

CHANGING SCENARIO OF RIGHT TO MAINTENANCE UNDER CODE OF CRIMINAL PROCEDURE

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1.0 Introduction

The basic social unit wherein we could observe the pre requisites of a welfare society is family. For proper and wholesome development of both men and women in a family, marriage is a must. Marriage, as an institution is necessary for the procreation of human race. Marriages as such give the married partners, a status and impose mutual obligations and rights. The prime obligation that arises out of marriage is maintenance. Maintenance should also be considered as human right (a basic minimum right to which a person is entitled to being a member of human family).

Towards safeguarding the interest of parties to marriage and other members of the family, maintenance is recognized. Perhaps in realization of this and with an avowed object of preventing the consequences that may tend to arise out of poverty and destitution a right, parallel to one provided under personal laws, is made available under the criminal jurisprudence in India. The centurion old law had its origin from England and withstood onslaughts of social and legal changes over the period of time.

2.0 MAINTENANCE : What does it mean??

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

Maintenance is not merely a legal right. It is part and parcel of basic human right. Section 125 of Cr.P.C. which intends to prevent starvation protects indirectly the basic human right of an individual. The personal laws of the Indian community viz., Hindus, Parsis, Christians and Muslims provide for maintenance or alimony. But these are mostly made available only to the married partners when they seek for matrimonial relief under their respective marriage laws. The right of maintenance provided under Section 125 of the Code of Criminal Procedure is something novel and unparalleled in Indian legislation. It shows a blending of the characteristics of criminal law, civil law and those of family law, but do not fall absolutely under any of these branches. No other law in India had given rise to such storm of events as that one under Section 125 of Cr.P.C.

The provision remained as the first unifying law on the personal aspect of the non-homogenous religious communities in India. The Supreme Court of India in *Bar' Tahira v. Ali Hussein*,¹ *Fuzlumbi v. K. Khader Valir*,² *Mst. Zohra Khatoon v. Mohd. Ibrahims*³ and *Mohd. Ahmed Khan v. Shah Bano Begum*⁴ upheld the secular characteristics of the provision.

Women though equal in population to their male counterparts, they do not enjoy the status on par with them. Women are honoured and even worshipped as goddesses but in real life they are relegated to a position much worse than a slave and kept always under sub-ordination. Section 125 Cr.P.C. which provides maintenance as a substantive right do not extend the same to all married women. Section 125 provides for economic assistance in case of neglect of children by their parents.

3.0 Maintenance: A Constitutional Obligation

The Preamble speaks of the goals the Constitution is set to realize. An important goal of the Constitution as specified by the Constituent Assembly is 'building of an egalitarian social order and to bring a radical socio-economic transformation based on Justice-Social, Economic and Political'.⁵ The Preamble reflects the sentiment of the Constitution builders. The basic human needs are food, clothing, and treatment in disease, education and participation at the grassroots level in the governance of the country. The path to realize these basic needs is propounded by the Constitution as achieving a socialistic state which could be for providing Justice-social, economic and political; liberty of thought, expression, belief, faith and worship; and equality, of status and opportunity.

The Supreme Court in Kharak Singh⁶ case held that the word 'life' as it occurs in 5th and 14th Amendment of the U.S. Constitution corresponds to Article 21 of the Indian Constitution. It means much more than animal existence. The word 'life'⁷ now is meant to include the right to basic necessities of life.⁸ Bhagwati. J., explains the right as one that includes the right to live with human dignity and all that goes along with it, namely, the basic necessities of life such as adequate nutrition, clothing and shelter over the head inclusive of other facilities.⁹

No person can live without the means of living. Hence right to life guaranteed under Article 21 includes the right to livelihood. If the right to livelihood is not treated as a part of the constitutional right to life; the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. This would not only denude the life of its effective content and meaningfulness but it would make life impossible to live.¹⁰

The Directive Principles impose a duty upon the state to perform its function. The provisions incorporated under Part IV of the Constitution, as per Article 37 reflects the objectives set forth in the Preamble of the Constitution. Article 39 provides that the state shall direct its policy towards securing the citizen, men and women equally, the right to an adequate means of livelihood. Article 44 directs implementing a homogenous civil code that could be applied commonly on the varying communities speaking varying languages in India. Article 45 intends to educate the younger generation, a must for social and economic development. Indirectly it provides the right to education to a class of people in India.

