanted the maintenance amount for maintaining herself and minor child approached the High Court by way of revisional application’. Then the learned judge made very passionate and emotional observations viz.:

"Naturally the need of the wife for a few crumbs of bread for herself and spoonfuls of milk for her minor son were not satisfied by the imprisonment of the husband for one month. These needs would be satisfied only upon the economic means for purchasing the crumbs of bread and spoonfuls of milk provided by affecting the recovery of the maintenance amount".

The judge remarked that the Metropolitan Magistrate having failed to do so, the wife approached the High Court by way of a Revisional Application. Even though no support was sought from any provision of law and it was assumed that the claim for recovery stood satisfied upon the husband being sent to
jail, the High Court rejected the Revisional Application summarily without a speaking order on 29th July, 1982. It is this order which has been subjected to appeal in the Supreme Court by special leave.

Justice Thakkar took very seriously the rejection of Revisional Application by the Delhi High Court without speaking order and said;

"We fail to comprehend how such an important question arising in the context of the petition preferred by a helpless woman could have been summarily rejected by the High Court by a non-speaking order. To say the least or it, it betrays total lack of sensitivity on the part of the High Court to the plight of a helpless woman. Were it not so, the High court would have atleast passed a speaking order unfolding the rational process which made the High Court fell helpless in helping a helpless woman and helpless child".

After referring to the provisions of Section 125 and 128 of the Code, his Lordship further observed;

"The scheme of the provisions embodies in Chapter IX of the Code comprising of Section 125 to 128 which constitutes a complete Code in itself requires to be comprehended. It deals with three questions, viz:(1) adjudication as regards the liability to pay monthly allowance to the neglected wife and child etc.(2) the execution of an order for monthly allowance. Now the one of the modes for enforcing the order of maintenance allowance with a view to effect recovery thereof is to impose a sentence of jail on the person liable to pay the monthly allowance".

Coming Back to the basic question, Justice Thakkar held in unequivocal terms that;

"Sentencing a person to jail is not a 'mode of enforcement'. It is not a 'mode of satisfaction' of the liability".

His Lordship further held;
"Sentencing to jail is a means for achieving the end of enforcing the order by recovering the amount of arrears. It is not a mode of discharging liability".

The order for monthly allowance can be discharged only upon the monthly allowance being recovered.

Thus, his Lordship reemphasis the sentence 'is only a mode or method of recovery and not a substitute for recovery'. The purpose of sending a person to jail is not to wipe out the liability which he has refused to discharge. The 'whole purpose of sending to jail is to oblige a person liable to pay the monthly allowance who refuses to comply with the order without sufficient cause, to obey the order and to make the payment'. It is important to note that on one hand the judge ruled that;

"A sentence to jail is no substitute for the recovery of the amount of monthly allowance which has fallen in arrear. Monthly allowance is paid in order to enable the wife and child to live by providing with the essential economic wherewithal. Neither the neglected wife nor the neglected child can live without funds for purchasing food and the essential articles to enable them to live".

Pertinently, his Lordship in the same breath held;

"Instead of providing them with the funds, no useful purpose would be served by sending the helpness husband to jail".

Now, one is bound to think that if 'no useful purpose would be served by sending the husband to jail', then why to put a person behind bars. Why not to provide opportunity to the non-claiment to earn remaining outside and pay to the claiment. As noted in the preceding pages sentence of
imprisonment can be imposed only when the Magistrate fails to execute the maintenance order by way of issuing warrant for levying the amount due in the manner provided for levying fines as per section 421 to 424 of the Code. Under Section 421 of the Code, the Court is empowered to execute the maintenance order by (1) issuing a warrant of attachment and sale of any movable property and/or (ii) by issuing a warrant to the Collector of the District, authorising him to realise the amount as arrears of land revenue from the movable and immovable property, or both of the defaulter. Therefore, when a Magistrate sentences the defaulter to imprisonment, one thing is clearly implied that the defaulter has no movable and/or immovable property. Consequently, if a defaulter, having no property is put behind bars, would he be able to pay the maintenance allowance? Secondly, if sentence of imprisonment to a murderer can discharge him from his crime, with what reasoning or rationality we can say that it cannot discharge the husband from his liability.

Another pertinent aspect of the Supreme Court judgement is the following observation; "On failure to pay any monthly allowance for any month, hereafter on the part of respondent No. 1, Surinder Singh, the learned Metropolitan Magistrate shall issue a warrant for his arrest, cause him to be arrested and put in jail for his failure to comply with this Court's order and he shall not be released till he makes the payment".1

The order that shall not be released till he makes the payment is clearly against the provision of law. Under

1. Emphasis added.
Sections 125 to 128 of the Code or in that matter under any other provisions of the Code no such power vests with the Court to order the sentence of imprisonment till the payment is made. It is negatory to the basic notions of maintenance jurisprudence enshrined in the Code.

**OFFER TO MAINTAIN HIS WIFE: REFUSAL ON JUST GROUND:**

Second proviso to sub-section (3) of Section 125 of the Code enables a husband to make an offer to maintain his wife, provided she lives with him. The wife is equally entitled to refuse to live with him, but in that case, the Magistrate is to consider the ground of refusal pleaded by the wife and if he is satisfied that there is 'just ground' for her refusal, he is free to enforce the maintenance order notwithstanding such an offer. Thus, before the proviso second to sub-section (3) can be invoked, there are three conditions precedent, (a) the husband must offer to maintain his wife on condition of her living with him, (b) the wife must refuse to live with the husband giving grounds thereof and (c) the Magistrate must be satisfied that there are just grounds for such refusal.

Rather the objective of the proviso is rightly pointed out was to bring in reconciliation between the couple as has been pointed by Mr Justice V.S. Jetly in Francisco Vs Luciana, wherein it is observed:

"The object of the Legislature is to bring about reconciliation when the offer to maintain is bonafide. The object also is to promote domestic happiness and not to keep a husband and

1.1969 Cr.LJ 1490, AIR 1969 Goa, Daman and Diu 126
A plain reading of this proviso clearly shows that the Magistrate has to enquire into the offer made by the husband whether it is bona fide or not and to enquire with regard to the refusal of the wife to live with her husband as to whether she is justified or not. It is pertinent to point out that mere offer on the part of the husband is not sufficient. The offer to maintain must be a bona fide offer and not merely an empty offer made with the object of escaping the obligation or a colourable offer just to meet the legal action instituted by the wife. Thus, even where the husband makes an offer to maintain his wife on condition of her living with him, the wife is not bound under the law to accept the offer. It is open to her to refuse to live on just grounds. It has been rightly pointed out that the provison has been enacted for the protection of the wife and not in the interest of the husband. The idea behind this provisio seems to be prevent a court from readily accepting the view that if a husband makes an offer to maintain his wife on the condition of his wifffe living with him, he ceases to neglect or to refuse to maintain his wife.


2. Abdul Ghaffar Vs Bibi Hafija Khatoom AIR 1968 Pat. 307

Thus, the offer is to be carefully tested and if the wife gives adequate reasons for refusing to live with the husband, she is not to be deprived of her right to maintenance.

Even a last minute’s offer to take back the wife may be sustainable, if it is genuine. But if the last minute’s offer is open to scepticism as it is put forward with no other object than to ward of the obligation arising in the Criminal Proceeding, it will hardly be honoured. A Division Bench of the Kerala High Court consisting of Justice S.K.Kader and W.L. Bhat, J., in A.S.N.Nair Vs. Sulochans has rightly observed;

"Therefore, merely because, his offer is belated, it cannot be rejected. The background of the case, the prior conduct of the parties, the setting in which the offer has been made and the motivations behind the offer have to be looked into in considering the genuineness or the bona fides of the offer. In so, considering the matter, the belatedness of the offer is a circumstance which alongwith the other circumstances, may assume importance in testing the genuineness of bona fides of the offer".

Thus, as pointed out in Mammutty Vs. Beepathumma, the scheme of the provision of proviso to section 125(3) is such that in maintenance cases no question of rejecting an offer as belated arises. At the same time, Justice K.K. Narendran

1. Ram Kishore Vs Smt. Bimla Devi, 1957 Cr.LJ 1052
2. Rulda Ram Vs Kala Devi, 1976 Cr.LJ 570 (H.P>) per Justice D.B.Lal.
3. 1981 Cr.LJ 1898 (Ker.) at p.1905
4. 1981 Cr.LJ 1355 (Ker.)
has rightly cautioned that 'an offer made at the eleventh hour may be said to be lacking bona fides'. By considering the above judgements, it may be concluded that the offer to maintain the wife can be made at any stage of the proceedings provided it is a genuine and bona fide offer and not a mere pretence to avoid execution of the order of maintenance. But the offer made at the eleventh hour is always open to scepticism and the court must look into the genuineness and bona-fide of the offer with utmost vigilence.

It is important to note that the offer to maintenance cannot take effect restrospectively. When a wife files an application for realising her arrears under Section 125(3) of the code and the husband makes an offer to maintain her if she lives with him, the offer if genuine can operate from the date it is made and not anteio to it.

Now, another question is whether the second proviso to sub-section (3) governs sub-section (3) only or does it govern sub-section (1) also? Some High Courts have taken the view that the proviso second governs sub-section (3) only. Dr. Diwan also opined that from the location of second proviso it is apparent that it governs only sub-

1. Mehrunnisa Vs Noor Mohd., 1971 Cr.LJ 453 (All.)
2. Subhagi Begum Vs Murli Pradhan, 1968 Cr.LJ 539 (pat.); Chand Begum Vs Hyderbaig, 1912 Cr.LJ 12700 (A.P.); Iqbalunni Begum Vs Habib Pasha, 1961 Cr.LJ 604 (A.P.); Smt. Bela Ram Vs Bhopal Chandra, 1956 Cr.LJ 506 (Cal.); Roop Chand Vs Charu Bala, 1966 Cr.LJ 1291 (Cal.); Merunissa Vs. Noor Mohd. 1971 Cr.LJ 453 (All).  
3. Law of Maintenance in India, p.134
The Patna High Court speaking through G.N. Prashad, J., held in Subhagi Devi Vs. Murli Pradhan that the proviso to subsection (3) is not applicable at the very first stage when the Magistrate is called upon to pass an order under subsection (1). Justice Chinnappa Reddy, of the Andhra Pradesh High Court ruled in Chand Begum Vs. Hyderabad that the 'proviso is meant to govern subsection (3) only and not subsection (1)'. If it is meant to govern the whole section, it should not have occurred as a proviso to subsection (3) which only deals with enforcement of orders.

Most of the High Courts have taken the view that proviso second to subsection (3) governs the whole section and not merely subsection (3) alone. A Division Bench of the Kerala High Court consisting of S.K. Kader and U.L. Bhat, JJ., has thoroughly examined this aspect in A.S.N. Nair Vs. Sulochana. The Court referred to various High Court

1. 1968 Cri. L.J. 539.
2. 1972 Cri. L.J. 1270.
4. 1981 Cr.LJ 1898 (Ker.)
decisions. In which a contrary view was taken and then observed in unambiguous terms that the proviso applies to the entire section. Giving reasons his Lordship observed;

"The second proviso contemplates making ‘an order under this Section.43The use of the word ‘section’ and not ‘sub-section’ is significant. This has been done only to emphasize that the proviso governs not only sub-section(3) but also sub-section (1) since even at the stage of passing maintenance order, it is open to the husband to make an offer under sub-section (1), Magistrate has to be satisfied that the husband ‘neglects or refuses’ to maintain his wife. In considering the same, Magistrate has to apply his mind regarding right of parties, offer made by husband, grounds urged by wife etc. The intention in incorporating the second proviso below sub-section (3) is only to elucidate this particular aspect not only for the purpose of the sub-section (3) but also for the purpose of sub-section(1). If this proviso had been placed just below sub-section(1), a doubt would have arisen, if an offer could be made at the enforcement stage covered by sub-section (3). To avoid any such doubt the proviso has been placed below sub-section (3). The relevant proviso was the first proviso in the old Code and its location led to the view that since the other proviso related exclusively to a warrant this proviso also must relate only to the enforcement stage. It is to counter this view that, in enacting the new Code (of 1973) just the position of the two provisos has been reversed". 3

V.S.Jeteley, J.C. of the Goa, Daman and Diu High Court has


2.Relied upon the decisions reported in Gopalakrishna Nair Vs Thankera 1970 Ker.LT 403; A.Ponnamma Vs. Neelakantan Nair, 1967 Cr.LJ 1334.

3.Emphasis added by the learned Judge.
also opined in *Francisco Vs. Luciana* that the proviso envisages 'an order under this section and not under sub-section (3) only, and therefore, it would also apply at the stage of sub-section(1). Finding it difficult to agree with the view that the proviso is not applicable at the stage of sub-section(1), his Lordship held;

"The question of an offer by a husband to maintain his wife on condition of her living with him may arise at the stage of sub-section(1) or even thereafter depending upon the facts of each individual case".

His Lordship also expressed that suppose, a wife leaves home on account of cruelty on the part of her mother-in-law. A husband may be helpless against his powerful and domineering mother. In this situation he may neglect to maintain his wife or refuse to live separately from his mother. He may thereafter recover his lost independence and have a separate home. His offer at this stage, will certainly be a genuine offer which could disentitle the wife to claim maintenance. Mr Justice Jetley further observed;

"The expression 'may make an order under this section' is to be construed so as to make it operative for the purpose of the entire section and not only sub-section(3). The word 'section' is not used unnecessarily or superfluously by the Legislature. The presumption is against such a use and so effect must be given if possible to all the words used, for the Legislature is deemed not to waste its words or say anything in vain.2 It has to be given a sensible meaning".

1. 1969 Cr.LJ 1490
3. At p.1494
Thus, Mr Justice Jetley rightly held that by limiting the scope of the explanation to enforcement, the social object of the addition of explanation to sub-section (3) would not be served. In Mammutly Vs. Beeopathumma, Justice K.K. Narenderan has opined that ‘either before the order for maintenance was passed or after that, the husband can offer to maintain his wife’.

Thus, from the above discussion, it becomes clear that the second proviso to sub-section(3) of Section 125 of the Code governs the entire section and not only sub-section (3). The expression ‘may take an order under this Section’ is a clear indication towards this. Moreover, if a husband can validly make an offer to maintain his wife on the condition of her living with him, by no stretch of imagination can he be denied this opportunity at the initial stage. Therefore, the second proviso not only governs a sub-section(3) but sub-section (1) also.

(i) EXPLANATION TO SECOND PROVISO OF SUB-SECTION(3) OF SECTION 125 OF THE CODE:

Another important question is, whether a husband, who has contracted marriage with another woman or keeps a mistress, makes a genuine offer to maintain his wife on the condition of her living with him, absolves himself from the liability to maintain his wife ?. The explanation to second proviso to sub-section(3) of Section 125 is a clear cut answer to

1.1981 Cr.LJ 1355(Ker.)
this question, which says:

If a husband has contracted marriage with another woman or keeps a mistress it shall be considered to be a just ground for his wife’s refusal to live with him. ¹

A bare glance at the second proviso to sub-section(3) clearly shows that the Magistrate has the jurisdiction to enquire into the offer made by the husband whether it is bona fide or not and also to enquire with regards to the refusal, of the wife to live with her husband as to whether she is justified or not. But, the explanation to sub-section(3) would show that the discretion to enquire is taken away when the husband marries for the second time or if he keeps a mistress, it shall be considered a just ground for his wife’s refusal to live with him. It may thus be seen from the combined reading of the second proviso and the explanation to sub-section(3) that the very fact of marrying another woman or keeping a mistress would itself entitle his wife to refuse to live with the husband and still claim maintenance.

But the Patna High Court in Subhaqi Devi Vs. Murli Pradhan and Calcutta High Court in Smt. Bala Rani Vs. Bhupal Chandra have taken the view that the mere fact of a

¹. The proviso was added in the old Code of 1898 by the Criminal Procedure (Amendment) Act No.9 of 1949.
³. AIR 1968 Oat.139
⁴. AIR 1956 Cal.134; followed in Roop CChand Vs. Charibala. AIR 1966 Cal.23 per Das Gupta J.,
second marriage conanot' ipso facto, establish such neglect or refusal within the meaning of sub-section(1) of S.488, Cr.P.C. (corresponding to S.125 (1) of the new Code) for a man may marry a second time and still he may not refuse to maintain his first wife. Therefore, without proving neglect or refusal on the part of the husband, the wife is not entitled to claim maintenance merely on the proof of the second marriage of the husband. Though earlier Punjab & Haryana High Court took the same view in Issar Kaur Vs. Som Devi and Dhan Kaur Vs. Niranjan Singh, but justice Dua who was party to decision in Dhan Kaur changed his approach in Smt. Rano Vs. Mathu Singh, wherein he added;

"but then when a husband imposes a condition that he will maintain his wife only if she lives with him in company with his other wife, in my opinion, the refusal and neglect are both implicit in it".

Later on, Justice M.M. Punchi of the same High Court in Sampuran Singh Vs. Gurdev Kaur, without referring to any case law on the point observed;

"and the presence of another woman in his house as his wife or mistress is obviously a valid ground for her to remain away from him and yet being destitute to claim maintenance".