4.0 Code Of Criminal Procedure: Its provisions relating to maintenance:

Public concern on wife battering gave the Magistrate courts, jurisdiction over matrimonial matters in England. The experience and success of Magistrate's jurisdiction over domestic matters thrust interest on English rulers in India to practice the same in Indian sub-continent. Women here were denied property rights by way of succession. The prevalence of polygamy among Hindu and Muslim communities caused them also much hardship. The indissoluble concept of marriage held good and divorce was an anti-thesis among Hindu jurisprudence. Though the moral obligation to maintain one's wife, children and parents stood recognized in the ancient Hindu system, its enforcement was least resorted to, in the then existing social conditions. When the criminal law provided at this juncture maintenance, as an inexpensive summary relief, this served an easy access to the vast needy class.

Section 125 and the sister clauses (Sections 126 & 127) in very abstract sense impose a legal duty on persons who have a moral obligation to take care certain of his relations. Inversely, it provides maintenance as a right to all those dependents who but for these benefit would be driven towards destitution. The right can be enforced on failure by one to take care of his near relatives. The object of this provision as is spoken by Sir James Fitz Stephen, the pilot of this legislation, is "preventing vagrancy or at least preventing its consequences".¹¹

The object of the provision is to serve social justice.¹² It is enacted to protect derelict women and children and fall within the constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution.¹³ The provision is for the benefit of women, children and parents towards preventing their starvation.¹⁴ The prime object is to prevent vagrancy by compelling a person who despite means, neglects or refuses to maintain his wife or child or father or mother unable to support themselves.

The relief provided under Section 125 of the Criminal Procedure Code can be enforced through the Magistrate Courts, spread all over the country. By affording an effective and speedy remedy without much expenditure, it intends to save the party entitled for maintenance from initiating a prolonged litigation before civil courts.

5.0 Who are the persons entitled to maintenance?

Section 125 thus imposes an individual obligation towards the society to maintain some of his close relatives. The remedy as a statutory right is made available to all neglected wives, discarded divorcees, abandoned children and helpless parents regardless of their religion, community and nationality. The Supreme Court in the cases of Nanak Chand¹⁵ and Mohd. Ahmed Khan¹⁶ clarified the applicability of this provision to all sections of the people irrespective of their personal laws. It is more like a uniform law in this respect." Subject to fulfillment of certain conditions, a class of members in the family relation related either by blood or marriage are entitled to avail themselves of maintenance under Section 125 of the Criminal Procedure Code. The class of people to whom the right is extended are:

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

(a) Wife's Right of Maintenance

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

The word wife means only a legitimate wife and excludes other such relations. The claimant must be a legally wedded wife. The legality of the marriage is to be tested in the light of the personal law applicable to the parties. When marriage is denied by the husband, the factum of marriage should be properly proved. The burden of proof is on the applicant. When a person signed the school admission register as father of the child, the marriage stands proved by his admission.¹⁷ Proof of valid and subsisting marriage is essential to claim maintenance. Where prima facie marriage is established, the court would order maintenance and the burden of proof will be on the party who disputes the validity of the marriage.¹⁸

A marriage proved illegal does not confer the status of wife on a woman and the right to get maintenance. The invalidity may arise out of solemnisation of a marriage in contravention of the provisions of the statute governing the parties. The chief grounds are as follows:¹⁹

- (i) Marriage solemnised when the spouse from a subsisting marriage, living;
- (ii) Marriage between parties within prohibited relationship;
- (iii) Marriage between parties who are sapindas;
- (iv) Marriage between parties who have not attained the statutory marital age; and
- (v) Nonperformance of such rites and ceremonies as followed by the members.