Contrary to this the Karnataka High Court in Theresa Gurudas

1. AIR 1959 Punj. 295 per Tek Chand J.,
2. AIR 1960 595(D.B.) oer Mehur Singh and Dua, JJ.,
3. ibid
4. 1962 Cr.LJ 75(Punj.)
5. 1985 (2)) HLR 1671
VS. K.S. Gurdas have observed that 'merely because the husband has been living with a woman after the wife deserted him, it does not entitle the wife to get relief under Section 125, Criminal Procedure Code without proof of neglect or refusal'. For holding this view the learned judge mainly relied upon the statements made in AIR Commentary on Code of Criminal Procedure, that 'proof of a second marriage by the husband cannot dispense with proof of the neglect or refusal to maintain the wife that 'Mere fact of second marriage—neglect or refusal to maintain first wife cannot be inferred. No order of maintenance can be based thereon unless neglect or refusal to maintain is proved; that Mere fact that husband has contracted second marriage is not sufficient, but it must be proved that there is neglect or refusal to maintain on the part of the husband that the 'mere fact that husband has married again several years after wife left him does not entitle her to claim maintenance unless neglect or refusal to maintain is proved'. The Madhya Pradesh High Court in Akhtarunnish Vs. Sharifkhan has considered the impact of second marriage of the husband and Mr. Justice K.L. Shrivastva observed;

"It is only neglect or refusal to maintain which goes to the furnish cause of Section or ground for a claim for maintenance. Husband contracting second marriage is not proof of such neglect or refusal and may not be confused with the cause  

2. 7th edition, pages 740 to 741  
3. I(1987) DMC 95
of action for a claim for maintenance. Neglecting the first wife is not neglecting to maintain her and a wife cannot find her application under Section 125(1) of the Code solely on the factual foundation of her husband’s second marriage. The question of second marriage falls for consideration only in the context of the husband’s offer to maintain her on condition of her living with him and the wife’s refusal to live with him. In terms of the explanation, appended to the second proviso to Section 125(1) husband’s contracting marriage with another woman shall be just ground for her refusal to live with him. Thus the husband’s second marriage merely clothes the wife with the right to refuse, to live with the husband and at the same time claim maintenance provided she is otherwise entitled to it in terms of sub-section (1) of section 125 of the Code. Right to refuse to live with the husband is a separate matter from her right to claim maintenance from him as pointed out in the decision in State Vs. Anwarbi.61

It is very significant to note that the decision in State Vs. Anwarbi has been made the base by Mr. Justice Shivastava for coming to such a conclusion. Unfortunately, the Karnataka and Madhya Pradesh High Courts, in both the above discussed the decisions, the Supreme Court’s judgement having direct bearing on the question under consideration, Deochand Vs. State has not been taken note of. The facts of Deochand case reveal that the wife filed an application under Section 488 of old Code (corresponding to S.125 of new Code) for maintenance in the Court of Judicial

61.AIR 1953 Nag. 133
62.ibid
63.1974 Cr.LJ 1089, AIR 1974 SC 1488
64.ibid
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Magistrate. The Magistrate dismissed that application holding that though the husband had taken a second wife he had neither neglected nor refused to maintain the first wife. The wife went in revision in the Session Court. The Session Judge taking the view that the fact that the husband had contracted second marriage during the subsistence of his first marriage was sufficient to entitle her to an order for maintenance, made a reference to the Nagpur Bench of the Bombay High Court, which was accepted by a single Judge of the High Court, who directed the husband to pay a sum of Rs.50 per mensem to the first wife by way of maintenance. A Division Bench of the High Court granted to the appellant leave to appeal to the Supreme Court under Article 134(1) (c) of the Constitution. This appeal was heard by a three judge Bench of the Supreme Court consisting of Chief Justice A.N. Ray, Justice Y.V.Chandrachud and Justice V.R. Krishnalyre. The Bench speaking through Justice Chandrachud confirmed the judgement of the High Court which means the wife was held entitled to maintenance on the ground of her husband's taking second wife as she was justified in refusing to live with the husband, the husband was under legal obligation to maintain her. In these facts and circumstances of the case, Justice Chandrachud held;

"As he has neglected to maintain her the High Court was justified in passing the order under appeal".

Thus, the ratio of the Apex Court's above decision clearly lays down that taking a second wife by the husband is itself
sufficient for the wife to claim maintenance under Section 125 of the Code.

The Patna High Court in 1967 took the view in Abdul Ghaffar Vs. Haffiza Khatoon that where the husband takes a second wife (even with the consent of first wife) the first wife would have a just ground for refusing to live with him and in such circumstances she would be entitled to claim maintenance from her husband without proving neglect of her on the part of her husband.

In a Division Bench decision of the Bombay High Court Tejabai Vs. Shankarrao, it was observed that 'whether the offer was made before the issue of any order under sub-section (1) or after the issue of the order under sub-section (3), makes no difference. Mr justice Palekar allowed even to the wife of second marriage (as under the Muslim Law a male Muslim can have four wives) to claim maintenance under the Code. The High Court accepted the contention that:

It cannot be said that 'just ground' or 'sufficient reason' of a husband contracting marriage with another wife is only available to the first wife vis-a-vis the second and not to the second wife vis-a-vis the first, on the ground that the proviso is not made for the benefit of the wife, who with open eyes, marries a husband, who already contracted a marriage.

2.1966 Cr.LJ 131 per Naik and Palekar, JJ.
3.p.134-135; a similar view has been taken if this provision by the Calcutta High Court in, Kunti Balo Bassi Vs. Nasin Chandra, AIR 1955 Cal. 108.
The leaned judge further observed:

"The words 'if a husband has contracted marriage with another wife' are quite general in terms. The dichotomy between 'has contracted marriage with another wife' and 'keeps a mistress' is obvious. So far as the keeping of the mistress is concerned, the verb "Keep" is used in its present tense, but, so far as the contracting of marriage is concerned, the verb is present perfect viz., 'has contracted'. The marriage may have been contracted at any time it will refer to the first as well as the second marriage".

This decision is relied on by Justice Gadgil of the same High Court in *Hafijjabi Vs. Abdul Aziz Kaderkhan*. Justice Bhasker Rao of the Andhra Pradesh High Court in *P.Symalamma Vs. P.Smabarah* relying on the Supreme Court decisions in *Deo Chand Vs. State* and *Subanu Alias Saira Bano Vs. A.M.Abdul Gafoor* held that it is a settled law 'that the explanation to sub-section (3) of S.125 Criminal Procedure clearly refers that wife has a right to live separately when the husband has married another lady or keeps mistress'. His Lordship observed:

"Therefore, when once the wife proves that her husband has married another lady or keeps a mistress, the wife has got the right to claim maintenance unless the husband proves that he is maintaining her by paying something in kind or cash".

On the question whether the wife is entitled for maintenance without further proof of negligence on the part of husband, Justice Bhasker Rao held:

1. 1983 Cr.LJ 931 (Bom.)
2. 1988 Cr.LJ 1891; II(1988) DMC 209
3. 1974 Cr.LJ 1089
4. 1987 Cr.LJ 980, AIR 1987 SC 1103
"I hold that as per the explanation to subsection(3) of S.125 Cr.P.C. the wife is entitled for the maintenance once she proves that the husband has married another woman or kept a mistress without further proof of any negligency or ill treatment on the part of the husband".

Same approach was taken by Muktadhar J., of the Andra Pradesh High Court in G. Subbhan Basha Vs. S.S. Begum and Mohorunnisa Beg Vs. Abdul Saleem and by Karnataka High Court in Kadirasag B.P. Vs. Nurubi and Veeranna Vs. Sumitrabai Madras High Court in Udai Kumar Vs. R. Kalavati. Recently, the Orissa High Court has also held in Neheru Beg Vs. Tapaswini Beg that second marriage by itself is sufficient for the purpose of award of maintenance by the Criminal Court. The Court followed its own High Court decisions in Dayanidhi Singh Vs. Rukhmnnii Dei and Jadab Chandra Vs. Smt. Kaushlaya.

It is pertinent to note that when the second wife is already dead, the first will not be justified of claiming maintenance under Section 125 of the Code, unless

1. Emphasis supplied
2. 1980 Cr.LJ 376
3. 1974 Cr.LJ 78
4. 1979 Cr.LJ NOC 12
5. 1991 Cr.LJ 774
6. I(1985) DMC 430 Mad
7. I(1992) DMC 197
8. 36(1970) CLT 1083,
9. 41(1975) CLT 353, 1975 Cr.LJ 856
the husband is guilty of neglect or refusal to maintain her.

Justice Fazal Ali speaking for the Supreme Court in Siraj Mohmed Khan Vs. Hafizunninsa explained the object of the explanation to the second proviso to sub-section (3) of section 125 of the Code in the following words;

"The object of, introducing this provision was clearly to widen the scope and ambit of the term 'just ground' mentioned in the proviso. This provision is not exhaustive but purely illustrative and self explanatory and takes within its fold not only the two instances mentioned therein but other circumstances also of the like or similar nature which may be regarded by the magistrate as a just ground by the wife for refusing to live with her husband under the code of 1973".3

IN Mst. Biro Vs. Behari Lal Justice Fazal Ali has pointed out the importance of the said explanation, which was added by an amendment of 1949 to sub-section (3) as;

"The amendment is clearly intended to put an end to an unsatisfactory state of law utterly inconsistent with the progressive ideas of the stated and emancipation of woman, in which women were subjected to a mental cruelty of living with a husband who had taken a second wife or a mistress on the pain of being deprived of any maintenance if they choose to live separately from such a husband".

A specific question, whether the 'explanation,' which says that if a husband has contracted marriage with another woman, shall be considered a just ground of wife's refusal to live with

1.1955 Sau. LR 360
2.1981 Cr.LJ 1430 at 1434
3.Emphasis added.
4.AIR 1958 J&K 47
him' applies only to sub-section (3) of S.125, or covers within its ambit even the original order of maintenance passed under sub-section(1) of that Section, was discussed by Justice T.U. Mehta of the Himachal Pradesh High Court in Chasitu Vs. Durga Devi Dissenting from Patna High Court's decision in Subhagi Devi Vs. Murli Pradhan, Justice Mehta very thoroughly examined the question and then held in unequivocal terms that;

"It is undoubtedly true that the explanation, which says that if a husband has contracted a marriage with another woman, it shall be considered to be a just ground for his wife's refusal to live with him, is attached to the second proviso to sub-section(3) of S.125 and arises out of the same because this second proviso says that if the husband offers to maintain his wife on condition of her living with him, and if she refuses to live with him, the Magistrate should consider the ground for refusal stated by her, and should thereafter pass proper orders after considering whether the wife's refusal to live with her husband is based on a just ground. Thus even though there would be no difficulty in holding that the explanation is attached to and arises from this proviso, if Section 125 is read as a whole, there would be absolutely no scope for any doubt that this explanation governs the whole Section 125 with the result that at the time of considering the question whether the husband has neglected or refused to maintain his wife as contemplated by sub-section(1), the Court would be justified in considering whether wife's refusal to live with her husband was based on a just ground or not. The reason for taking this view is that if after the order of maintenance is passed, and at any stage when it is sought to be executed, the wife can reject the husband's offer to reside

1.1980 Cr.LJ 885; See also Shambu Reddy Vs Ghalamma, AIR 1966 Mys.311; Teja Bai Vs Shanker Rao, AIR 1966 Bom.48; Hafijjabbi Vs Abdul Aziz Kadirkhan, 1983 Cr.LJ 931.

2.1968 Cr.LJ 539
with him on a ground which can be considered to be just, there is no reason why even before the said order is passed, the wife would not be entitled to show that she had a just ground to refuse to go and reside with him".1

Justice Mehta has rightly opined that the Section 125 was enacted to give protection to the wife and intention of the Legislature in enacting the explanation was to preserve the dignity of the woman whose husband is found living with another woman.

SECOND MARRIAGE VIS-A-VIS MUSLIM LAW: Muslim Law permits limited polygamy and allows a Mohmmedan man to keep four wives at a time. Therefore whether a Muslim husband's second marriage, being allowed by his personal law, would not be treated as a just or sufficient ground for staying separately and claiming maintenance by his wife? In Abdulla Khan Vs. Chandni Bai, the Judicial Commissioner held that a Muslim woman will have not justification to refuse to live with her husband simply because he had contracted marriage with another wife on the ground that the personal law of Muslim is not affected by the amended proviso to Section 488(3) Criminal Procedure Code (corresponding to sub-section (3) of Section 125 or new Code), but K.S. Hegde, J., of the Mysore High Court held in

1.p.887. The decision of Ranjit Kaur Vs Avtar Singh, AIR 1960 Punj.221; H.Syed Ahmed Vs Naghat Parveen Tej Begum, AIR 1958 Myr.128 also discussed on this point.

2.AIR 1956 Bhopal 71.
Syed Ahmed VS. N. P. Tai Begum that if the parties come within the 'mischief' of section 488 Criminal Procedure Code, 1898 they shall be governed by its provisions notwithstanding their personal law. His Lordship rightly observed:

"The Criminal Procedure Code, is a law of the land and not of any community. If there is a conflict between the law enacted by the Legislature and the personal law then the former prevails. The Legislature will is supreme in this land unless controlled by the Constitution".

The decision of Abdulla Khan was also dissented from by the Madras High Court in Mohamed Haneefa Vs. Mariam Bi. The Gujrat High Court in B. S. Khan Vs. Sikander Khan has rejected the contention that a Muslim husband's taking second wife cannot be treated as a reasonable ground for staying separately and claiming maintenance by the first wife as Muslim Law permits a Mohammedan male to keep four wives at a time. Justice A. P. Ravani held;

"No self-respecting woman would like that her husband may contract a second marriage. If second, third or even fourth marriage is permissible under Mohmedan Law a Mohmmdean male may indulge in that luxury. At the most he may not be liable for offence of bigamy. But if such a behaviour proves to be an irritant to his wife and if the same becomes a source of mental agony to her he cannot take shelter undr his personal law and say that he is not liable to pay maintenance to his wife. In a given case,

1. AIR 1958 Myr. 128
2. AIR 1956 Bhopal 71
3. 1969 Cr. LJ 1412
4. 1984 HLR 313
Mohommadean wife would surely be entitled to live separate and claim maintenance solely on the ground that the very idea of contracting second marriage by her husband is abhorrent to her mind and therefore the second marriage by her husband causes mental agony and cruelty to her. In such a situation husband cannot take shelter under his personal law and claim immunity from paying maintenance to his wife".1

Now, the question is well settled that the second marriage of the husband, even where parties are governed by Muslim Law which allows limited polygamy conferred a right upon the wife to live separately and claim maintenance under Section 125 of the Code. The Supreme Court has laid down a clear law on this issue in Subana Alias Saira Bano Vs. A.M.Abdul Gaffoor. Earlier in Mohd. Ahmed Khan Vs. Shah Bano Begum the explanation came to be scanned by the Supreme Court, while it examined a larger question regarding the right Muslim divorced wife’s right to claim maintenance under Section 125 of the Code. A five judge constitutional Bench speaking through Chief Justice Y.V. Chandrachud has considered the importance of the explanation to the second proviso to Section 125 and placed reliance on this explanation to fortify the view that the right under Section 125 of the Code can be exercised irrespective of the personal law of the parties especially in regard to Muslims, and then observed;

1.ibid p.315, Emphasis added

2.AIR 1987 SC 1103, 1987 Cr.LJ 980

3.AIR 1985 SC 945; 1985 Cr.LJ 875, per Chief Justice Venkataramiah and Ranganathan Mishra, JJ.
"That proviso says that if the husband offers to maintain his wife on condition that she should live with him, and she refuses to live with him the Magistrate may consider any ground of refusal stated by her, and may make and order of maintenance notwithstanding the offer of husband, if he is satisfied that there is a just ground for passing such as order".

His Lordship after noting the provisions of explanation, observed that 'it is too well-known that a Mohomedan may have as many as four wives at the same time not more. If he marries a fifth wife when he already has four, the marriage is not void but irregular. Finally, his Lordship held;

"The explanation confers upon the wife the right to refuse to live with her husband if he contracts another marriage".2

Therefore, the Supreme Court, has categorically held that section 125 of the Code overrides the personal law, if there is any conflict between the two. Consequently, a Muslim wife is very much within her right to refuse to live with her husband and claim maintenance on the sole ground of her husband’s second marriage, even though the Muslim Law permits four marriages at a time.

The Supreme Court has done indepth examination of the Explanation to sub-section(3)of Section 125 of the Code, and directly discussed the question under our present consideration in Subanu alias Saira Bano Vs. A.M. Abdul Gafoor that if a Muslim wife whose husband has married again


2. Emphasis added

3. 1987 Cr.LJ 980
then a Muslim wife whose husband has taken
a mistress to claim maintenance from her husband,
can there be a discrimination between Muslim women falling
in the two categories in their right to claim maintenance
under Section 125, Criminal Procedure Code, 1973'. In this
case, the husband opposed the right of his wife to
maintenance under Section 125 of the Code mainly on the
ground that since he is permitted by Muslim Law to take
more than one wife his second marriage cannot afford a legal
ground to his first wife to live separately and claim
maintenance. The husband also pleaded that he was driven to
the necessity of marrying again because the appellant
failed to rejoin him. The husband further pleaded that even
so he had offered to take her back and maintain her and the
said offer exonerated him from his liability to pay
maintenance. The Division Bench consisting off A.P.Sen and
S.Natrajan.JJ., thoroughly examined both these contentions.
The Apex Court referred to the High Court decisions, where in
it was held that the second marriage of the husband entitled
the wife to an order of maintenance under old Section 488
of Criminal Procedure Code, 1898, and also High Court
decisions taking contrary view that the mere fact that a

1. Bayanna Vs Devamma, AIR 1954 Mad.226; Kandaswami Vs
Nachammal, AIR 1963 Mad.263; Syed Ahmed Vs N.P.Taj Begum,
AIR 1958 Myr. 128; Shambu Vs Chalamma, AIR 1966 Bom.48;
Mohammad Haneefa Vs Marian Bi,, AIR 1969 Mad.414
2. Bela Rani Vs Bhupal Chandra, AIR 1956 Cal.134; Rupchand
Vs Charubala, AIR 1966 Cal.83, Ishar Vs Sona Devi, AIR
1959 Punj.295; Dhan Kaur Vs Niranjan Singh, AIR 196000
Punj.595
husband has contracted marriage with another wife or keeps a mistress cannot be said to amount to neglect or refusal on the part of the husband to maintain his wife, within the meaning of sub-section (1) of Section 488. Justice Natarajan then critically examined the Allahabad High Court decision in Ramji Malviya Vs. Munni Devi, where it was held that ordinarily remarriage will be sufficient ground for refusing to live with the husband but if the remarriage had been occasioned by the wife's unjust refusal to live with her husband she cannot take advantage of her own wrong and claim maintenance. His Lordship also quoted with approval the following observations of Justice Krishna Iyre in Sahulameedu Vs. Subaida Bevi:

"It behoves the Courts in India to enforce S.488(3), Criminal P.C. in favour of Indian women, Hindu, Muslims or other. I will be failing in my duty, if I accede to the argument of the petitioner that muslim women should be denied the advantage of para 2 of the proviso to S.488(3)."

and the observation of Chinnappa Reddy, J., in Chand Begum Vs. Hyderbaig:

"Therefore, a husband who married again cannot expect the Court to come to his rescue if he wants the first wife to share the conjugal home with a co-wife. If she decides to live separately he is bound to provide a home for her and maintain her. If he does not do that he neglects or refuses to maintain her within the meaning of S.488 (1), Cr. P.C. Thus the offer

1. 1970 Ker.LT 4 (Ker.HC)
2. 1972 Cri.LJ 1270 at 1273 (A.P.)
of a husband who has taken a second wife to maintain the first wife on condition of her living with him cannot be considered to be a bona-fide offer and the husband will be considered to have neglected or refused to maintain the wife".