But a woman who has been accepted and declared as wife notwithstanding absence of ceremonial marriage is considered to be a wife.²⁰ Much recently the Supreme Court in *Dwarika Prasad Satapathy v. BidyutPrava Dixit* and another the Supreme Court with a view to protect women who are victims of seduction by unscrupulous male members in the society has ordered maintenance in favour of such a woman.²¹

Section 125 (2) provides that the term 'wife' includes a woman who has been divorced by her husband or has obtained a divorce from her husband and has not remarried. Though a divorce puts an end to the marital relationship for the purposes of this provision, the phrase 'wife' takes a wider meaning and includes a woman who is divorced or who obtains divorce either judicially or non-judicially and who has not remarried. The provision with an extended meaning for 'wife' has its application to the needy class of all communities inclusive of Muslims.²² The remedy is made available even to a woman who gets divorce on her own volition. For a Muslim woman the remedy was made available even if she got a decree for dissolution of marriage under the Dissolution of the Marriages Act, 1939.²³

Circumstances that Disentitle the Right of Maintenance to Wife

Section 125 (4) enumerates three different circumstances which disentitle a wife to receive maintenance under Section 125(1) of Cr.P.C. These are conditions subject to which a wife will be eligible for maintenance under Section 125(1). If maintenance has already been ordered the same may be cancelled on proof of these circumstances. The conditions apply only to a wife and not either to children or parents.

- a) Living In Adultery
- b) Refusal to Live with her Husband
- c) Living Separate by Mutual Consent

Conjugal relation obligates a wife to live with her husband. If she fails to fulfill this obligation and refuses to live with her husband without there being sufficient cause this amounts to desertion. In such circumstances her living separate does not give her the right for maintenance. The respondent has sufficient cause and can offer to maintain his wife provided she comes and live with him.²⁴

(b) Children's Right of Maintenance

Children are considered national assets. Their proper molding alone will make them proper citizens of tomorrow. The society and as well as the parents have a due role to play towards making a child. Neglect by parent or failure on their part to take proper care of their children should not drive them to take a criminal career. Section 125 provides for maintenance to children who are neglected or not cared for by their parents. A father has a moral duty to maintain his child. In recognition of this, Section 125 Cr.P.C. entitles children whether legitimate or illegitimate to get maintenance from their father. Section 125(1) (b) extends this statutory right towards minor children born within or outside matrimonial wedlock, while clause (c) of the same proviso provides maintenance to a major child who though has attained the age of majority is not able to maintain itself, because of physical or mental abnormality or injury. With regard to married daughters, the liability to maintain lies with the husband. But

in case of her being minor or married and her husband having no sufficient means until the time she attains majority, the father may be required to pay maintenance allowance.

(c) Parent's Right of Maintenance

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

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

Though the duty to maintain as between father and son is reciprocal, a son cannot refuse payment of maintenance to his father on the ground that his father has not fulfilled his parental obligation towards him at his younger age. An issue of interest of this sort was raised before the Patna High Court in *Pandurang Baburao Dabhade v. BaburaoBhauraoDabhade* and another.

6.0 Is it obligatory for a daughter to Maintain Her Parents???

A daughter's liability towards her parent is another issue that remained unsettled for some time until the intervention of the Supreme Court to clarify the position. The use of the word 'his' in relation to Section 125(d) tends to give an impression that only sons have an obligation to maintain their father or mother and such an obligation is not there with the daughter. With the amendment in section 6 of Hindu succession act, if daughters can be made co-parceners like sons, then simultaneously they also owe a duty towards their parents to be maintained just as a son is expected to do.

For the first time, the Kerala High Court recognized such a right and imposed the duty on daughters to maintain her parents.²⁶ Then came the decision of the Supreme Court in *Dr. Mrs. Vijaya Manohar Arbat v. Kasirao RajaramSawai* and another²⁷ which held that the word 'his' includes both male and female children. This appears to be a reasonable interpretation of the provision. The Court observed that maintenance of parents being a moral duty there was no reason why a daughter should be excluded. The social economic conditions of the society have changed a vast. Girls now have the right to own property on their own and the right to inherit property.