Justice Natrajan then emphatically pointed out that in the reported decision, where the explanation to sub-section (3) of Section 125 has been construed, even entitling a wife to claim maintenance on the basis of explanation, the Courts have only taken into consideration the first limb of the explanation, viz., "if a husband has contracted marriage with another woman". Interpreting the second limb of the Explanation to Section 125(3) which hitherto remained unconsidered, his Lordship held;

"We would like to point out that the Explanation contemplates two kinds of matrimonial injury to a wife viz., by the husband either marrying again or taking a mistress. The Explanation places a second wife and a mistress on the same footing and does not make any differentiation between them on the basis of their status under matrimonial law, if we ponder over the matter we can clearly visualise the reason for a second wife and a mistress being treated alike. The purpose of the Explanation is not to affect the rights of a Muslim husband to take more than one wife or to denigrate in any manner the legal and social status of a second wife to which she is entitled to as a legally married wife, as compared to a mistress but to place on an equal footing the matrimonial injury suffered by the first wife on account of the husband marrying again or taking a mistress during the subsistence of the marriage with her. From the point of view of the neglected wife, for whose benefit the Explanation has been provided it will make no difference whether the woman intruding into her matrimonial life and taking her place in the matrimonial bed is another wife permitted under law to be married and not a mistress. The legal status of the woman to whom a husband has transferred his affections cannot lessen her distressor her feelings of neglect.
In fact from one point of view the taking of another wife portends a more permanent destruction of her matrimonial life than the taking of a mistress by the husband. Be that as it may, can it be said that a second wife would be more tolerant and sympathetic than a mistress so as to persuade the wife to rejoin her husband and lead life with him and his second wife in one and the same house. It will undoubtedly lead to a strange situation, if it were to be held that a wife will be entitled to refuse to live with her husband if he has taken a mistress but she cannot refuse likewise if he has married a second wife. The Explanation has to be construed from the point of view of the injury to the matrimonial rights of the wife and not with reference to the husband’s right to marry again. The Explanation has, therefore, to be seen in its full perspective and not disjunctively. Otherwise it will lead to discriminatory treatment between wives whose husbands have lawfully married again and wives whose husbands have taken mistresses. Approaching the matter from this angle, we need not resort to a comparison of Muslim wives with Hindu wives or Christian wives, but can restrict the comparison to Muslim wives themselves who stand affected under one or the other of the two contingencies envisaged in the Explanation and notice the discrimination."

Consequently, the Supreme Court lays down the law in unambiguous terms that a right has been conferred on the wife under the Explanation to live separately and claim maintenance from the husband, if he breaks his vows of fidelity and marries another woman or takes a mistress. The Explanation is of uniform application to all wives including Muslim wives.

As to the second defence of the husband, that in view of his offer to take back the wife and maintain her, he stands absolved of his liabilities to pay maintenance,

1.p.985, these observation are relied on the Madhya Pradesh High Court in Manu Bai Vs Sukhdeo, 1990 Cri.LJ646
Justice Natrajan took due notice of the fact that the offer by the husband had been made only before the Revisional Court and that too after the second marriage had taken place. Therefore, it is obvious that such an offer to take her back was only a make-believe one and not a genuine, sincere and bona fide offer. As a result, the Supreme Court rejected both the contentions of the husband and Rs. 300/- p.m. as maintenance was awarded with effect from 18.10.1984, when the husband married a second wife.

The Calcutta High Court's (in Kartick Gorai Vs. State of West Bengal) is perfectly in consonance with the intent and ratio of the Supreme Court's above judgement. L.M. Ghosh speaking for the High Court upheld the award of maintenance allowance to the wife observing;

"Even if the second marriage was not strictly proved the mere association with another woman would be a valid ground on the part of the wife to live separately". 2

These decisions are in conformity with the notion that 'a wife has a right to exclusive association of her husband undefiled and unpolluted by any other woman'. Mr justice A.S.Qureshi speaking for the Gujrat High Court in Dharmishthaben Vs. Hasmukhbahia has emphatically held;

"In law, the position is absolutely clear that a wife can refuse to live with the husband and yet claim maintenance under Section 125 of Criminal Procedure Code, if he has remarried or is living

1.11(1987) DMC 274
2.ibid p.276 Emphasis supplied.
3.1990 Cr.LJ 2132.
in adultery with another woman". 1 Thus, it is submitted that the provision as well as judicial approach are very clear that a wife will be entitled to claim maintenance under section 125 of the Code, not only where her husband has remarried but even where he keeps a mistress or leads an adulterous life.

A Division Bench decision of the Bombay High Court in Mustafa S.Seikh Vs, Shamshad Begum M.S. requires special evaluation because the single Bench took contradictory approach on the question 'whether it is permissible for the court to deny maintenance to the wife because the husband has contracted second marriage'? It is pertinent to note that the Bench took note of the fact that in this present case, the husband professes Muslim religion and undisputedly he is entitled to contract second marriage even during the life time of his first wife. The Bench over ruled its earlier Single Bench decision in Mohammed Vs. Raisa wherein it was held that when a wife( the parties were Muslim in the case) left the house of the husband without any cause, then she had no right to live separately merely because the husband contracted second marriage and consequently, was not entitled to maintenance. Observing

1.ibid 2135-36 Emphasised supplied
2.1(1991) DMC 34. This petition was placed before the Division Bench of the High Court as the petitioner challenged the constitutional validity of the explanation to Sec.125(3), but this contention was not pressed.
3.1986 Mat.LJ 1041
that the 'learned Single judge overlooked that in the proceeding under Section 125 of the Code, it is not necessary for the Court to ascertain as to who was in the wrong and whether the wife was guilty of leaving the matrimonial house without any reason', the Justice Pendre held;

"Even assuming that the wife is in the wrong leaving the house, she cannot be deprived of maintenance when husband contracts second marriage and that fact by itself entitle her to live separately".1

The most surprising aspect of this decision is that the Bench on one hand overruled its earlier single Bench’s decision, Mohammed Vs. Raisa, and said that a wife can claim maintenance on the ground of her husband’s second marriage but on the other hand, Justice Pendre has observed in its earlier paragraph 6 of the judgement as follow;

"The power to grant maintenance is conferred on a Magistrate provided two basic requirements are established. The first requirement is that the wife is unable to maintain herself and the second is that her husband has sufficient means but neglects or refuses to maintain the wife. The Explanation to sub-section (3) merely provides the guideline to the Court and prescribed that when husband contracts second marriage, then the wife is entitled to live separately from her husband. The Explanation by itself does not enable the wife to claim maintenance under sub-sub-section(1). A wife may be entitled to live separately from her husband because the husband has contracted second marriage but that fact by itself is not enough for a Magistrate to award maintenance. The wife has to establish that she is living separately and she is unable to maintain herself and her husband has neglected or refused to maintain her. Unless these facts are established, the wife is not entitled to claim maintenance merely because the husband has

1.Emphasis supplied; para 9 of the judgement, p.38
If we conclude that the Division Bench intends to lay down the law that the fact of second marriage is not enough for a Magistrate to award maintenance and the wife has to establish that her husband has neglected or refused to maintain her, this proposition of law clearly runs contrary to the one which has been laid down by the Apex Court in Subami alias Saira Bano Vs. A.M. Abdul Gafoor, which we have discussed in detail in the preceding pages. The law laid down by the Supreme Court is binding on all Court in India. Therefore, the above legal propositions laid down by the High Court will not be good law. Moreover, it is very unfortunate that the High Court itself has taken contradictory approach in the said case.

1. Emphasis supplied

2. 1987 Cr.LJ 980
9. BARS TO CLAIM MAINTENANCE BY THE WIFE_ SUB-SECTION(4) OF SECTION 125 OF THE CODE:

Second provise to sub-section(3) of Section 125 of the code enacts provisions for the husband's offer to maintain his wife on condition of her living with him, and wife's refusal on just ground for doing so. Explanation to sub-section(3) says that it shall be considered to be just ground for his wife's refusal to live with him, if her husband has contracted second marriage with another woman or keeps a mistress. Sub-section(4) of Section 125 provides that a wife shall not be entitled to receive maintenance from her husband.

- if she is living in adultery, or
- if, without any sufficient reason, she refused to live with her husband, or
- if they are living separately by mutual consent.

Thus, the above stated provisions of Section 125 of the code formulate that a wife shall not be entitled to maintenance from her husband if she refuses to live with him unless there exists just ground or sufficient reason for her doing so. The wife is also disentitled to maintenance, if she is living in adultery or when husband and wife are living separately by mutual consent.

The scope of sub-section(4) of Section 125 of the Code has been very meticulously enunciated by Justice Ratnavel Pandian in S.S. Manidram Vs. A.B. Ranjan observing:


"The circumstances which disentitle a wife to obtain an order of maintenance, as contemplated under sub-section (4) of section 125, notwithstanding the existence of the foundation and condition for exercise of jurisdiction, are (1) living in adultery (2) her refusal to live with her husband without sufficient cause, and (3) the fact that the husband and wife have been living separately by mutual consent".

In Ghasitu Vs. Durga Bai, Justice, T.U. Mehta has very correctly held that:

"It is obvious that sub-section(4) governs the whole of Section 125 for the grant of maintenance because it provides for certain conditions which would disentitle the wife to receive the maintenance from her husband".

Recently, the Calcutta High Court has expressed the same view in Amarendra Nath Bagini Vs. Gouri Rani Bagini. Thus three bars have been enumerated in sub-section (4) of section 125 which disentitles a wife to obtain an order of maintenance under Section 125(1) of the code. Let us critically examine these three conditions:

(a) LIVING IN ADULTERY: "A wife has a right to exclusive association of her husband undefiled and unpoluted by any other woman", say Justice A.S.Qureshi. With the same force it may be asserted that a husband has a right to exclusive association of his wife undefiled and unpoluted by any

2. 1992 Cr.L.J. 2415 at 2417.
3. Emphasis supplied
other man. As rightly held, "the unchastity on the part of a woman (and also sexual intercourse by a man with a woman outside wedlock) are the sins against the ethics of matrimonal morality in this country." Adultery by wife is the most serious matrimonal injury to the husband. The term Adultery should be understood in the light of the social idea of the community being a serious breach of matrimonal tie. The moral principle underlines there under is that no woman can fairly claim a right to be kept by two men. Otherwise it would be contrary to morality hold that the woman who is leading a vicious course of life is entitled to claim maintenance from her husband. Sub-section(4) disentitles a wife to claim maintenance from her husband, if she 'is living in adultery'. It is of utmost importance to note that the expression used in sub-section(4) is 'living in adultery'. The courts in India have explained the meaning of this expression on various occasions. From the reading of various judgements of the

The following proposition emerges:

- The present view taken by the Courts is that the expression 'living in adultery' is merely indicative of the principle that a single or occasional lapse from virtue would not be sufficient reason for refusing maintenance within the ambit of sub.sec.(4). Therefore, single or isolated acts of adultery would not suffice to refuse maintenance to the wife. It is not solitary lapse from virtue but continuous immoral conduct, which is required to refuse maintenance.

- The type of adultery contemplated to attract the provisions of sub.section(4) is of the nature of continual or recurring lapse. It has to be repetition or habitual.

- Living in adultery is outright adulterous conduct resulting into quasi-permanent. Union between the wife and the adulteror.

It has also been held by some High Courts that adulterous conduct of wife before marriage is not sufficient, and mere friendship with a man does not amount to adultery within the meaning of sub.section(4). This is also a well settled law proposition that the Magistrate has probe and find out whether at or about the time of application, there has been adulterous conduct on the part of wife. Therefore, the

relevant time of adultery is either immediately prior to or after the filing of the application for maintenance. It has been rightly held in S.S.Manickram Vs.A.B.Rajam by Justice Ratnavel Pandian of the Madras High Court that:

"In my opinion it would be quite meaningless and even absurd to interpret the words 'is living in adultery' in the sense that the husband, in order to succeed in his defence against the maintenance claim, must prove that his wife was living in adultery on the date of the application itself".

In Sarvan Vs.Anjana Bai, the Bombay High Court speaking through S.N.Khatari,J., has taken a very reasonable view that even where the wife starts living in adultery after the filing of the application for maintenance under section 125 of the Code, the Magistrate cannot ignore it, but is bound to give due consideration to it, as his Lordship emphatically said that:

"It is difficult to agree with the learned Judges first reason that if a wife starts living in adultery after filing of her petition that factor cannot be taken into consideration by Magistrate while making the final order under S.125 Cr.P.C. If the facts constituting the plea of wife's living in adultery occur during the pendency of the petition, naturally the Magistrate cannot turn a Nelson's eye to

3. Ibid. p.361.
4. 1985 Cri.L.J.1213,1985(2)HLR 52
them, and proceed to pass an order in favour of the wife leaving the unfortunate husband to move the Magistrate for cancellation of the order under S.125(5) Cr.P.C.\textsuperscript{1}

In Ram Kishore Vs. Birbal Devi\textsuperscript{2}, it was held that if a wife begins to live in adultery after the order of maintenance passed under sub-section(1) of Section 125, she is entitled to maintenance upto the date when she begins to live in adultery. But the Andhra Pradesh High Court in K. Jagmaih Vs. K. Seshire Khamma\textsuperscript{3} has taken a very reasonable view that the order of maintenance passed under sub-section(1), if cancelled on the basis of adultery, would take effect from the date of order of cancellation.

But the burden of proof lies on the husband\textsuperscript{4} and on such proof being laid, the wife should be given the opportunity to rebut it\textsuperscript{5}. It is true that direct evidence of the adultery can seldom be given but at the same time, there must be some evidence to prove the allegation of adultery and mere bazar gossip\textsuperscript{6} hearsay or incredible

\begin{enumerate}
  \item Emphasis supplied.
  \item 1957 Cr.L.J. 1052.
  \item 1976 Cr.L.J. 219.
  \item R. Sabbayamma Vs. R. Venkata Rao, AIR 1954 Mad.90.
  \item R. Sachita Rout Vs. B.K. Rout, 1987 Cr.L.J. 655.
\end{enumerate}
evidence would not prove adultery. When the husband proves it satisfactorily that the wife was living in adultery the wife would be disentitled to claim maintenance under section 125 of the Code. Dr Diwan is of the view that in proceedings under Section 125 the quantum of proof of adultery should be the same as in matrimonial cases, i.e. the preponderance of probabilities.

(i) BIRTH OF CHILD: IS IT SATISFACTORY PROOF OF LIVING IN ADULTERY: The High Courts have different tones on this question, but mainly to give benefit of maintenance provisions to the 'weaker section' i.e. wife. In Durghatia Vs. Ayodhya, it was held that even when wife gives birth to an illegitimate child, by itself it is insufficient to hold that the wife was 'living in adultery' so as to disentitle her to claim maintenance. But if a child is begotten when the husband had no access, it was held in Mathein Vs. Maung, that it would show that the wife was living in adultery. But the Madhya Pradesh High Court view seems to be more convincing that if a wife conceived an illegitimate child,

4. AIR 1953 V.P. 28 only b are maintenance allowed; Naryan Gopal Vs. Gita Bai; AIR 1945 Nag. 264; Jatinder Nath Vs. Gouri Bala Debi, (D.B.); AIR 1925 Cal. 794; Lakshmi Ambalam Vs. Andiemmal.
5. AIR 1937 Rang. 67,38 Cr.L.J. 646.
she is disentitled for maintenance. Moreover the maintenance provision can be invoked only by a faithful wife. The same view is in Rattibai case. Both the above quoted decisions have been referred to with approval in Babu Lal Vs. Munnibai.

Another important question, whether compelling the wife to undergo medical examination for proof of allegation of adultery against her will amount to testimonial compulsion which is violative to Art. 20(3) of the Constitution of India, according to which no person accused of an offence can be compelled to be a witness against himself, was considered by the Madras High Court in R.P.Ulaganambi Vs.K.C.Loganayaki. Justice Sengottuvelan after examining the case law held that referring the wife to a medical examination will not amount to violation of Art 20(3) of the Constitution of India.

But what is the functional relevancy of the bar of 'is living in adultery'? The judiciary has interpreted the expression 'is living in adultery' to mean that these words

1. 1966 JLJ S.N. 17
3. 1986 Cr.L.J. 1522 at 1526, wherein it was held that proceeding under S.125 are governed by the Code and Article 20(3) of the Constitution is applicable to such proceedings.
would not take into their fold stray instances lapse from virtue, but requires continual or recurring lapses. It is pertinent to note that before the Amendment of 1976, under Hindu Marriage Act, 1955, a decree of divorce could be obtained on the ground that the other spouse 'is living in adultery' and a decree of judicial separation could be passed on the ground that the other party has after the solemnization of the marriage, had sexual intercourse with any person other than his or her spouse'. By the Marriage Laws (Amendment) Act, 1976 the grounds of judicial separation and divorce are made same. Now a spouse can get the decree of judicial separation as well as of divorce on the ground that the other party:

"has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse".

Under Indian Divorce Act, the expression used is 'The other party, since the solemnization of the marriage has been guilty of adultery. The Parsi Marriage and Divorce Act used the words 'defendant has since the marriage committed adultery'. Therefore, under the above matrimonial statutes, to get the decree of divorce, the ground is not 'is living

1. Section 13(1) of the Act.
2. Section 10(1) of the Act.
3. The decree of judicial separation can be obtained on the ground specified under Section 13(1) and (2) of the Act.
4. Section 10.
5. Section 32.
in adultery'. Consequently, under all these above said provisions one act of adultery is enough to constitute a ground of divorce.

Thus, if a single act of adultery is sufficient to dissolve a marriage now one wonders whether it is desirable to have the requirement of 'is living in adultery' to debar a wife from claiming maintenance? Should a single act of adultery not be sufficient to disentitle her to claim maintenance under Section 125 of the Code? If a single act of adultery is sufficient to grant a degree of divorce, which unties the matrimonial tie supposed to be tied for life, is it not in consonance with the present social ethics to consider a single act of adultery sufficient to decline maintenance to such an adulterous wife? This 'single act adultery notion came for consideration before the law commission and it has stated in its 4th Report.

"In Section 488(4) the words 'living in adultery' have been almost uniformly interpreted as indicating as adulterous course of life as distinguished from a single lapse from virtue. It has been suggested that a single act of adultery should be enough to disentitle a wife to maintenance. We are unable to accept the suggestion. Hardships are bound to arise if the wife is totally debarred from the remedy under this section, because of a single lapse from virtue. Further to deprive her of maintenance for an occasional lapse may force her to live in a sinful life and give her no chance to redeem herself".

Mr. Justice Krishan Iyre, while dealing with a case of maintenance under Section 125 of the Code has rightly held in Bai Tahira Vs. Ali Hussain Fissa Alli,¹ that the law is

¹ AIR 1979 S.C. 363 at 366.
dynamic and its meaning cannot be pedantic but purposeful,
The Madras High Court in S.S. Monickram Vs. A.B. Rajan has rightly held.

"No doubt, the term 'adultery' as understood in the light of social idea of the community, viz, even a single instance, is a serious breach of the matrimonial tie since such conduct is against the moral standards expected of each of the spouses."2.

These observations gain more relevance, because these are made while discussing the provisions of sub-section(4) of Section 125 of the Code. In Rattibai3 case the High Court went on to hold that even a single act of adultery might be sufficient for refusing maintenance applied for in the summary proceedings initiated by the wife. Therefore, it is time understand and appreciate the realities of the social notions of the society. If a single act of adultery can be sufficient to destroy the very foundation of matrimonial relations, how could it be insufficient to deny maintenance to an adulterous wife under the Code.

(b) WITHOUT SUFFICIENT REASON:

1. 1980 Cr.L.J. 354 at 359.
2. Emphasis added.
3. 1966 JLJ S.N. 17.
Wife's refusal to live with her husband without sufficient reasons is another ground on which her claim for maintenance allowance could be defeated viz., sub-section (4) of S.125.

A Division Bench of the Kerela High Court consisting of S.K.Kadar and U.L. Bhat, JJ., in A.S.N.Nair Vs.Sulochana has very rightly observed that there is no qualitative difference between the expression 'just grounds' mentioned in the second proviso to sub-section (3) and the expression 'sufficient reason' mentioned in sub-section (4).

Justice T.U.Mehta has also observed in Ghastu Vs.Durga Deve that the 'ground's which are 'just' are always 'sufficient' Dr.Diwan also says that 'sufficient reason' or grounds to live separately would mean the same thing as 'just ground' 'just cause' or 'reasonable excuse'.

Venkataswami, J., of the Mysore High Court has very correctly observed in Rahmath Vs.Zainabi that sufficiency of reason contemplated under sub-section (4) is a question of fact. He rightly gave a note of caution further:

"But it is not to say that any and every person or pretext put forth on behalf of a wife should be accepted in satisfaction of such a

3. 1980 Cr.L.J. 885 (H.P.) at 888.
5. 1973 Cr.L.J. 879 at 880.
requirement. The cause shown must be reasonable and must have some relation to the health and safety of the wife. The section does not contemplate any reason by way of inconvenience, hardship or such other, which is purely based on economic or financial grounds.

Sometimes, the wife might say, "I do not like your face and so I would live away and since I am your wife, it is your duty to maintain wherever I may choose to live. Is she entitled to claim maintenance under such circumstances under Section 125 of the Code? The answer to this question can be found from the observation of Justice D.S. Tewatia of the Punjab & Haryana High Court in Raghbir Singh Vs. Krishna,

wherein he said:

"The right of the wife to be maintained by the husband stems from the performance of the marital duty. A wife which is not prepared to do that cannot claim maintenance as a matter of right under the statute. It is only when the court inter alia comes to a finding that the wife claiming maintenance had been prevented from performing the marital duty by the husband that she could be awarded maintenance, as in that case it could be said that while the wife was prepared her part of the marital duty, she had been prevented from doing so by the husband. Otherwise, it would come to this that a wife may decide on its own to live away from her husband and seek maintenance without any kind of fault on the part of the husband."

Having emphasized this concept of matrimonial duty, his Lordship affirmatively held:

"Reading the provisions of sub-section(1) and (4) cumulatively, would show that even if the Court comes to finding that till the filing of the petition, the husband had neglected or refused to maintain her even then the court would decline to pass an order of maintenance in favour of the wife if the wife refuses without

1. 1983 HLR 254.
any sufficient cause to live with him". Thus, the wife does not have an absolute right to claim maintenance under the code and the husband is not bound to maintain his wife in all the circumstances. Only where the wife has sufficient reasons to refuse to live with her husband, her husband can be burdened with maintenance order, if he neglects or refused to maintain her. Therefore, a husband is not obliged to maintain his wife if she is not willing to live with him and discharge her marital obligations without any justification. It is well settled law now that the order of maintenance under the code is not to be made merely for the asking but only on grounds specified therein.

As Mr. Justice B. Venkatsawami of the Mysore High Court has rightly observed in Rahmath Vs. Zainabai that any and every reason or pretext put forth on behalf of a wife cannot be accepted as a sufficient reason. Only a grave, weighty and convincing reason can be termed as sufficient reason. The cause shown must be reasonable. His Lordship very correctly stated that the sufficiency of reason contemplated under sub-section(4) is a question of fact. Therefore, no hard and fast rule can be laid down to determine/test whether the reason is sufficient, reasonable just or not. It

1. Emphasis added.
depends upon the facts and circumstances of each case. Though the phrase "sufficient reason" has not been defined anywhere in the Code and it is also not advisable to prepare, an exhaustive list of sufficient reasons, yet on the analysis various decided cases it is possible to point out certain instances of 'sufficient reasons' or 'just ground' which are as follow:

Cruelty, whether physical or mental, is a sufficient reason for the wife to refuse to live with her husband. An apprehension from the conduct of the husband that the wife is likely to be physically harmed due to persistent demand of dowry from her husband's parents or relations would manifestly be a reasonable justification for the wife's refusal to live with her husband. The allegation of false adultery or unchastity would also amount to sufficient reason. Where the husband resides with his wife's sister:


it shall be sufficient ground for wife to refuse to live
with her husband. The misbehaviour of the mother-in-law
which is of serious nature as to cause apprehension of
physical harm may amount to sufficient ground. A
threatening letter by a Muslim husband to his wife that she
should return otherwise she would be treated as divorced was
held sufficient reason for the wife to live separate.

But, the mere fact that the husband is living with his
parents or other family members shall not be a sufficient
reason for the wife's refusal to leave her husband. A
unsubstantiated fear of the wife to live with her husband
does not amount to sufficient reason. Husband's refusal to
migrate to wife's place would not give sufficient reason for

4. Sateesan Vs. Mony, 1979 KLT 233; 1957 Cr.L.J. 1282. For
contrary view see, Juliet Vs. Antony, 1985 Cr.L.J. 1613
(Mad.) A Division Bench of the Calcutta High Court in
kamal Basu Vs. Kalayani Basi, AIR 1988 Cal.II observed;
"We must not be taken to have advocated the husband's
shedding off his aged parents or other aged relations
to infirmaries and to built a home only for his wife
and minor children. But in the context of set up of our
modern society. We cannot with Art. 14 and Art. 15
staring at our face, take that view of the law which woul
dexpose wife to unreasonable unpleasantness from the
relations of her husband in her matrimonial home. The
wife is entitled to the society, comfort and consortium
of the husband and those rights would come within her
rights to 'personal liberty' under Art 21 of the
Constitution".

wife's refusal to live separate.

In the India Society, normally a wife is supposed to live with her husband and where a wife does not choose to live with her husband she has to show a sufficient cause or just ground for doing so. Therefore, the burden of proving 'just ground' under Section 125(3) or sufficient reasons under Section 125(4) of the Code is on the wife and not on the husband.

(c) LIVING SEPARATELY BY MUTUAL CONSENT:

The third condition envisaged under sub-section(4) of section 125, which disentitles a wife to claim maintenance is 'if they are living separately by mutual consent'. It is very pertinent to note that merely because the husband and wife are living separately, it is not sufficient to deny maintenance to the wife. It is the 'mutual consent' which matters.

Living separately by mutual consent is a clear bar to wife’s claim for maintenance. Sub. section (4) of Section 125 Criminal Procedure Code clearly mentioned that no wife shall be entitled to receive maintenance allowance from her husband inter-alia. If "they are living separately by mutual consent," viz., Nathuram Vs. Smt. Atar Kanwar, the Allahabad High Court has rightly held that where separate living proceeded from common desire of the husband and the wife to live separately, whatever the reason for the desire may be, it is certainly by mutual consent, Mr. Juski G. Prashad in this case found that the parties were living separately by mutual consent and, therefore, the wife was not entitled to maintenance under Section 488 Criminal Procedure Code, 1898. The decision of Nathuram's case was followed by the Calcutta High Court in Amarendra Nath Bagni Vs. Gouri Rani Bagni, the Justice J.N. Hore said that in instant case separate living proceeded from the common desire of the husband and the wife to live separately and was in fact an outcome of a free agreement between the parties, therefore, the wife was not entitled to maintenance under section 125 of the Criminal Procedure Code. Justice G.M. Sheth of the Gujrat High Court

1. Sharwan Vs. San Durga, II (1983) DMC 89 at 91;
3. Ibid.
4. 1990 Cr. L.J. 2415 at 2417; see also Amar Nath Kapoor Vs. Prean Nath Khanna.
after reviewing the case held in *Ajit Singh Hakamsing Vs. Lashkars* that living separately by mutual consent should be the outcome of the desire of both parties independently reached by each of them and none of them should take recourse to separate living owing to circumstances brought about by one of them. Where wife was compelled to live separately owing to her husband’s keeping a mistress, it could not be said that she was living separately by mutual consent so as to operate as a bar to her claim for maintenance. His Lordship very lucidly observed:

"Living separate by mutual consent can only be inferred if both the sides on their own, independent of their circumstances and without any compulsion of events or circumstances, agree to live separately, possibly each desiring to live the life he or she likes it, it could be said that there is such separate living by mutual consent. It is only in such circumstances that the Legislature intended to disentitle wife to claim maintenance by this speedier remedy provided under S.488 of the code (corresponding to section 125 of new code of 1973). It is only when such facts are proved, there would be a good defence for the husband to disentitle the wife to claim maintenance."

But, where the husband and wife have executed ‘divorce agreement’ on grounds of incompatibility of marriage and remote chances of living together and the wife is living separately in pursuance of such agreement, it was held recently by the Andhra Pradesh High Court in *M.Ramakrishna*.

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5. 1971 Cr.L.J. 888, wherein the following decision were discussed; Ram Saran Dass Vs. Ram Piari, AIR 1937 All. 115; Smt. Chameli Vs. Gajraj Bahadur, AIR 1954 All.33; Laisram Vs. Smt. Khaiden, AIR 1965 Manipur, 49; Dr.Mukand Lal Vs.Smt. Jyotishmati, AIR 1958 Punj.380.

Reddy Vs. T. Jayamma that her act of living separately is not by mutual consent which could disentitle her to claim maintenance. This decision clearly lays down that even if there is an agreement for divorce, but not an agreement for living separately by mutual consent, the wife will certainly be entitled to maintenance under section 125 of the code. Recently, the Madhya Pradesh High Court relying on the Apex Court's decision in Bai Tahira Vs. Ali Hussain Fissalli has also held in Molyabai Vs. Vishram Singh that the provisions of sub-section (4) of Section 125 will not be applicable where a settlement out of courts has been entered into between the parties which was confined only to right of divorce proceedings. Under such a settlement even if the wife accepted Rs. 1500/- it will not amount to relinquishing maintenance rights as the same was not in lieu of forgoing the claim for maintenance in future.

Mr Justice A.K. Laxameshwar of the Karnataka High Court in Veeranna Vs. Sunitrabai held that 'even if the husband and wife are living separately on the advice of panchayatdars it does not amount to living separately by mutual consent.'

9. See also Pankajakshy Basal Vs. Shridharan, 1979 Cr.L.J. NOC 187 (Ker.)
From the examination of the provisions of sub-section (4) and the case law discussed above, it is evident that a wife shall not be entitled to maintenance from her husband only, if they are living separately by mutual consent. The judiciary has rightly emphasized the condition of 'mutual consent'. Whenever the husband pleads the defence of living separately by mutual consent against the claim of maintenance by his wife, the Magistrate must examining such defence with Lynx's eyes and should allow to succeed such defence only if the husband and wife are living separately, and if such living separately is by mutual consent, and if such mutual consent is an outcome of the desire of both the parties, and neither of the spouses is compelled to live separately owing to any compulsion of events or circumstances.

(i) DIVORCE BY MUTUAL CONSENT WHETHER AMOUNTS TO LIVING SEPARATELY BY MUTUAL CONSENT: The High Courts of Kerala in Pandmanabhan Vs. B.Sarojini and K.Shanmukhan Vs. G.Sarojini taken have the correct view that the claim of the wife under Section 125 of the Code for maintenance cannot be defeated on the strength of a divorce obtained by mutual consent by the spouse. Justice A.S.Srivastva of the Allahabad High Court has further observed in Virendra Kumar Vs.State of U.P. that in such a case the parties to the

26. 1983 HLR 636; See also Prakash chandra Vs.Smt. Parkashwanti, Cr.R.No.1235 of 1980 decided on 6.12.82 by a D.B. of All A.C.
marriage are living separately not by mutual consent but by the intervention of a divorce decree. His Lordship held:

"In fact "living separately by mutual consent" in sub-section(4) of Section 125 connotes an agreement between the parties which provides for their living separately by mutual consent and further that they are actually living separately in terms of that agreement. Parties living separately after a divorce decree cannot be said to be living separately in terms of an argument to that effect even though the basis of the decree is mutual consent".

Thus, to bring a case within the ambit of sub-section(4), it must be shown that the husband and wife are living separately by a definite contract and not in pursuance of a decree of divorce by mutual consent.

(d) SUB-SECTION(4) OF SECTION 125 VIS-A-VIS DIVORCED WIFE:

Now, an interesting question discussed by the Court is, whether the two grounds namely refusing to live with the husband without sufficient reason and living separately by mutual consent embodied in sub-section(4) of Section 125 are applicable to divorced wife also? The provision under explanation(b) to sub-section(1) of Section 125 enables a divorced wife too to get maintenance till she gets remarried. Thus, a divorced wife is included within the definition of the term 'wife'. Now can a husband take the defence that the divorced wife is refusing without sufficient reason to live with him inspite of earnest efforts made by him to persuade her to come and reside with him? Is the extended definition of 'wife under

27. Ibid p.637.
Explanation(B) to Section 125(1) for the purpose of the whole of chapter IX and hence whenever and wherever in that chapter any rights, liabilities, disqualifications, etc. are provided in favour of or against 'wife' they must be applicable to the 'divorced wife' also. Justice S. Padmanabhan of the Kerala High Court, in Velukutty Vs. Prasannakumari, replied this question in the negative observing:

"By the extended definition, now for the purpose of Chapter IX, there are two categories of wives, those who are continuing as wives and those who are not but not remarried. That does not mean that even for the purpose of Chapter IX all the rights, duties, disqualifications, etc. provided for or against a wife must be made applicable to a divorced wife. That will depend upon the applicability of a relevant provision in the case of a divorced wife."  

His Lordship then proceeded to explain that some of the provisions are applicable only to a wife whose status as wife is subsisting and some others may be applicable to a divorced wife, e.g. Section 127(3), while some other provisions may be applicable to both e.g. Section 127(1). Therefore, the wife of a subsisting marriage and divorced wife have different status, position, rights and responsibilities. Rejection of the claim of a wife for maintenance on grounds available to the husband during subsistence of marriage may not be available against her after divorce. In para 8 of the judgement, Padmanabha, J.

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1. 1985 Cr.L.J. 1558 1986(1) HLR 109; see also Natwar Lal Vs. Bai Girja, 1984 HLR 380.

2. Ibid p. 1559 Emphasis added.
held categorically that:

"In my opinion the two grounds namely refusing to live with the husband without sufficient reason and living separately by mutual consent are not applicable in the case of a divorced wife. Normally divorced spouse will only be living separately and the question whether it is by mutual consent or not does not arise."¹

Thus, the learned judge,² was of the view that the obligation to live with the husband and the condition of sufficient reason for refusing to live with the husband will arise only during subsistence of marriage. After divorce the wife is not bound to discharge marital obligations including her company and submission to conjugal rights of the husband. The husband has equally no right to request her to come and reside along with him as a condition precedent for the payment of maintenance. Consequently, the provisions of sub. section (4) and (5) are not applicable to a divorced wife. The same view is taken by the Madras High Court in S. S. Manickram Vs. A. B. Rajan³. Recently justice V. S. Kokje of the Madhya Pradesh High Court in Mohyabai Vs. Vishram Singh⁴ has examined the provisions of sub. section (4) vis-à-vis divorced wife and opined that the word 'wife' in

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1. Ibid. p. 1560. Emphasis added.
2. It is specifically stated in the judgement that the ground of adultery occurring in sub. section (4) and (5) is not considered because there is no such case.
sub-section(4), so far as the question of living separately by mutual consent is concerned, cannot be said to include a divorced wife also. Divorced wife, his Lordship held:

"is by the very fact of divorce has to live separately from her husband, she is not expected at all to live with her husband and therefore the question of her living separately by mutual consent does not arise."

Justice Koje further observed:

"Consent to live separately is required only when there is an obligation to live together. When the obligation to live together itself has come to an end, living separately of a divorced couple cannot be said to be living separately by mutual consent for the purpose of sub-section(4) of section 125 disentitling the divorced wife from claiming maintenance."

Therefore, the very purpose of the Explanation(B) to sub-section(1) of Section 125 shall be defeated if the divorced wife is expected to live with her husband and her refusal to live with her husband is taken to be living separately by mutual consent. A full Bench of Keral High Court has also observed in Mariyumma Vs. Mohd. Ibrahim that the provision of sub-section (4) and(5) are not be applicable to a divorced wife, but will apply to a wife whose marriage is subsisting. In another decision of the Keral High Court reported as K. Saumukhan Vs. G. Sarojini, U.L. Bhat, J., relying on the full Bench decision in

1. Ibid p.71.
Mariyumma pointed out that the classification between 'a wife whose marriage is subsisting' and 'a divorce' in Section 125 is necessary to lend substance to the provisions contained therein and cannot be said to be violative to Article 14 of the Constitution of India. His Lordship further observed that the classification is based on intelligible differentia and springs from the very status or lack of status and is also intended to serve the broader object of the scheme of law. To illustrate this reasoning Mr Justice Bhat refers to the bar regarding the disability of a wife to claim maintenance where she refuses to live with her husband 'without sufficient reason'. The learned judge emphatically held:

"To provide such a disability in the case of divorcee wife would be the height of absurdity as under the present law of any community, a divorce wife has no duty to live with her erstwhile husband. Thus, it can be seen that the classification is not only reasonable but also necessary in order to lend content, substance and meaning to the provisions contained in section 125 of the Code."

Thus, while the condition of wife's refusal to live with her husband without sufficient reason and living separately by mutual consent enacted in sub-section(4) and (5) of Section 125 are very much applicable to a wife of subsisting marriage, those conditions will not disentitle a divorce wife to claim maintenance.