7.0 Procedure

The Code of Criminal Procedure that provides maintenance as a substantive right presents also conditions subject to which the right is extended to a claimant. Besides, the code specifies also the jurisdiction and the procedure to be followed in the enforcement of the right.

8.0 Basis of the claim

An application under Section 125 of the Criminal Procedure Code, by a wife, child or parent, will be entertained only on proof of some elements. The applicant needs to prove that the respondent has sufficient means and that he/she has neglected or refused to maintain him/her. In addition, he or she has to prove her inability to maintain him or herself. On the side of the respondent the requisites are:

- (1) He should be having sufficient means and
- (2) There should have been neglect or refusal on his part to maintain the petitioner

9.0 Jurisdiction of the Magistrate Court

A Magistrate of First Class alone is given jurisdiction to entertain application for maintenance under Section 125 Cr.P.C.²⁸ A Court which normally exercises criminal jurisdiction is seized of this matrimonial and purely civil jurisdiction to cater to the needs of a vast majority of deprived population. The formal procedure for claim of maintenance by a wife or father or mother is to make a petition under Section 125 before the Family Court, if established for the area or before the Magistrate's Court, otherwise. In case of minors, the mother or any guardian can present a petition on their behalf. The applicant is heard. When the Court is satisfied that the applicant asking for maintenance has a *prfma facie* case, the Court takes the petition on file and issues summons to require the appearance of the respondent.

The legislature has favoured monthly payment of maintenance an easier and convenient mode of payment under Section 125 Cr.P.C., without causing much hardship to the liable respondent and at the same time towards serving the basic objective on the part of the petitioner. Under Section 125 Cr.P.C. the Magistrate is required to award maintenance only at a monthly rate. The amount has to be ascertained and must be fixed unless otherwise altered under Section 127 Cr.P.C. by change of circumstances. The order can only be for payment of money²⁹ and

not in any kind.³⁰Section 125 of Cr.P.C. provides maintenance only as a summary remedy and hence the amount payable is much limited. The amount is so fixed by this provision that it fulfills modestly the needs and requirements of the wife. The objective of this remedy is not to enable the wife to live in luxury and make her feel that her living separate is profitable and thus impede any future possibility of reconciliation. The amount must be sufficient to keep her body and soul together.

In fixing the maintenance, the status of the parties and the income of the opposite party need to be considered.³¹the discretion enjoined on the Magistrate should be exercised in such a manner that it does not permit the applicant to lead a luxury life and at the same time not to drive her to a starving life. it must be modestly consistent with the needs and requirements of the wife and the status her family is accustomed to Maintenance orders under Section 125 of Cr.P.C. is to take effect either from the date of order or from the date of application.“ Normally, the order is to take effect from the date of order but if the circumstances permit, the Magistrate can make the order to take effect even from the date of application. If the date is not mentioned in the order, the implied meaning is that it is to take effect from the date of order.” Pendency of the application for long years is a reasonable circumstance to pass an order from the date of application.

The maintenance order having been passed, it becomes the duty of the court itself to see that payments are duly made. The only legal obligation placed on the wife or the minor or parents in whose favour the order is made, is to present an application within one year from the date on which the amount becomes due. Section 125 (3) of the Code imposes such an obligation on the claimant to bring to the knowledge of the Court the breach of maintenance order by an application. When this is done, it is for the Court to get its own order enforced and see that it is complied with. The proceedings from that stage cannot be treated as one between the original parties.

The Court has every power to enquire into the reasons for non-compliance of the order and any failure on the part of the respondent to comply with the order without sufficient cause can empower the Court to issue a warrant for levy of the amount. A willful neglect on the part of the respondent even after constraint measures being taken by the Court may lead to placing him under imprisonment. A sentence of imprisonment can be passed by the Magistrate so as to compel the respondent obey the order of the Court. An application for the recovery of arrears of maintenance shall be made to the Court within a period of one year from the date of the order or from the date on which it became due. No application filed after this period of limitation will be entertained nor executable.“ Maintenance becomes due on the date of passing of the order though it might have been granted from the date of application. The limitation of one year for recovery of arrears starts in such cases from the date of the order.