1. AIR 1978 Ker 231.
10. CANCELLATION OF MAINTENANCE ORDER UNDER SUB-SECTION(5) OF SECTION 125: PASSED IN FAVOUR OF THE WIFE UNDER SECTION 125(1) OF THE CODE: Sub.section(5) makes provisions for the cancellation of maintenance order passed under sub.section(1) of Section 125. It is pertinent to point out that the language of sub.section(5) makes it clear that it applies to the wife alone and not to the children or parents. Sub.section(5) runs as follow:

"On proof that any wife in whose favor an order has been made under this section is living in adultery or that without sufficient reason she refuses to live with her husband or that they are living separately by mutual consent the Magistrate shall cancel the order".

Thus, where an order of maintenance has been passed in favour of the wife, the Magistrate shall cancel such order on the proof that:

- that the wife is living in adultery.
- that without sufficient reason she refuses to live with her husband or
- that they are living separately by mutual consent.

These three conditions are the same as those contained in sub.section(4). But the fundamental difference is that while sub.section(4) refers to a state prior to the order passed in maintenance proceedings whereas sub.section(5) refers to the stage after the order has been passed.

The Andhra Pradesh High Court speaking through Jagannadha Rajum J., in Jagnam Srinivasa Rao Vs. Jangam Rajeshwari Thas held that Section 125(4) does not strictly

2. 1990 Cr.L.J. 2506.
give a right to cancel the maintenance order. It only disentitles the wife to receive maintenance under specified circumstances. Only sub-section(5) of Section 125 gives the power to the Magistrate to cancel the order of maintenance.

In K.Jagmaiah Vs.K.Seshirekhamma, A.S.Rao, Ag.C.J. of the Andhra Pradesh High Court has rightly held that sub-section(4) and (5) though similarly worded have reference to different situations while sub-section (4) relates to the period when the application for maintenance is originally made, sub-section(5) concerns the period subsequent to the passing of the order for maintenance. A Division Bench of the Supreme Court consisting of A.P.Sen and Natrajan JJ., in Subanu alias Saira Banu Vs.A.M. Abdul Gafoor 2 has held:

"While sub.s(4) provides that a wife shall not be entitled to receive maintenance from her husband, if she is living in adultery or if without sufficient reason, she refuses to live with her husband or if she lives separately by mutual consent. Sub.s(5) provides that an order of maintenance already passed can' be cancelled for any of the aforesaid reasons".

It is pertinent to note that in sub-section(5) the expression 'the Magistrate shall cancel the order' has been used. The effect of these words is only to nullify the order from the date when it was passed. Thus, the wife will be entitled to get maintenance upto the date of order of

1. 1976 Cr.L.J. 219, See also Manubai Vs.Sukdeo 1990 Cr.L.J. 646 (M.P.).
2. 1987 Cr.L.J. 980.
cancellation. On the analysis of the case law discussed above, it is clear that sub-section(5) envisages the conditions on the basis of which a Magistrate shall cancel the order of maintenance passed already in favour of the wife. As all the three situations stated in sub-section(5) are the same as those of sub-section(4), the discussion undertaken in the preceding pages on sub Sec(4) is thoroughly relevant and enlightening.

11. ALTERATION IN MAINTENANCE ALLOWANCE UNDER SECTION 127 OF THE CODE: Section 127 of the Criminal Procedure Code makes provisions for alteration including cancellation or variation in the maintenance order passed under section 125. Section 127 is intended to correct the maintenance order.

1. Alteration in allowance: (1) On proof of a change in the circumstances of any person receiving under Section 125 a monthly allowance or ordered under the same Section to pay a monthly allowance to his wife, child, father or mother as the case may be, the Magistrate may take such alteration in the allowance as he thinks fit: Provided that if he exceeds the allowance, the monthly rate of five hundred rupees in the whole shall not be exceeded.

Where it appears to the Magistrate that in consequence of any decision of a competent Civil Court, any order made under Section 125 should be cancelled or varied, he shall cancel the order or as the case may be, vary the same accordingly.

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 orders from the date of her remarriage.
(b) the woman has been divorced by her husband and that she has received whether before or after the date of the said order, the whole of the sum which, under any customary or personal law application to the parties, was payable on such divorce cancel such order:
(i) in the case where such sum was paid before such order, from the date of which such order was made.
(ii) in any other case, from the date of expiry of the period if any for which maintenance has been actually paid by the husband to the woman.
(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or down by any person, to whom a monthly allowance has been ordered to be paid under Section 125, the Civil Court shall take into account the sum which has been paid to, recovered by such person as monthly allowance in pursuance of the said order.
Three grounds are envisaged in Section 127, on the basis on which the Magistrate can make alteration in maintenance orders, which are follows:

(a) CHANGE IN THE CIRCUMSTANCES: The first ground which enables alteration in maintenance allowance is the proof of a change in the circumstances. It is important to note that an application for alteration in maintenance order on the basis of change in the circumstances can be made by either of the spouse i.e. in whose favor the order of maintenance has been made, or against whom the order of maintenance has been passed. This is clear from the language of sub-section (1) to Section 127, wherein it is stated, 'on proof of change in the circumstance of any person' - receiving under section 125 a monthly allowance, or - ordered under the same section i.e. section 125 to pay a monthly allowance.

Another important aspect of sub-section (1) of section 127 is that it is applicable to all persons viz., wife, child,

4. In Meenakshi Vs. Balakrishan, 1980 Cr.L.J. 1200, the Mad. H.C. held that change of circumstances would include change of circumstances of the husband also. See also Mohd. Islail Vs. Saramnal, 1960 Cr.L.J. 1090, Shamshudin Vs. Sabhiya, 1938 Mat. L.R. 460.
father and mother. Before the Magistrate can pass an order of alteration in the allowance he has to be satisfied about the changed circumstances. The expression 'on proof of' makes it explicit. The Magistrate is vested with discretion, as the wording of sub-section (1) of section 127 makes it clear by using the expression, the Magistrate may make such alteration in the allowance as he thinks fit. But, if the Magistrate increased the allowance, the monthly rate of five hundred rupees in the whole shall not be exceeded.

Dr. A.S. Anand, J. has held in Bansi Lal Vs. Puspha Devi that such an order of alteration in the allowance can be made effective only from the date of the order under section 127 of the code and not from the date of the application seeking alteration. Mr. Justice P.N. Bakshi of the Allhabad High Court in Balak Ram Vs. State observed that the Magistrate has the jurisdiction to make alteration in the order of maintenance, which had been passed earlier on the basis of compromise. The same view is expressed by the Madras High Court in Padmanabhan Vs Bam.

Even where the parties agreed that the amount of maintenance will not be increased as compromised, the Allahabad High Court, in Balak Ram Vs. State held at notwithstanding such an agreement, if

6. 1973 Cr.L.J. 750, wherein the Court relied on Kerala High Court decision in Sivarajan Vs. Meenakshy, ILR (1966) 1, Ker 165.
7. II(1983) DMC 265 per Maheswaran, J.
there has been a change in circumstances, it is always open to the Court to alter the allowance. Intriguingly, when the same question came before Mr. Justice Verma of the same High Court in Kastoori Devi Vs Cheeda Lal, his Lordship took the contrary view without referring or taking notice of Balak Ram’s case. Mr. Justice Verma held in unequivocal terms that if husband and wife enter into an agreement allowance once fixed will not be altered, that agreement cannot be said to be in contravention of the provisions of section 489 of the Code of 1898 (corresponding to section 127 of the new code). The agreement in no way defeats the provisions of Section 127, of the Code. It is a valid agreement and the parties are bound by it. No question of public policy is involved at all in such a case. There is no statute which prohibits husband and wife entering into an agreement to the effect that maintenance allowance once fixed will not be enhanced.

The Andhra Pradesh High Court in K. Venkatamma Vs. K. B. Ramanna has taken the view that when there is a private settlement between the parties arrived at as regards to future maintenance, an application for enhancement of maintenance cannot be filed before criminal court under section 127(1) of the court. The proper remedy in that case


10. Supra.

is to approach the Civil Court. It is submitted that the Magistrate has the discretion to make alteration in the maintenance allowance on the proof of change in the circumstances and if, acting judicially in the interest of justice, he feels the necessity to enhance the amount, he has the jurisdiction to do so. In A.S. Govindan Vs. Mrs. M. Jayammal, the Madras High Court held that the circumstances which existed even at the time of the order of maintenance cannot be considered under section 127(1) of the code, which contemplates only those circumstances which came into existence after the order of maintenance.

Mr. Justice Anand in Bansi Lal Vs. Pusha Devi has categorically laid down the law that the ‘changed circumstances envisaged in section 127 are a change in pecuniary or other circumstances of the party paying or receiving the allowance which justify the alteration of the order of maintenance. So, the expression change in the circumstances is not confined only to the change in pecuniary circumstances. Mr. Justice R.S. Sarkaria speaking for the Supreme Court in Bhagwan Dutt Vs. Smt. Kamla Devi observed:

"The circumstances contemplated by

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14. Corresponding to Sec. 489 of the J&K Criminal Procedure Code, 1898.
Section 489(1) (corresponding to Section 127(1) of the new code) must include financial circumstances and in that view, the inquiry as to change in the circumstances must extend to a change in the financial circumstances of the wife.

The use of the word 'include' quoted above, by the Supreme Court clearly emphasises that change in circumstances is not confined only to financial circumstances but extends to include much more.

There may be a bewildering variety of circumstances in which the Magistrate's decretion will have to be exercised and it is not proper or wise to traverse the whole gamut of possibilities and lay down how that discretion ought to be exercised in a given situation.

Thus, it may be concluded that substantial increase in the income of the husband, increase in the salary of the father, increase need due to the growing up of the children, cessation of financial liability of the husband on account of his sisters' marriage, wife's beginning to earn

17. Bracteed added.
18. Emphasis supplied.
18a. Nagendra Iyre Vs. Premanathi, 1973 Cr.L.J. 1677 (Mad.).
sufficiently to maintain her employment of the wife, attainment of majority of the child, birth of a child or death of a child have been held to be a change in the circumstances, sufficient to justify alteration in the maintenance order under Section 127(1) of the Code. The Kerala High Court in Shamshudin Vs. Sabhiya has held that provision of Section 127(1) do not admit any interpretation to the effect that a mere change of law, personal or otherwise would be change of circumstances of any person. Therefore, the order of maintenance passed before the coming into force of the Muslim woman (Protection of Rights on Divorce) Act, 1986 cannot be altered as a ‘mere change of law would not amount to change of circumstances so as to attract the operation of Section 127(1) of the Code.’

Whether the term ‘alteration’ used in Section 127(1) also includes ‘cancellation’ or not, is a point of divergent views amongst the High Courts. One view is that, on change of the circumstances alterations in maintenances amount does not contemplate a total discontinuation of maintenance allowance, but refers only to an increase or decrease in the

The second view is that the word 'alteration' includes 'cancellation' also. This view seems to be more sound and acceptable. Let us take an example. A labourer husband is ordered to pay maintenance to his divorced wife. After sometime he meets with an accident and becomes blind and crippled. He files an application for alteration in maintenance allowance on the basis of change in the circumstances. Would it not be more appropriate to cancel the order of maintenance in such a case?

More importantly, the title 'Alteration in Allowance' has been assigned to the whole of Section 127 and not to sub-section (1) of the same alone. The title, therefore should not be regarded as pertaining to sub-section (1) only. Since sub-section (2) and (3) provides for cancellation of maintenance and since these sections are also governed by the title there is absolutely no doubt that the word 'Alteration' includes cancellation. Secondly, the legislature has fixed only an upper limit of Rs.500 and no lower limit. Therefore the Magistrate would be entirely justified if, in view of the compelling nature of the changed circumstances of the concerned parties, he orders the amount of maintenance to be reduced to zero.

28. Surya Narayan Vs. Sadhu, AIR 1943 Mad. 416; In Re Din Mohammad, ILR 5 All 226.
(b) CANCELLATION OR VARIANCE OF MAINTENANCE ORDER IN CONSEQUENCE OF CIVIL COURT'S DECISION_ SUB.SECTION(2) OF SECTION 127: Sub-section(2) of Section 127, which is becoming most significant provisions, reads as:

"Where it appears to the Magistrate that in consequence of any decision of a competent Civil Court, any order made under Section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly."

The functional relevanteu and rationale of sub section (2) of Section 127 seems to be that it is aimed to bring the order of Magistrate in conformity with the decision of a competent Civil Court. So, sub-section (2) invests the Magistrate with ample discretion to cancel or vary the maintenance order already passed under Section 125, in consequence of a decision of a Civil Court. But, this discretion must be exercised judicially on a careful consideration of the facts and circumstances of each case. It is also important to note that the Magistrate before proceeding to cancel the maintenance order should satisfy himself that there is a decision of a competent Civil Court, that the application for cancellation of maintenance order is bonafidely based on

3. In Ravindra Kaur Vs. Achant Swarup, 1966 Cr.L.J. 247(All.) it was held that an ex-parte decree which has become final of a competent Civil Court is as good for the purpose of Sec. 127(2) of the Code as a decree passed on merit.
such decision. It is the decision of a Civil Court and not the pendency of proceedings in a Civil Court, which could be sufficient to invoke the Magistrate’s jurisdiction under Section 127(2) of the Code. Even a decision by a competent Civil Court ipso-facto does not wipe out the order of maintenance made under Section 125 of the Code. An application by the non-claimant is to be filed under Section 127(2) to get the maintenance order cancelled or varied as the case may be. In Bhagwant Singh vs. Surjit Kaur, a Division Bench of the Punjab & Haryana High Court consisting of S. S. Sandhwalia, C.J., and S.P. Goyal, J. held that:

'Where the decree of the Civil Court is directly on the issue of the liability or the quantum of maintenance, then it is obviously a judgement of a court of competent jurisdiction directly on the point. Once that is so, it calls for notice that the language of the statute is in the terms mandatory. The Legislature has designedly used the words "shall cancel the order or, as the case maybe, vary the same accordingly."

Regarding discretion vested in the Magistrate under Section 127(2), the Division Bench was conscious of that fact when it observed:-

The opening part of Section 127(2) of the new Code undoubtedly vests a certain discretion in the Magistrate. He must be satisfied or at least it should appear to him that the decision of the competent Civil Court has necessitated a

cancellation or variation of the earlier order. However, once he comes to that conclusion that the language of the provision implies that he has no discretion but, to cancel or vary the order in accordance with the Civil Court decree.

The question what exactly is meant by the phrase ‘any order made under Section 125 ’ occuring in Section 127(2), of the Code, has been thoroughly examined by Justice U.L. Bhat of the Kerala High Court in Nanu Vs. Vasantha. It was contended in that case that on an application filed under Section 125 different kinds of order made there on viz., order granting maintenance and order regarding maintenance, fall within the ambit of Section 127(2). Rejecting this contention his Lordship held that only order directing a person to make monthly allowance of maintenance to the wife or the child, the father or the mother is contemplated. Justice Bhat observed:

"It is only where there is such an order directing payments of maintenance that the question of cancellation or even variation would arise. The decision or order rejecting an application under S.125 is not an order which could be cancelled or varied under S.127(2) of the Code." 8.

The Patna High Court has rightly held in Bhagya Narian singh Vs. Maya Devi9that when in an execution proceedings of a Civil Court, decree allowing the quantum of maintenance, a substantial part of the husband’s land was sold, the

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8. Ibid p.442; Emphasis added.
Magistrate should have issued appropriate order under section 127(2) of the Code.

Another pertinent aspect pointed by Justice M.L.Jain of the Delhi High Court in Kuldip Kanwar Vs. Smt. Chandra Kanta\textsuperscript{10} is that Section 127(2) does not require that the order of the Civil Court should be subsequent to the order of the Magistrate\textsuperscript{11}. This sub section (2) will apply even where the order of Civil Court is antecedent but was brought to the notice of the Magistrate later on. The Kerala High Court in Devaki Vs. E.Palli\textsuperscript{12} held that to avail the benefit of Section 127 (2) the decision of the Civil Court must have been inter-party and on an issue raised between the parties and not on an issue raised between one of the parties to Section 125 proceedings and a third party or between strangers.

The Rajasthan High Court in Hari Krishan Vs. Shanti Devi\textsuperscript{13} held that a clear and categorical finding given by a competent Civil Court regarding the paternity of the child cannot be overlooked or ignored or disregarded by the Magistrate on an application filed under Section 127(2) of the Code.


\textsuperscript{11} Hari Krishan Vs.Smt. Shanti Devi, II(1988) DMC 281; same view is taken.

\textsuperscript{12} 1989 (1) Crimes 222.

\textsuperscript{13} II(1988) DMC 281 per M.C.Jain J.
Some of the High Courts have taken the view that even where a Civil Court has granted decree for restitution of conjugal rights in favour of the husband, the Magistrate is not bound to cancel the maintenance order under Section 127(2) of the Code, though he should consider the effect of such a decree. But contrary to this, the Gujarat High Court has held in Harish Mansukhlal Vs. Hansagauri that a decree of restitution of conjugal rights passed in favour of husband is sufficient to cancel the order of maintenance passed in favour of wife. Justice V.V. Bedarkar has very rightly reasoned the decision observing:

"If there is a decision of a competent Civil Court granting decree of restitution of conjugal right, in favour of the husband showing his intention of recieving the wife and that decree of restitution of conjugal rights clearly shows that wife without reasonable excuse has withdrawn from the society of the husband, then that decree of the Civil Court clearly makes out a ground under sub section (2) of 127 of the new Code."

This decision is based on a true construction of the provisions contained in Section 125 and Section 127 of the Code. The decision of the Civil Court which establishes the guilt of a party, that party should not be allowed to continue to recieve maintenance allowance. The same principle should be applied where on the ground of desertion

15. 1982 Cr.L.J. 2033, see also David Vs. Chinnamma, 1973 Cr.L.J. 91; Gita Kumari Vs. Sheo, 1975 Cr.L.J. 137.
the Civil Court has passed decree of judicial separation\textsuperscript{16}.

When the competent Civil Court declares that the relationship of husband and wife never existed,\textsuperscript{17} or has not been proved,\textsuperscript{18} the Magistrate should cancel the order of maintenance passed under Section 125 of the Code. Similarly, when the marriage between the parties is annulled by the Civil Court the High Court held in Krishan Gopal Vs. Usha Rani\textsuperscript{19} that the Magistrate shall cancel the order of maintenance passed under Section 125 of the Code.

Chief Justice S.S. Sandhwalia of the Punjab & Haryana High Court in the Bhagwant Singh Vs. Surjit Kaur\textsuperscript{20} has very lucidly laid down that:

"Now a part from the specific language in Section 127(2) of the Code, it appears on the larger principle also as well settled that where Civil rights of parties are involved, the plenary jurisdiction is with the Civil Courts and normally their decreased over side or have a precedence over a parallel or equivalent jurisdiction".

To deduce this principle his Lordship relied on the significant ruling of the Supreme Court in Cap. Ramesh Chandra Kaushal Vs. Mrs. Veena Kaushal\textsuperscript{21} wherein Justice

\begin{itemize}
\item[17.] Mohd. Abid Ali Vs. Ludden, AIR.
\item[19.] 1982 Cr.L.J. 901.
\item[20.] 1981 Cr.L.J. 151 (D.B.),
\item[21.] 1978 Cr.L.J.
\end{itemize}
Krishna Iyer speaking for the Bench as under:-

"Broadly stated and as an abstract proposition, it is valid to assert as Sri Desai did, that a final determination of a Civil right by a Civil Court must prevail against a like decision by a criminal Court"\(^22\).

After reviewing other judicial authorities on the point in the Bhagwant Singh case,\(^23\) Chief Justice Sabdhawalia held in Emphatic terms:

"To conclude on the legal issue, I would note on the language of Sec.127(2) of the new Code as also on principle and precedent, that it would be obligatory for a Magistrate to follow the judgement of the competent Civil Court, especially on the part of maintenance and consequently, to cancel or vary the earlier order of the Criminal Court under Section 125 of the new code, accordingly."\(^23a\)

Thus, it is submitted, that from the language of sub. section (2) of Section 127 as well as the study of the above discussed decision, it is evidenced that the Magistrate, though vested with discretion must, if there is a decision of a competent Civil Court which has direct bearing on the question of maintenance, cancel or vary the maintenance accordingly.

(c) CANCELLATION OF MAINTENANCE UNDER SUB.SECTION(3) OF SECTION 127, PASSED IN FAVOUR OF A WOMAN UNDER SECTION 125 OF THE CODE: In Favour Of A Woman Under Section 125 Of The Code:

22. Emphasis added.
23. Supra.
Beside sub-section (5) of section 125, sub-section (3) of the section 127 also provides for cancellation of order made under Section 125 in favour of a woman who has been divorced or who has obtained a divorce from her husband. The difference between these two provision is that while the former provision is applicable basically to the 'wife' of subsisting marriage, sub-section(3) to Section 127 is applicable to a divorced wife. It would be beneficial to reproduce the text of sub section(3) to Section 127 which is as follows:

"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:--
- the woman has, after the date of such divorce remarried cancel such order as from the date of her remarriage.
- the woman has been divorced by her husband and that she has recieved, whether before or after the date of the said order, the whole of the sum which, under any customary or personnal law applicable to the parties, was payable on such divorce, cancel such order:
  i) in the case where such sum was paid before such order, from the date of which such order was made.
  ii) in any other case, from the date of expiry of the period if any for which maintenance has been actually paid by the husband to the woman.
- 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 thereon".

The above provision makes clear that the Magistrate can cancel the orders of maintenance passed in favour of a woman, who has been divorced or who has obtained a divorce in three envisaged cases:

(a) When the divorcee wife remarries
(b) When she has been divorced by her husband and she has received the whole sum payable to her under any customary or personal law and
(c) When the woman who has obtained a divorce from her husband has voluntarily surrendered her right to maintenance.

(i) REMARRIAGE CANCELLATION OF MAINTENANCE ORDER FROM THE DATE OF REMARRIAGE: Sub Section (3) to Section 127 is a new addition in the Code of 1973. No such provision existed in the Code of 1898. It seems that the necessity to add this provision arose because of extended definition to the term 'wife' by explanation(b) to Section 121(1), whereby 'divorced wife' is also made eligible to claim maintenance from her former husband. So, a husband is bound to maintain his divorced wife even after the decree of divorce has been obtained by one party or the other. But, if the divorcee wife remarries, the order if maintenance passed in her favour shall be cancelled by the Magistrate under clause (a) of sub section (3) to Section 127 of the Code.

The object of this provision has been explained by Justice P.N. Bakshi of the Allahabad High Court in Ramesh Chandra Vs. Beena Saxena that:

"The Sanctity of the marriage must be preserved, and once such a sacrament or contract is broken, then the separated or divorced wife should not be left on the way to take to vegrancy and immoral means or earning a livelihood. Once she remarries, then that gap in her life is filled up and she can look up to her second husband to support and maintain her." 26

Thus, the duty to maintain a divorced wife is enjoined upon former husband so that she can continue to live a prior life till such a time as society accepts her in remarriage as another man's wife. Once the divorced wife remarries, the Magistrate shall cancel the order of maintenance as from the date of her remarriage.

(ii) CLAUSE (b) OF SUB.SEC. (3) OF SECTION 127 VIS-A-VIS MUSLIM LAW: 127 is the most controversial provision which has caused difficulties of interpretation. According to this clause (b), when the woman in whose favour maintenance order has been passed is divorced by her husband and who has received, whether before or after the date of the said order, the whole of the sum which,

- under any customary or personal law applicable, to the parties was payable on such divorce,

The Magistrate shall cancel such maintenance order:

- in the case where such sum was paid before such order, from the date of which such was order made,

- in any other case from the date expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman.

So, Section 127 (3)(b) provides for the cancellation of the order of maintenance if the divorce gets the whole of the sum payable on divorce according to customary or personal law applicable to the parties. The purpose of Section 127(3)(b) as pointed out by Dr. Diwan, is simply this that a wife cannot be allowed double benefits, one of the customary

27. Law of Maintenance in India, p.158.
or personal law payment and the other of the payment under Section 125.' The provision of clause(b) of sub. section (3) of Section 125 seems to be recognise the substitute maintenance arrangement by lump sum payment reconized by the custom of the community or the personal law of the parties. A bare glance of different customary or personal laws in India, makes it clear that Section 127(3)(b) relates to Muslim Law concept of dower or Mahr. The Supreme Court in Bai Tahira Vs. Ali Hussain and Fazlumbi Vs. K. Khadu Ali took the view that if the amount of Mehr paid to muslim divorced wife was sufficient enough to provide resources for her sustenance the order of maintenance under Section 125 would be cancelled but when such amount of Mehr was merely nominal or was not adequate for her to live with the requisite standard, the order of maintenance will not be cancelled. But later on a five Judges Bench of the Supreme Court held in famous Shah Bano case that since Mehr, according to Muslim Personal Law was not an amount ‘payable or such Divorce’ as required by clause (b) of sub section (3) of Section 127 of the Code that amount could not be taken into consideration while deciding on application under

28a. 1979 Cr.L.J. 151.
28b. 1980 Cr.L.J. 1249.
Section 125 of the Code.

(iii) CLAUSE (c) OF SUB-SECTION (3) OF SECTION 127_

VOLUNTARY SURRENDER THE RIGHT OF HER MAINTENANCE: Clause (c) of Sub. Section (3) of Section 127 provide that when the woman

- has obtained a divorce from her husband and
- that she had voluntarily surrendered her rights to maintenance after divorce

the Magistrate can cancel the order of maintenance passed in her favour. So, the maintenance order can be fulfilled. The solitary act of mere divorce, even though at the instance of wife does not lead to the cancellation accompanied by voluntary surrender of the right of maintenance subsequent to her divorce, which empowers the Magistrate to cancel the order of maintenance.  

Except under the Indian Divorce Act, 1869 the divorce by mutual consent is allowed in other matrimonial statutes viz., the Hindu Marriage Act, 1955 and the Parsi Marriage and Divorce Act, 1936. Under the Hindu Marriage Act, 1955 even divorce under custom is still lawful.

At the outset it must be stated that by now the law is well settled that a wife whose marriage has been dissolved by a decree mutual consent is very much entitled to claim

30. Section 13-B.
31. Section 32-B.
32. Section 29(2) of the Act.
maintenance under Section 125 of the Code. Therefore, the term divorced wife very much includes within its ambit the wife whose marriage is dissolved by a decree of divorce by mutual consent under their matrimonial law or in accordance with custom. Now, if at the time of divorce by mutual consent or by customary mose, the spouses entered into a compromise that no one would have claim of maintenance after divorce, the question which arises for consideration is, whether such divorced wife is still entitled to maintenance under Section 125 of the Code? We can put the question the other way also. Where the wife voluntarily relinquishes her claim to maintenance at the time of divorce by mutual consent, will she be entitled to claim maintenance after such divorce under Section 125 of the Code? Whether such relinquishment will amount to the surrender of her right to maintenance after her divorce?

In Shrawan Vs Sau Durga, the spouses got divorce by mutual consent. Two documents 'Divorce Deed' and 'Consent Deed' were executed by both the husband and wife. When the divorcee wife filed an application for maintenance under Section 125 of the Code, the husband resisted it inter-alia


35. II(1988) DMC 89.
on the ground that Durga had specifically relinquished her right to claim past and future maintenance as per 'consent deed'. The learned judicial Magistrate granted maintenance to Durga. The Session judge though thoroughly referred to 'consent deed' yet upheld her right to maintenance with the observation that 'no doubt,Durga has written that she will not demand any maintenance, but legal right cannot be given up in this manner'. Justice V.A. Mohta of the Bombay High Court relying on the Supreme Court decision in Ramesh Chandra Kaushal Vs. Mrs. Veena Kaushal, wherein it was opined that a divorced wife's right to maintenance as per definition contained in Explanation (b) to Section 125 (1) continues 'unless parties make adjustments and come to terms regarding the quantum or the right to maintenance', quashed and set aside the order of maintenance passed in favour of Durga. His Lordship also recognised the legal concept of the voluntary surrender of right to maintenance by the divorcee wife, observing:

'Clause (c) of sub-section(3) of Section 127 mentions that order of maintenance will have to be cancelled in case 'the woman has obtained divorce from her husband and that she had voluntarily surrender her right to maintenance after divorce'. In this background, it is difficult to sustain the view taken by the learned Session Judge that legal right of maintenance cannot be given up. It is pertinent to notice contracting out of the right under Section 125 Cr.P.C. is not prohibited'.


Recently, a Division Bench of the Punjab & Haryana High Court in Ranjit Kaur Vs. Pavittar Singh has considered a reference question whether a wife who had voluntarily surrendered her right to maintenance in divorce proceedings would not be entitled to claim subsequent maintenance allowance under Section 125 of the Code of Criminal Procedure. This question arises from the following facts. The spouses got decree of divorce on the basis of mutual consent. During divorce proceedings, the wife made a statement.

"I have heard the above statement of the respondent and is correct. I cannot live in the house of respondent as wife. Our child resides with respondent for which I have no objection and there is his benefit in living with the respondent. I relinquish my right to my maintenance and to take the child. I can avail the legal remedies for taking my articles back."

Thereafter, the wife filed an application for maintenance under Section 125 of the Code. The husband contested the claim of the wife mainly on the plea that the wife has no locus-stand to file the present application as she had voluntarily relinquished her right to maintenance during the divorce proceedings. The trial Magistrate and the Additional Session Judge upheld the objection of the husband in the light of Section 127(3)(c) of the Code. When the case came before a single judge of the High Court, the learned judge

38. 1992 Cr.L.J. 262, per I.S.Tiwana & B.S.Nehra, JJ.
not finding himself in agreement with a earlier single Bench decision of the same High Court in Darshan Singh Vs Maninder Kaur made reference to larger Bench which was heard by I.S.Tiwana and B.S.Nehra, J.J. The learned Division Bench, without producing or examining in its judgement, the provision of clause (c) of sub-section (3) to Section 127 which has direct hearing on the question posed in the case, emphasising the object of Section 125 observed:

"Therefore, this statutory right of a wife to maintenance cannot be bartered, done away with or negatived by the husband by setting up an agreement to the contrary. Such an agreement in addition to its being against public policy would also be against the clear intendment of this provision."

Now, the question arises—whether it was an 'agreement' which was put as defence to wife's claim of maintenance by the husband's in this case? Surely not. It was the voluntary surrender of maintenance right as could be made out of the statement itself, made by the wife in the divorce (based on mutual consent) proceedings. If we critically examine this statement it becomes crystal clear that it was the wife who said that she cannot live in the house of the husband as wife. She consented to leave their child with her husband. Rather she herself said that it was to the benefit of the child if it lived with her husband. She categorically surrendered her right to maintenance. All these facts show that the requirements of Section 127(3) (C) are completely fulfilled. Being party to a divorce by mutual consent the wife has obtained divorce from her husband and secondly, she
has voluntarily surrendered her right to maintenance. As held in Sharawan Vs. Sau Durga, the surrender of right to maintenance is not prohibited. Rather surrender of right to maintenance is specifically recognised by legal provision viz., clause (c) of sub section (3) to Section 127 of the Code. The Division Bench also relied upon the observation of the Supreme Court in Bai Tahira Vs. Ali Hussain Fissali, made in the context of Section 127 (3) (b), observing that it makes no difference in principle when the matter is examined and treated as one under Section 127 (3) (c), as both these sub clauses relate to cancellation of maintenance order. True both clauses deal with cancellation of maintenance order but the concept, thought and philosophy behind these two clauses, (b) and (c), is totally different. To apply the provision of clause (c), two above stated requirements are required, whereas for the applicability of clause (b), receiving the whole sum payable under customary or personal law, is the main consideration. Therefore, both these clauses (c) of sub-section (3) to Section 125 is enacted to serve a social purpose and is beneficial for both wife and the husband. Many a times the settlement among spouses is reached on the consideration that the future financial liabilities come to an end. In such circumstances if both

40. 1987(2) HLR 386.
41. II (1988) DMC 89.
42. AIR 1979 SC 362, 1979 Cr.L.J. 151.
43. See K.Venkatamma Vs. K.Ramanna, 1989 Cr.L.J. 2416 at 2418.
the spouses come to a settlement and the divorcee is settled at the instance of the wife and she voluntarily surrenders her right to maintenance subsequent to divorce, there is nothing unwarranted. The husband in such cases should be held entitled to get the order of maintenance cancelled. The relinquishment of legal right of maintenance by the wife is legal as it is recognised by provision viz., Section 127(3)(c) of the Code, itself.

Sometimes, it is opined that Section 127 would come into operation only after an order under Section 125 is passed. In other words Section 127(3) (b) or (c) cannot be brought in at the time when the application under Section 125 is to be heard or decided. It seems to be too technical an approach. It is bound to frustrate the very object maintenance provisions.

(d) ORDER OF MAINTENANCE MADE UNDER SECTION 125 OF THE CODE SHOULD BE TAKEN CONSIDERATION BY THE CIVIL COURT: Sub. Section (4) of Section 127 makes it clear that the monthly allowance ordered to be paid under Section 125 of the Code shall be taken into consideration by a Civil Court at the time of making any decree for the recovery of any maintenance of dowry.

(e) THE ORDER OF MAINTENANCE REMAINS OPERATIVE UNLESS CANCELLED UNDER SECTION 127 OF THE CODE: The judiciary is unanimous on the point that once an order is made under Section 125, it will remain in operation, even though there
is a decision of the Civil Court does not automatically cancel the Magistrate's order of maintenance. The proper course is to apply for cancellation of the maintenance order under Section 125 (5) or Section 127 of the Code. The Supreme Court in Jagir Singh Vs. Ranbir Singh even held that a maintenance order passed in favour of major son under the old Code of 1898, shall be deemed to be an order of maintenance made under Section 125 of the new Code as soon as the new Code comes into force and that maintenance order does not automatically cease to effect on the coming into force of the new code. The Supreme Court further held that the father of the child may apply for cancellation of the order on the ground of admitted attainment of majority of the son. The Supreme Court has also held in Bhupinder Singh Vs. Daljeet Kaur that the fact that the wife or the child came to live with the husband or the father will not by itself vacate the order. It has to be vacated by taking appropriate steps. But once an order of maintenance passed under Section 125 is cancelled under Section 125(5), if the aggrieved wife or child again wants to get maintenance on the ground of neglect or refusal of the husband or father

44. Leela Ben A Goswami Vs. Goswami B. Dhanpuri, 1987 Cr.L.J. 1637 (Gul.).
subsequent to such reunion, a fresh application must be for such relief.

Though there is no provision in the Code, yet it is desirable that before cancelling an order of maintenance notice to the opposite party must be given. The Punjab & Haryana High Court in Prem Singh Vs. Gian Kaur held that if a husband did not avail the remedy under Section 127 of the code for cancellation of maintenance order passed under Section 125, then it shall not be desirable for the Court to exercise its inherent jurisdiction. On the other hand, if the parties come together and asked the Magistrate to cancel the order, Mr. Justice Sen of the Calcutta High Court has held in Tetri Vs. Ram Newaj that the Court has the jurisdiction to cancel the order. In any such event the High Court by virtue of Section 482 of the Code can cancel the order.

(f) WOULD THE ORDER UNDER SECTION 127 BE RETROSPECTIVE OR PROSPECTIVE: The High Courts have divergent opinions on the question whether the order of alteration made under Section 127 shall be effective retrospectively i.e. from the date of application or prospectively i.e. from the date of order made under Section 127, itself? The Delhi High Court in Smt. Raj Kumari Vs. Sri Dev Raj Vij has taken the view that

49. I(1990) DMC 456 per S.S. Grewal, J.
50. AIR 1950 Cal.
51. 1984 Cr.L.J. NOC 206.
enhancement of maintenance under Section 127 of the Code can be ordered from the date of application. The Court based its decision on the ground that the proper approach to interpret Section 127 is to treat it as incidental operation to the main Section 125. The decision of the Kerala High Court in Parameshware Moothan Vs. Bala Meenakshi\textsuperscript{52} is very interesting. Three different propositions have been laid down in this case. Mr. Justice T.C.Raghavan has held in this case that while the order for enhancement of the maintenance allowance can be made to take effect from the date of the application filed under Section 127 instead of from the date of order, the order reducing the maintenance allowance cannot be given effect retrospectively on the principle that amount already accrued cannot be retrospectively varied. His Lordship even expressed the view that the order for cancellation following under Section 127(2) in consequence of the decision of a Civil Court should take effect from the date of the decision of the Civil Court and not from the date of the order or from the date of the application for cancellation. It is pertinent to note the single Bench of the same High Court earlier in Bhargavi Amma Va. Kutti Krishnan\textsuperscript{53} has taken a contrary view.

Similarly, the Allahabad High Court while in Brij Pal Singh Sukhbir Devi\textsuperscript{54} held that the Magistrate has the power

\textsuperscript{52} 1969 Cr.L.J. 484.

\textsuperscript{53} AIR 1967 Ker. 54 per p. Gorinda Manon, J.

under Section 127(2) to cancel an order of maintenance retrospectively where the Civil Court has declared the wife disentitled to maintenance, but later on in Gulshan Ali Vs. Mumtaj Fatima, and Mehrunnisa Vs. Noor Mohd. the Allahabad High Court observed that cancellation of maintenance order under Section 127 has no retrospective effect and it does not exonerate the husband from the liability to pay maintenance due prior to the order of cancellation of maintenance.