The proceedings for maintenance may be taken by the wife against husband in any district (i) Where he is, or (ii) where he or his wife resides, or (iii) where he last resided with his wife or with the mother of illegitimate child.³²The procedure to be followed by the Magistrate while conducting proceedings under Section 125 has been prescribed by sub-Section (2) and (3) of Section 126. Sub-Section (2) requires the Magistrate to take all evidence in the presence of the opponent or when his personal attendance is dispensed with, in the presence of his pleader by following summons procedure. Though all evidence must generally to be taken in the presence of the parties, when the other party is willfully avoiding service as attendance before the Court, the Magistrate on satisfaction of this may proceed to hear and determine the case ex-parte.³³ Bi-party decision is always preferable to an ex parte one. An ex-parte order passed under the proviso to Section 126(2) can be set aside on good cause being shown on an application made within three months from the date thereof.³⁴This could also be done on the condition of payment of costs to the opposite party.³⁵

10.0 Alteration & Cancellation of Maintenance

An order passed under Section 125 must be in conformity with its terms, scope and intendment. Towards achieving this, Section 127 has been incorporated to alter the allowance by change of circumstances favouring either the claimant or the respondent or cancellation of the same when the applicant is no more eligible for the remedy available under Section 125. At any cost, the amount derivable under this provision should not exceed the maximum fixed statutorily. On proof of change in the circumstances of any person receiving maintenance under Section 125, the monthly allowance as ordered under the same Section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate is empowered to make such alteration in the allowance as he thinks fit.³⁶

Remarriage of a divorced woman results in the cancellation of the order from the date of her remarriage. The husband should be absolved from his obligation under Section 125 of Cr.P.C. if payment of lump sum under the customary or personal law is sufficient to substitute the maintenance allowance. Sub Section (2) of Section 127 permits the judicial Magistrate to take note of the remedy derived by the claimant through a competent civil court and vary or cancel the relief it has been providing to him or her. Alternatively, under Section 127(4), the civil courts are empowered to take into account the sum which has been paid to or recovered under Section 126 as monthly

allowance while passing any decree for the recovery of any maintenance or dowry. An application for alteration is necessary before a Magistrate assumes jurisdiction under this Section.

Section 128 describes the right that vests with the claimant for maintenance under Section 125 of Cr.P.C. to receive without payment a copy of the order of maintenance on successful litigation.

11.0 Right of Maintenance to Women in Live-in Relationships

What is Live in Relationship?

Live-in relationship is a relationship in the nature of marriage where both partners enjoy individual freedom and live in a shared household without being married to each other.

There is a continuous cohabitation between the parties without any responsibilities or obligations towards each other. There is no law which ties them together.

As per Indian law there are no rights or obligations on the parties in live relationship.

The right to maintenance in live in relationship is decided by the court in accordance with the Domestic Violence Act, 2005 and the individual facts of the case.

12.0 Relevant case:

Badri Prasad vs. Dy. Director of Consolidation

D.Velusamy vs. D.Patchaiammal

IndraSarma vs. V.K.V.Sarma

Sarabjeet vs state of Maharashtra

In a landmark judgment the Supreme Court dismissed a petition by the petitioner 'Z' who worked in the Bollywood and contended that the respondent could not claim the status of a wife to be legally entitled to get maintenance under the Hindu Marriage Act, 1955. The Court held that cohabitation of a couple would give rise to the presumption of a valid marriage and if a live in relationship breaks down, the man is bound to pay maintenance to the women.

13.0 Conclusion

125 of Cr.P.C. provides for maintenance as a right to discarded wives, neglected children and parents not cared for. Provision of maintenance to wife, children and parents assures them an adequate standard of living. It is thus a basic human right. The state is obliged to assure this right to every individual in the society. Towards fulfillment of this obligation, the state has provided this as a right under Section 125 of the Cr.P.C. Similar provisions are also there under various laws touching on the personal aspect of various religious groups in the Indian community. Mere legislation will not be sufficient towards fulfilling the international obligation on the part of the state. The state should also see the true realization of these rights by the deprived class.