The High Courts of Rajasthan in Hari Krishan Vs. Shanti Devi, Calcutta in J.H. Amroon Vs. R. Sassoon, Jammu and Kashmir in Bansi Lal Vs. Rushpa Devi, Punjab & Haryana in Bal Raj Singh Vs. Balkar Singh, Kerala in Bhargavi Amma Vs Kutti Krishna, Madhya Pradesh in Indra Kumari Vs. Raj Kumar, have taken the view that the order of alteration under Section 127 of the Code operates prospectively and not retrospectively. These Courts have taken this view on the reasoning that while the Legislature has given discretion specifically under Section 125(2) to the Magistrate to award

56. AIR 1971 All. 138.
57. 1989 Cr.,L.J. 439.
58. AIR 1949 Cal. 584.
60. 1983(2) Crimes 284.
61. AIR 1967 Ker 54.
61a. 1973 Cr.L.J. 1556.
maintenace either from the date of application or from the order, no such power is given to the Magistrate under Section 127 of the Code. Therefore, The Courts have to act within the strict limitation set out for the exercise of their jurisdiction and they cannot overstep the same on any equitable ground. This approach is in consonance with the provision of Section 127 of the Code. It will certainly be in the interest of both the parties that the Magistrate should make alteration in the maintenance order under Section 127 (2) from the date of order itself.

(h) FORUM OF APPLICATION UNDER SECTION 127: In Vithalaro Vs. Ratnaprabha it has been laid down that an application for cancellation for maintenance order must be made to the Magistrate who passed the original order of maintenance or to the successor in office and, not before any other Magistrate. But, if the successor Magistrate has no jurisdiction to try maintenance cases, the Madras High Court held in Nookala Vs. Nookala that in such a case the Magistrate may forward the application to the Court having jurisdiction and such Court has jurisdiction to cancel the order.

12. FORUM OF PROCEEDINGS, MODE OF TAKING EVIDENCE AND GRANT OF COSTS IN MAINTENANCE PROCEEDINGS UNDER SECTION 126 OF THE

63. AIR 1948 Mad. 101.
CODE OF CRIMINAL PROCEDURE, 1973: Maintenance Proceedings

Under Section 126 of the Criminal Procedure Code, 1973:

Section 126 of the Criminal Procedure Code, 1973 deals with three different aspects of procedure. Sub-section (1) of Section 126 lays down the forum where the proceedings under Section 125 may be taken against a person, i.e. it seals with jurisdiction. Sub-section (2) contains two parts. The first Part of this sub-section pertains to the mode of taking evidence and the second part in the form of proviso makes provisions regarding ex-parte decree. Sub-section (3) gives power to the Court to make order as to costs. The provisions of Section 126 correspond to sub-section (6) to (8) of Section 488 of the repealed Code of 1898, but there are two important changes. Firstly the words 'or his wife resides' are added in Section 126(1)(b), whereby

Section 126 runs as under:-

(1) proceedings under Section 125 may be taken against any person in any district;
   a) where he is, or
   b) where he or his wife resides, or
   c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

All evidence to such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made or, when his personal attendance is dispensed with in the presence of his pleader and shall be recorded in the manner prescribed for summons case:

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding services, or wilfully neglecting to attend the Court the Magistrate may proceed to hear and determine the case ex-parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.
the scope of jurisdiction has been widened and secondly, earlier in the Code of 1898, in sub section (6) of Section 488 the evidence was to be taken in the presence of the 'husband or wife', whereas now Section 126(2) uses the words 'person'. The use of the word person is wide enough to bring within its ambit all persons liable to pay maintenance viz., parents as well as children. It is also pertinent to note that the words 'any person' appearing in the opening sentence of sub-section (1) of Section 125 against whom maintenance can be claimed under the said Section.

(a) FORUM OF PROCEEDINGS INITIATED UNDER SECTION 125 OF THE CODE: Sub-section(1) of Section 126 gives alternative forums where the proceedings for maintenance under Section 125 of the Code can be taken up. According to Section 126(1) proceedings under Section 125 may be taken against any person in any district:-

   a) where he is. or
   b) where he or his wife resides or
   c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

So, clause (a) to (c) of Section 126(1) demarcate the jurisdictional limits of a Court to entertain a petition under Section 125 of the Code.

(i) IN ANY DISTRICT: The expression 'in any district' has attracted different interpretations by the High Courts. A First Class Magistrate who generally exercises the jurisdiction under Section 125 of the Code is in charge of a particular area in the district. Consequently, there may be
more than one First Class Magistrates in a district. Now, the question which arises for the consideration is, whether an application can be filed in any of the Courts of First Class Magistrate or only in the Court of that Magistrate in whose jurisdiction he or she resides? The Bombay, Calcutta, Gujurat, Patna, Kerala, High Courts have taken the view that application under Section 125 can be filed in the Court of any Magistrate in the district.

But, a more reasonable approach is taken by the Madras High Court in Shakuntla Vs. Trirumalaya and Andhara Pradesh High Court in Abdul Qayyum Vs. Durdana Begum, that an application can be filed only in the Court of a Magistrate in any district where husband resides. It is submitted that this is the true interpretation of the words 'in any district'. Mr. Justice Muktadar in Abdul Qayumm has very rightly held that the words 'in any district' do not mean 'in any court in any district, where the husband resides'. Dissenting from the Bombay High Court decision in

2. Ram Nath Sardar Vs. Rakha Rani Sardar, 1975 Cr.L.J. 1139, wherein Shanti Bai Decision, ibid is quoted with approval.
7. 1973 Cr.L.J. 873.
8. Ibid.
Shatibai Vs. Vishnupant, his Lordship was constrained to observe:

"In my opinion, it would be stretching the intention of the legislature too far by importing the word 'court' in sub-section (8) of Section 488 Cri. P. C. (corresponding to read any Court in any district)."

Thus, the Legislature never intended to empower every First Class Magistrate in any district with the jurisdiction to entertain the application for maintenance under Section 125 of the Code. Only that Magistrate in any district, in whose jurisdiction the husband or other person liable to pay maintenance resides, has the power to entertain the application for maintenance under Section 125 of the Code.

(ii) THE SIGNIFICANCE OF THE EXPRESSION, 'WHERE HE IS' USED IN CLAUSE (a) OF SUB-SECTION (1) OF SECTION 126: It must be pointed out that the above said legal propositions are applicable to decide the question of 'reside' or 'last resided' under clause (b) and (c) of sub-section (1) of Section 126 of the Code. As far as clause (a) of sub-section (1) is concerned there is no need to fulfil these requirements. Under clause (a) maintenance proceedings under Section 125 can be started against any person in any district where he is. If a person is staying at a particular place even without the intention to reside there, the Magistrate of that place can entertain the application under clause (a) of Section 126(1) for maintenance. The person against whom the application is filed may work there for gain even though he may not have a permanent residence
within such jurisdiction. The use of the word 'is' in clause (a) to sub section(1) of Section 126 indicates that the legislature intends that proceedings may be taken against the opposite party, who have no permenent residence within the jurisdiction of the Magistrate concerned, but who may be easily found there. In Jose Vs. Mary Jose the Kerala High Court has pointed out that the word 'is' in clause (a) of Section 126 (1) is used in a much wider sense than the word 'resides' and not limited by the intention to stay or the duration or nature of the stay.

The Supreme Court in Jagir Singh Vs Jaswant Singh, examined in depth the meaning of the words 'resides', 'last resided' and 'is'. Lucidly pointing out the meaning of 'is', Mr. Justice Subba Rao speaking for the Supreme Court held in para 11 of the judgment:

"The verb 'is' connotes in the context the presence or the existence of the person in the district when the proceedings are taken. It is much wider than the words 'resides': it is not limited by the animus manendi of the person or the duration or the nature of his stay. What matters is his physical presence at a particular point of time. This meaning accords with the object of the chapter wherein the concerned

9. AIR 1965 Bo.107.
10. See Jagir Kaur Vs. Jaswant Singh, 1963 Cr.L.J. 413 But, the Gujrat High Court in Ambalal Patel, AIR, 1963 Guj. 91; has taken the view that while the casual or temporary residence is implicit in the expression 'resides' the words 'last resided' does not recognise a causal residence.
11. Indu Bala Vs. Satchid Prashad, AIR 1939 Cal. 333.
section appears. It is intended to reach a person, who deserts a wife or child leaving her or it or both of them helpless in any particular district and goes to a distant place or even to a foreign country, but returns to that district or a neighbouring one on a casual or a flying visit. The wife can take advantage of his visit and file a petition in the district where he is living his stay. So, too, if the husband who deserts his wife, has no permanent residence, but is always on the move, the wife can catch him at a convenient place and file an petition. She may accidentally meet him in a place where he happens to come by coincidence and take action against him before he leaves the said place. This is the salutary provision intended to provide for such abnormal cases. 14.

Thus, Section 126 of the Code enables a distribute persons to get the much needed and urgent relief in one or other forums convenient to them.

(iii) THE MEANING OF THE TERMS, 'RESIDES' AND 'LAST RESIDED' CLAUSE (b) AND (c) OF SUB.SECTION 126(1) OF THE CODE: The expression 'resides' or 'resided' used in sub-section (1) of Section 126 has been given different interpretations by the High Courts. But there is no doubt that there is unanimity also. The Legislature on the recommendation of the Law Commission 15, that the venue of the proceedings should also include the place where the wife may be residing on the date of application, has added the words 'his wife' in clause (b) of sub-section (1) of Section 126 of the Code. Some Courts 16 have taken the unanimous view


15. 41st Report, page 306.

that now the jurisdiction has been enlarged and widened, and the wife can file an application for maintenance under Section 125 in the Court within whose jurisdiction such a wife resides. Moreover, residing at the time of filing or presenting application is enough.  

The word 'reside' is defined in the Oxford Dictionary as 'to live permanently or for a considerable time, to have one's settled or usual abode to live, in or at a particular time.' In Corpus Juris Secundum it is noted that "Reside has been held equivalent to or synonymous with 'abide, dwell, to have one's home, live, lodge, remain residence, sijourn, and stay.' 'Reside' is said to be usually classed as synonymous 'with inhabit': but not, in strictness, properly so.

The word 'reside' has been thoroughly examined by R. Pandian, J., of the Madras High Court in K. Mohan Vs. Balakanta Lakshmi, wherein after referring to the definition of the word 'Reside' in Oxford Dictionary and Corpus Juris Secundum and the decisions of the Allahabad, Lahore and the Supreme Court, it was observed:

"Therefore, it is clear that the expression 'resides' occurring in S. 126(1) (b) has to be given a liberal construction and the Legislature could not have intended to use the said term in the technical sense of 'domicile' and it has to be understood to include the temporary residence also.""23

But, his Lordship at the same time held in para 10 of the judgment that:

Whatever meaning is given to it, one thing is obvious and it is that it does not include a casual stay in or a flying visit to a particular place. In short, the meaning of the word in the ultimate analysis depends upon the context and the purpose of the particular Statute.24

In Corpus Juris Secundum also, it is stated that the word 'reside' is employed in a wide variety of significations. At page 285, the two distinct meanings of the terms reside are noted as follows:

"It has been said that the word 'reside' has two distinct meanings, and that it may be employed in two senses, and in what sometimes referred to as the strict legal or technical sense, it means legal domicile as distinguished from mere residence or place of actual abode. In this sense the word 'reside' means legal residence, legal domicile, or the home a person in contemplation of law, the place where a person is deemed in law to live, which may not always be the place of his actual dwelling, and thus the term may mean something different from being bodily present, and does not necessarily refer to the place of actual includes not only physical presence in a place as a place of abode.25

The Lahore High Court in Charan Das Vs Surasti Bai26 has

23. p. 1319.
25. Supra.
26. AIR 1940 Lah. 449.
held that the sole test to determine residence was whether a party had the 'animus manendi' or an intended to stay for a definite period at one place and if he had such an intention, then alone could he be said to reside there. Similarly, in Balakrishna Vs B. Sakunta Bai, the Madras High Court has held that the word 'reside' implies the mere intention to remain at a place and not merely to pay it a casual visit intending shory to move on to one's permanent residence. The same view was taken later on by the same High Court in Sampooram Vs. N. Sundaresan. The Mysore High Court in N.R. Mane Vs. Radha Rukmani Bai speaking through Ahmed Ali Khan, J., has held that:

"It is wrong to treat the word 'resided' as equivalent to something in the nature of having a domicile in a particular place or one's place of origin or where one's family lives. But, 'resided' means to live or have dwelling place abode. Where there is something more than a flying visit."

The Patna High Court in Abdul Hamid Sadiq Vs. Bibi Asharakunnisa has further held that any person who dwells permanently or for a considerable time at a particular place may amount to 'reside' at that place. How much length of period is required to ascertain residence has to be decided with reference to the facts of case. The court should always

27. AIR 1942 Mad. 666.
28. AIR 1953 Mad. 78.
29. 1973 Cr.L.J. 547.
30. Emphasis added.
31. 1965 Cr.L.J. 236.
try to distinguish whether the period of stay was meant merely for a visit or for the purpose of residence, although of a temporary character. Mr. Justice J.K. Mohanty of the Orissa High Court took the same view in Sada Sivuni Vs. S. Divakar Rao, His Lordship observed that 'reside' means something more than flying visit or casual stay. But, it was pointed out that there must be an intention to stay for a period. A person resides in a place if he makes it his abode permanently or even temporarily.

It has been held by the Allahabad High Court in Mohd. Rasul Vs. Mst. Raboo that staying for a few months for treatment of one's wife will not come within the expression 'resides'. The Lahore High Court held in Gulam Hussain Vs. Bakam Bibi that the fact that the marriage of the couple took place within the local limits of the jurisdiction of Magistrate will not give him jurisdiction to entertain application for maintenance.

The Apex Court in Jagir Kaur Vs. Jaswant Singh has thoroughly examined the meaning of the terms 'resides', 'last resided together' and 'is' used in Section 488(8) of the Code 1898 (corresponding to Section 126 of the Code of


33. AIR 1955 All. 693.

34. AIR 1926 Lah. 663.

543

1973). Observing that the same meaning should be given to the term 'resides' and 'last resided', Subba Rao, J., very lucidly pointed that 'resides' does not mean only domicile in the technical sense of the word. It however means something more than a flying visit or a casual stay in a particular place. There shall be animus manendi or an intention to stay for a period depending upon the circumstances of each case. A person resides in a place if he through choice make it his abode permanently or even temporarily and whether a person has abode depends upon the facts of each case. The Supreme Court has also rightly taken note of the fact that the decisions on the subject, under present consideration, are legion and it would be futile to survey the entire field. The principal propositions emerging from the decision of the Supreme Court in Jagir Kaur and other above discussed decisions may be adequately summed up, as under:

- that the word 'reside' does not mean 'domicile' in the technical sense of the word.
- that there must be the abode of the person which may be permanent as well as temporary.
- that there must be animus manendi or an intention to stay.
- that the stay must be something more than a flying visit or casual visit or casual stay.
- that it depends upon the facts of each case to determine whether a person has chosen to make a particular place his abode or not.

(iv) FORUM OF MAINTENANCE APPLICATION BY PARENTS_ A PLEA TO AMEND THE PROVISIONS_ The Criminal Procedure Code of 1973 also makes provisions for the maintenance of parents under

36. Ibid.
Section 125(1) a father or mother who is unable to maintain himself or her self has the right to claim maintenance. The important question is as to where an application can be filed by the parents. And whether Section 126(1) applies to the parents also, particularly clause (b) to sub-section (1)? On a plain reading of sub-section (1) of Section 126, it appears that clause (c) to this sub-section has no relevance to the question of determining the forum for filing the maintenance application by parents. Clause (b) also does not have direct reference to parents. It is only clause (a) of Section 126(1) which directly deals with jurisdictional aspect of parent's application for maintenance under Section 125 of the Code. Thus, if a father or mother is unable to maintain himself or herself, the application for maintenance can be filed only at a place where his or her child resides. This is the clear mandate of clause (a) to sub-section (1) of Section 126. But, can the parent initiate the proceedings where his or her child resides? In other words, can the Court take assistance of clause (b) of Section 126 (1) to decide the forum for filing application for maintenance by the parent? The Calcutta High Court in Sodhansu Sekhbar Gangoli Vs. State held that the venue of the application is the place where the son or daughter resides and not where the indigent parent lives. Mr.

1. 1985(2) HLR 624, 1985 (2) Crimes 214.

2. The High Court also rejected the plea that assistance of Section 179 of the Criminal Procedure Code, 1973 can be taken to determine the forum under Sec. 125 of the Code, ibid p.626.
Justice Sankar Bhattacharjee speaking for the Calcutta High Court observed:

"Where the language of a Section is plain and clear, the Court cannot question the wisdom of the Legislature in enacting it. If the Legislature had really intended to extend such benefit to the parents by including the place of their residence in the venue, it could easily do so by inserting the words 'or where the father or mother resides' in Section 126 (1) of the Code which has not been done. By no stretch of imagination, therefore, can it be said that the father or the mother can be initiate proceedings under Section 125 of the Code against the son in the district where he or she (father or mother) resides."

But the Allahabad High Court in Ganga Sharan Varshney Vs. Shakuntla Devi has rejected the contention that the application for maintenance under Section 125 by the father or mother can be instituted only where the son or the daughter is. Mr. Justice S.R. Bhargava, though noted in this case that the Parliament omitted to introduce the words 'father or mother' in clause (b) of Section 126 (1), wherein it has introduced the words 'where he or his wife resides', yet his Lordship preferred to observe:

"When the Parliament intended to give facility to helpless person to claim maintenance at a place where he or she resides, omission of mother or father in the said clause is accidental or inadvertent. The intention of the Parliament is clear, that the helpless person should be given facility of claiming maintenance at a place where he or she resides."

Bhargava, J. M. following Karnataka High Court decision in Ananth Gopal Pai Vs. Gopal Naryan Pai, wherein it was held

3. 1990 Cr.L.J. 128.  
that the father seeking maintenance can file application at a place where he resides, further observed.

"A statute has to be construed in a manner to carry out the intention of the Legislature and even a modification or constradiction of the language of the Legislature is permissible in order to square with the intention. If the desititute or Vagrant mother is compelled to institute proceedings only at a place where the son resides, she may not at all be in a position to pursue her case. On the other hand, the son having pecuniary resources can certainly context the case against her at the place where the mother resides. The intention of the Legislature behind S.125 Cr.P.C. is to provide against vagrancy and destitution".

Thus, it was opined by Justice Bhargava that keeping in view the intention of the Parliment, clause (b) of Section 126(1) of the Code should be liberally constructed in such a manner as enables the claiment in general whether wife, or child or illegitimate child or mother or father to claim maintenance at the place where she or he resides.

Recently, this Anant Gopal Pai case came for consideration before the Rajasthan High Court in Ramavtar Singh Vs.Budha Ram. Justice N.C.Sharma speaking for the Rajasthan High Court held that the decision in Anant Gopal Pai case runs counter to the decision of the Lordship of the Supreme Court in Jagir Kaur Vs.Jaswant Singh and that

5. Wording of Vepa P.Sarathi at pages 140 and 141 in his book Interpretation of Statutes, 2nd ed.quoted with approval in Ananth Gopal Pai Case, ibid.

6. Ibid.

7. 1992(1) HLR 226.

8. Supra.

the learned judge of the Karnataka High Court did not take in note of the said Supreme Court decision. Justice Sharma further observed that:

"It was wrong for him to assume that Section 126 had in its view only the husband and the wife or the mistress of the husband and not the father. It is again wrong to state that in so far as father or the mother or the children are concerned, Sec. 126 is silent. I am of the view that Sec. 126 had also in its preview father or mother claiming maintenance from their son and it is vocal in its relation to them and not silent. It is also erroneous to state that in an application under Section 125 of the Code, the principles underlying Section 177, which relates to an offence have to be kept in view.

Following, the Calcutta High Court decision of Sodhansu Sekhar Gangoli case, Justice Sharma, J., invoked Section 482 Criminal Procedure Code to set aside the maintenance proceedings instituted by the father at Alwar, where he resided and observed that it could be filed only at Delhi, where his son resided.

It is submitted that the decision of Allahabad High Court in Ganga Sharan Varashney case seems to be attractive as it is surely based on a socially oriented approach. But where the language of the provision is plain, clear and unambiguous, the Court should not question the wisdom of the Legislature in enacting it. It is the Legislature which makes the law. The Court's duty is to administer the law so made. On the question under present consideration, without doing violence to the language of clause (b) of Section 126,

one Can’t conclude that the said clause applies to parents also. The Allahabad High Court has itself realised so, and observed:

"Only this much needs to be observed that there is a lacuna in the section and that was to be filled up according to intention of the Parliament".

The only point is as to the proper authority which can fill up the said lacuna: Parliament or Court. It is submitted that clause(b) of Section 126(1) of the Code requires immediate amendment so as to allow the parents to claim maintenance under Section 125 of the Code, where he or she resides and not only where his or her son or daughter resides. But, unless and until the necessary amendment is made in the provisions, the Court cannot interpret the law solely on the basis of sreeseemed intention, ignoring the plain and clear language of the provisions on the subject.

(b) PROCEDURE REGARDING EVIDENCE AND EX-PARTE ORDER UNDER SUB SECTION(2) 126 OF THE CODE: According to sub.section(2) of Section 126 of the Code, all evidence in maintenance proceedings under Section 125 of the Code shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made. Where the personal attendance of such person is dispensed with, the evidence shall be taken in the presence of his pleader. It is also laid down that evidence in maintenance proceedings shall be recorded in the manner prescribed for summons cases. The mode of taking and recording of summons cases is enacted in

The Kerela\textsuperscript{12} and Punjab High Courts\textsuperscript{13} have taken the view that the provisions of sub-section(2) of Section 126 are not mandatory mainly on the grounds that under this section, the person against whom order of maintenance is to be enforced is not strictly a person accused of a crime and the considerations which apply to the construction of the provision dealing with the trial of a persons accused of a crimes are hardly applicable to the interpretation of Section 126. The Bombay High Courts has held in Arun Kumar Vs.Chandan\textsuperscript{14} Bai that proceedings are not vitiated merely because the evidence of the wife and her witnesses was recorded in the absence of the husband though in the presence of the advocate. But lateron the same High Court speaking through Jahangirdar, J., has held in Ramesh Laxaman Vs.Jayashree\textsuperscript{15} that Section 126(2) itself provides that all the evidence shall be recorded in the manner prescribed for summons cases. But, the second approach which is certainly nearer to the true interpretation of the provisions of Section 126(2), 273 and 274 of the Code, is that the provisions of Section 126(2) are mandatory and the procedure of taking and recording evidence in maintenance proceedings

\textsuperscript{12} Abdurehima Vs.Khadeja, 1988 Cr.L.J. 29.
\textsuperscript{13} Joginder Singh Vs.Bibi Raj Mohinder Kaur AIR 1960 Punj. 249.
\textsuperscript{14} 1980 Cr.L.J. 601.
\textsuperscript{15} 1982 Cr.L.J. 1460.
as laid down in the said Section must be adhered to. It has also been held that there is no provision for deciding such a case on an affidavit. But, if the Magistrate on being satisfied that the service of summons was sufficient, the Allahabad High Court held in Brindawan Choubey Vs. Ram Sanwar that by accepting and referring to the affidavit of the wife filed before the Magistrate after he had passed an order directing the proceedings to go ex-parte, no illegality could be said to have been committed, in passing an ex-parte maintenance order. Thus, where the Magistrate does not follow, the summon procedure as laid down by Section 126(2), but followed summary trial procedure, the proceedings are liable to the quashed since the defect is not curable.

(i) EX-PARTE ORDER UNDER PROVISO TO SUB.SECTION(2) OF SECTION 126 OF THE CRIMINAL PROCEDURE CODE, 1973: The proviso to sub.section(2) of Section 126 makes provisions for ex-parte orders and also to set them aside. Accordingly, if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is


18. 1990 Cr.L.J. 877.

The Magistrate may proceed to hear and determine the case ex-parte. The Magistrate may set aside such ex-parte order passed by him for good cause shown on an application by the aggrieved person. The application is to be made within three months from the date thereof. The order to set aside the ex-parte order may be subject to such terms, including terms as to the payment of costs to the opposite part, as the Magistrate may think just and proper. Therefore, on close perusal of the said proviso to Section 126(2), it is evident that there are two limbs. While the former empowers the Magistrate to pass ex-parte order, the latter enables him to set aside the same under a given set of circumstances. The provision of the proviso to pass ex-parte order is aimed at expediting the disposal and awarding maintenance to the destitute without any delay.

Both the above stated eventualities have different fields to operate. 'Wilfully avoiding service' means that the person against whom service of summons is sought is wilfully avoiding to be served with such summons. 'Wilfully neglects to attend the Court' will operate when the service of summons is already effected but the person so served wilfully neglects to attend the Court. In both these situations, the satisfaction of the Magistrate is a condition precedent. It must be noted that proceeding ex-parte against a person is a grave step. Therefore, the Magistrate shall have jurisdiction to proceed ex-parte only,
when he is satisfied that the person is wilfully neglecting to attend the Court of wilfully avoiding the service of summons. 21

Viz., In Sukhinthammal Vs. Subramaniam, 22 Mr. Justice R. Pandian of the Madras High Court emphasized that in the proviso to Section 126(2) a more rigorous prerequisite is contemplated that there should be either wilful avoidance of service or wilful neglect to attend Court after having accepted service. His Lordship then explained the meaning of the word 'wilful' saying:

"The word 'wilfully' means 'deliberately, obstinately, purposefully, intentionally or knowingly'."

Padian, J., further observed:

"The use of the word 'wilfully' before the words 'avoiding service' or 'neglecting to attend the Court points out to the obligation cast on the Magistrate to seek from the material placed before him his satisfaction that the person against whom an order for payment of maintenance is proposed to be made is deliberately intentionally or knowingly avoiding to accept service or neglecting to attend the Court. Therefore, the Magistrate can proceed ex-parte against that person only when the material placed before him compels him to come to the conclusion that the person knew about the summons sought to be serviced upon him and in spite of that knowledge he is deliberately or


22. 1985 Cr.L.J. 1294.
intentionaly avoiding to accept service or deliberately neglecting to attend the Court. Unless the condition precedent of one of the two alternatives is satisfied, the Magistrate cannot proceed ex-parte against that person”.

Justice K.B. Srivastwa of the Allahabad High Court has pointed out the significane of the word 'wilfully neglects' in Kalika Vs. Jagdei observing that wilful means designedly, deliberately or set purpose that is to say the mind and the overt action moving together. His Lordship further observed:

"What amounts to wilful negligence is a question of law though it has to be decided on the basis of given facts... It will not enough if a man happen to be absent on a particular date because that will only establish his physical absence but whether that absence is wilful or negligent or wilfully negligent is a inference of law to be drawn from the proved facts and circumstances".

Recently, the Orissa High Court speaking through Justice L. Rath in Indramani Jena Vs. Smt. Mingilata Jena has rightly observed that the essence of the provisions of Section 126(2) is the satisfaction to be reached by the Magistrate about the person concerned wilfully avoiding service or wilfully neglecting to attend the Court. It is pre-eminently desirable that the ex-parte order must disclose ex-facie such satisfaction having been reached. Since the order is available to be scrutinised in revisional


jurisdiction of the High Court, it is necessary to be a speaking one so as to disclose the mind of the Magistrate to enable the High Court, while in seisin of the case, to find out the justifiability of the order.

Thus, it is crystal clear, that the Magistrate must be satisfied about the wilful avoidance of service or wilful neglect to attend the Court in view of the facts and circumstance of the case.

It is pertinent to note that it is not the requirements of the provision of Section 126(2) that any process to compel the attendance of the respondent should be initiated. In a criminal trial if the accused is absent he has to be brought before the Court, if necessary, by coercive steps. But a person against whom maintenance proceedings are initiated is not a accused. If he is wilfully avoiding service or wilfully neglecting to attend the Court, he can proceeding against ex-parte only.

(ii) THREE MONTHS LIMITATION TO SET ASIDE EX-PARTE ORDER: In the proviso to sub-section(2) of Section 126 of the Code, itself, it is stated that 'any order so made may be set aside for good cause shown on an application made. 

-within three months from the date thereof


Some of the High Courts have taken the view that the application for setting aside ex-parte order for maintenance may be filed within three months from the date of knowledge. But the true construction the provisions quoted above particularly 'from the date thereof', make it clear that the Magistrate has jurisdiction to entertain the application for setting aside the ex-parte order within three months from the date of order itself. As we have discussed in the preceding pages the Magistrate can pass ex-parte orders of maintenance only if he is satisfied that the respondent is wilfully avoiding service or wilfully neglecting to attend the Court, therefore, it is in consonance with the spirit and letter of the proviso Section 126(2) that the time of limitation of three months should be counted from the date of order itself.

A Full Bench of the Punjab & Haryana High Court in Joginder Singh Vs. Balkaran Kaur and the Madras High Court


28a 1972 Cr.L.J. 93.
in Meenakshi Ammal Vs. Somasundara Nadar and Sukhirthammal Vs. Subramaniam have taken the view that the non-compliance with procedure prescribed for the service of summons in the Criminal Procedure Code may be a good ground for allowing application to set aside the ex-parte order and that the mere non-observance of the proper procedure would not make an ex-parte order invalid and entirely liable to be ignored.

In Mehta Popat Lal Vs. Kashi Ben the Gujarat High Court held that it is not within the competence of the executing Court to go beyond the ex-parte order. Such order can be set aside only by following the procedure laid down in the proviso to Section 126(2) of the Code.

It is important to note that the jurisdiction of revisional Court begins only after the person aggrieved by the ex-parte order has availed himself of the remedy under Section 126(2) of the Code. Without availing the said specific remedy, the revision does not lie.

Undoubtedly, a revision will lie against an order refusing to

30. 1985 Cr.L.J. 1294.
32. 1973 Cr.L.J. 1015.
set aside ex-parte order under Section 126(2) of the Code.\(^{34}\)
Revision can also be filed if an order of ex-parte is passed
without complying with the provision of Section 126(2) of
the Code.\(^{35}\)
But, a person cannot invoke the inherent
jurisdiction of the Court under Section 482 of the Code
without following the remedy provided for setting aside ex-
party order under Section 126(2) of the Code.\(^{36}\)

(iii) RECORD OF PROCEEDINGS AS IN SUMMONS CASES: SERVICE BY
REGISTERED POST IS NOT PROPER: Sub-section (2) of Section
126 requires though by implication that the record of the
proceedings is to be made in the same manner as in
proceedings in summons cases. The process for service is
summons is laid down in Section 61 to 67 of the Criminal
Procedure Code, 1973. The summons is a mild the form of
process. Summon may be issued either for appearance of the
accused person of of a witness, or for producing a document
or thing. Generally, the High Courts have held that in
maintenance proceedings under Section 125 of the Code,
summons must be served in accordance with the provisions of
Section 62 of the Code, which lays down that every summons
shall be served by a police officer, of subject to such
rules as the State Government may make in this behalf, by

\(^{34}\) Mohd. Haider Vs.Tahir Fatima 1978 All Cr.C. 134.

\(^{35}\) Sumatha Vs.N.J.Peter, 1985(2) Crimes 670; P.M.Doddiah
Vs.Sulochanamma, 1979 Mad. L.J. 269.

\(^{36}\) Partha Sarathy Vs.Banumathy, II(1988) DMC 473; Makhdum
Ali Vs. Nargis Bano, 1983 Cr.L.J. 111; Akhlari Begum
an officer of the Court issuing it or some other public servant. Based on the Latin maxim of Natural Justice, audi alteram partem, a notice of the application of maintenance filed under Section 125 should be issued to the person from whom maintenance is claimed. The High Courts have a contrary view on the question of sufficiency of service through registered post. One view is that there is no provision under Section 61 to 69 of the code which allows service by registered post to the person except in the case of witness under Section 69. Therefore, service by registered post under Section 125 of the Code is not a proper service. Recently, the Andhra Pradesh High Court speaking through a Raju, J., in Guthikonda Vs. Guthikonda categorically held that there is no provision of service of summons by registered post. Therefore, the procedure contemplated by sections 61 and 62 of the Criminal Procedure Code has necessarily to be followed. But earlier a full Bench of the Kerala High Court, dissenting from a number of

decided cases, has held in Balan Nair Vs. Bharani Amma, that the proceedings under Section 125 of the Code are 'essentially of a Civil nature' and service in regard to maintenance proceedings is not required to be effected strictly in terms of the provisions of Section 61 and 69 of the Code and service by registered post would also be valid service. It is aversed, that orders of maintenance under Section 125 of the Code have far reaching consequences. The language of sub-section (2) of Section is very plain, clear and unambiguous. The process should be in the manner of the summons cases. Service through registered post except in the case of a witness is not permitted under Section 61 to 69 of the Code. Therefore, the Court must adheret to the provisions of these sections.

(iv) NO PERIOD OF LIMITATION IS FIXED TO CLAIM MAINTENANCE UNDER SECTION 125 OF THE CODE OF CRIMINAL PROCEDURE, 1973: Section 125 of the Code has not restricted the period of Limitation to claim maintenance. Recently, in Golla Seetharemutu Vs. Goll a Rathanamma, a Division Bench of the Andhra Pradesh High Court held that 'simply because the wife


42. 1987 Cr.L.J. 399, see also Damodaran Vs. Challamma 1987 (I) K.L.T. I(F.B.).

has not claimed maintenance for a long time, it does not mean that she has completely abandoned her right or voluntarily given up her claim to maintenance.

(c) COSTS UNDER SUB.SECTION(3) OF SECTION 126 OF THE CRIMINAL PROCEDURE CODE,1973: Sub.section(3) of Section 126 enacts the provisions that the Court in dealing with the application under Section 125 shall have the power to make such orders as to costs as may be just. The use of the word 'Court' instead of 'Magistrate' signified that not only the Magistrate but the Session Court as well as High Court in empowered to a ward costs. It is important to note that the Magistrate can order as to the payment of costs under sub.section(2) of Section 126 also at the time of setting aside ex-parte order. In that case the costs awarded is to be paid in cash, whereas Court order under sub.section(3) is to be recovered only through a distress warrant issued under Section 421(3) of the Code.

Justice H.H. Kantharia of the Bombay Court in Sou Malan Vs.Balasahib Bhim Rao was surprised and shocked to find that the learned Session Judge awarded cost of Rs.100/- by the wife to the husband. His Lordship observed that a judicical officer who is concious of the Constitutional mandate of social justice will pass such an order of

awarding cost by the wife to a husband.

13. ENFORCEMENT OF THE MAINTENANCE ORDER UNDER SECTION 128 OF THE CODE OF CRIMINAL PROCEDURE, 1973: Section 128 of the Code which makes provision for two different aspects runs as follow:

"A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due".

This Section is a verbatim reproduction of Section 490 of the Code of Criminal Procedure, 1898. Section 128 is a beneficial provision for the destitute and helpless persons in whose favour the maintenance order is passed. It lays down:

Firstly, a copy of the maintenance order is to be given free cost. The copy of order without payment is to be given

- to the person, in whose favour the order of maintenance has been made, or
- to his guardian, if any or
- to the person to whom the allowance is to be paid

The Second part of Section 128 assume great significance, as it deals with enforcement of maintenance orders. Accordingly, order of maintenance may be enforced by any Magistrate in any place where the person against whom it is made may be. Thus, expression any place implies any place in India outside the jurisdiction of the Magistrate who passed the order. The order of maintenance passed under Section

1. In re-Karri Papauarma, ILR(1881) Mad. 230.
125 of the Code may be enforced by 'any Magistrate' in any place, where the person liable to pay maintenance, may be, but such Magistrate must be satisfied as to
- to identity of the parties and,
- to non-payment of the allowance due.¹

Therefore, the Magistrate is not to determine the fact, whether the person against whom maintenance order is sought to be enforced resides there or not. The Rangoon High Court in Maung Tur Zan Vs. Ma Myaing² has rightly held that Section 490 (corresponding to Section 128) gives an alternative remedy to the person for whose benefit the maintenance amount is awarded, by enabling an application for execution to be made directly to the Magistrate within whose jurisdiction the person against whom the order is passed may be as well as to the Magistrate who passed the original order, or his successor.

It is important to note that while deciding the question of validity of maintenance order passed under Section 125 of the Code vis-a-vis the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, the Punjab & Haryana High Court in Hazran Vs. Abdul Rehman³ and the Kerala High Court in Mohammed Hazi Vs. Rubiya⁴ have taken the assistance of Section 128 of the Code and observed that order of maintenance made before coming into force of the Muslim Women Act are enforceable under Section 128 of the Code.

¹ Mazahar Abbas Vs. Smt. Sakeena, 1986(1) HLR 464 (All.).
² AIR 1941 Rang. 247.
³ 1989 Cr.L.J. 1519.
⁴ 11(1987) DMC 495.