Section 125 of Cr.P.C. though affords a substantive right; it is merely an enabling provision. Unlike wives and parents, children for whom also the protection is extended, cannot invoke the aid of this provision unless someone represents on their behalf. To assure an adequate standard of living to everyone and his family is an obligation on the part of the state. Towards fulfillment of this obligation the state has to provide social security to every individual who is in need of such assistance of all, children must be given special care and attention.

Willful neglect to maintain one's wife, children and parent should be considered an offence and provided with sufficient sentence. Women need to achieve a greater financial independence. But the mandate still remains a mirage. All efforts must be made to bring a common civil code.

14.0 References

1. AIR 1979 SC 362.
2. AIR 1980 SC 1730.
3. AIR 1981 SC 1243.
4. AIR 1985 SC 945.
5. Quoted by Smt. Indira Gandhi in her Inaugural address at the seminar on 'Dynamic of Social Justice' on 31st October 1980 at New Delhi.
6. Kharak Singh v. State of U.P., AIR 1963 SC 1295.
7. Allgever v. Louisiana (1897) 165 U.S. 578 the U.S. Supreme Court held the 'life' includes all personal rights and their enjoyment embraces the use and enjoyment of faculties. acquiring useful knowledge, the right to marry, establish a home and freedom of worship, conscience, contract, occupation, speech, assembly and press. Cited in ChanderShailja, Justice V.R. Krishna Iyer on Fundamental Rights and Directive Principles, Deep & Deep Publications, New Delhi, 1998, p.160.
8. Francis Mullin v. Union Territory of India, AIR 1979 SC 746.
9. Francis Corolie v. Union Territory of Delhi, AIR 1981 SC 748 at 753.
10. Olga Tellis v. State of Maharashtra, AIR 1986 SC 180.
11. Chandrachud J observed in BhagwanDutt v. Smt. Kamladevi and another, AIR 1975 SC 83 at p.85.
12. Kaur v. Jaswant Singh, AIR 1963 SC 1521.
13. Ramesh Chandra Kausal v. VeenaKausal, AIR 1978 SC 1807.
14. BhagwanDutt v. Kamladevi, AIR 1975 SC p.83.
15. Mohd. Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945.
16. Nanak Chand v. Chandra Kishore Agganval, 1970 Cr.L.J. 522.
17. S.A. Kaiser v. Noor Sahan, 1980 Cr.L.J. 611.
18. Mohan ram v. Badamo Devi, 1974 Cr.L.J. 227.
19. Personal Laws provide these elements for a valid marriage.
20. Bali Narayan v. Shiddheswari 1981 Cr.L.J. 673.
21. T. 1999 (8) sc. 329.
22. Bar^c Tahira v. Ali Hussain FissalliChothia, AIR 1979 SC 362.
23. Zohra Khatoon v. Mohd. Ibrahim, AIR 1986 SC 587.
24. Section 125 (3) of Cr.PC. 1973.
25. 1980 Cr.L.J. 256.
26. AreefaBeevi v. Dr.K.M. Sahib, 1983 Cr.L.J. 412 (Ker).
27. 1987 Cr.L.J. p.977.
28. Section 125(1) of Cr.P.C. 1973.
29. Mukta v. Datta, AIR 1924 Bom 332.
30. Annapoomadew^c v. Satrugra, AIR 1960 Orissa 94.
31. Gurcharan Singh v. Sita, 1973 Cr.L.J. 1628.
32. Section 126 (1) of Cr.P.C. 1973.
33. Balan Nair v. Bhavam'AmmaValsamma, 1987 Cr.L.J. 399 (Ker.) F.B.
34. Kamla Devi v. Mehma Singh, 1989 Cr.L.J. 1866.
35. Section 126 (2) of Cr.P.C. 1973.
36. Balak Ram v. State, 1973 Cr.L.J. 750.