

Maintenance
of
Wives, Children and Parents

by
P. M. BAKSHI



Institute of Judicial Training & Research U.P.
1/19 Vishwas Khand,-1, Gomti Nagar,
LUCKNOW-226016

Publishers : Institute of Judicial Training & Research U.P.
1/19, Vishwas Khand,-1, Gounti Nagar,
LUCKNOW-226016

First Edition-1992

Copyright : Institute of Judicial Training & Research U.P.

Printers : U. P. Co-operative Federation Press
32, Station Road, Lucknow.

PREFACE

The conjugal pollution contaminates blood and breeds litigation amongst even the near and dear. The battles are fought, won or lost in courts, but their legal crafts elude the knowledge of many and most.

Mr. P. M. Bakshi, a known jurist, bridges over the gap with sensitivity and versatility so peculiar to his pen.

A. B. HAJELA

Director

Institute of Judicial Training & Research (U.P.)

LUCKNOW

Lucknow

Date : 27.3.1992

CONTENTS

1.1	Object of Section	—	3
1.2	Interpretation	—	3
1.3	Constitutionality	—	4
1.4	Persons entitled	—	4
1.5	Meaning of "Wife"	—	4
1.6	Minor wife.	—	6
1.7	Voidable marriage : pre-marital pregnancy	—	6
1.8	Validity of marriage disputed	—	6
1.9	Second wife	—	7
1.10	Maintenance of wife	—	8
1.11	Wife unable to maintain herself	—	8
1.12	Mention in application	—	10
1.13	Husband's income	—	10
1.14	Wife's private income	—	11
1.15	Inadequate dower	—	12
1.16	Factum of marriage	—	12
1.17	Proof of marriage	—	12
1.18	Muslim women	—	13
1.19	Living in adultery	—	14
1.20	Criminal and civil courts	—	14
1.21	Civil liability	—	15
1.22	Summary procedure	—	15
1.23	Preliminary inquiry	—	16
1.24	Divorced wife (Muslim).	—	16
1.25	Daughters' right on marriage	—	17
1.26	Lunacy Act	—	17
1.27	Personal Law	—	18
1.28	Order and its effect on Civil Court	—	18
1.29	Hindu Adoptions Act	—	18
1.30	Hindu Law	—	18
1.31	Muslim Law	—	19

1.32	Shariat Act	—	20
1.33	Agreements to defeat the Section	—	21
1.34	Agreement or decree, whether a bar	—	21
1.35	Earlier decree or order	—	22
1.36	Insolvency	—	23
1.37	Foreign decree	—	23
1.38	Cancellation by Civil Court	—	23
1.39	Fraud: Civil Suit.	—	24
1.40	Injunction by Civil Courts	—	24
1.41	Ex parte proceedings	—	24
1.42	Decree for conjugal rights or divorce	—	25
1.43	Allegations of adultery	—	25
1.44	Decree for restitution	—	25
1.45	Foreign divorce	—	26
1.46	Nature of the proceedings	—	27
1.47	Inquiry and dismissal	—	28
1.48	Nationality	—	28
1.49	Daughter	—	29
1.50	Persons who can be ordered: Joint family	—	29
1.51	Offer to maintain	—	30
1.52	Sufficiency of means	—	30
1.53	Neglects or refuses to maintain	—	33
1.54	Implied neglect	—	34
1.55	Child	—	34
1.56	Married daughters	—	34
1.57	Child unable to maintain itself	—	35
1.58	Legitimacy and paternity	—	36
1.59	Mother's ability	—	37
1.60	Liability of father	—	38
1.61	Child born after 7 months	—	38
1.62	Child of second wife	—	38
1.63	Parents	—	39
1.64	Daughter's duty	—	39
1.65	Meaning of maintenance	—	41

1.66	Education	—	41
1.67	Impotence	—	43
1.68	Affluent husband	—	44
1.69	Medical expenses	—	44
1.70	Amount of maintenance	—	45
1.71	Illegitimate child	—	46
1.72	Divorced wife and custody	—	46
1.73	Paternity	—	46
1.74	Unable to maintain	—	47
1.75	Tarwad	—	48
1.76	Father or mother	—	48
1.77	Adoptive mother	—	48
1.78	Offer to maintain children	—	48
1.79	Minor children	—	50
1.80	Propriety of custody	—	50
1.81	Children nearing majority	—	51
1.82	Mixed Award	—	52
1.83	Period	—	52
1.84	Conditional orders	—	52
1.85	Joint order	—	52
1.86	Payment in kind	—	53
1.87	Progressive increase	—	53
1.88	Discretion	—	53
1.89	Reasons for the order	—	53
1.90	Maximum amount - meaning of	—	54
1.92	Civil Courts	—	55
1.93	Amount payable to each	—	55
1.94	Additional maintenance by civil court	—	55
1.95	Proportion of one third	—	56
1.96	Separate sum for each claimant	—	56
1.97	Consent orders	—	56
1.98	Enforcing consent orders	—	57
1.99	Compromise with a concubine	—	58

1.100	Lump sum	— 59
1.101	Offer to maintain	— 59
1.102	Binding effect of compromise	— 60
1.103	Ex parte order	— 60
1.104	Contracting out	— 61
1.105	Incorporation of compromise	— 61
1.106	Living separately	— 61
1.107	Conditional compromise	— 61
1.108	Form of final order	— 62
1.109	Divorced wife	— 63
1.110	Statutory right of until severance	— 63
1.111	Magisterial order until severance	— 65
2.1	Sub-station (2) - effective date.	— 65
2.2	Duration	— 66
2.3	Interim orders	— 66
2.4	Death	— 67
2.5	Personal right	— 67
3.1	Section 125 (3) - enforcement of order	— 67
3.2	Sufficient cause	— 68
3.2A	Composite order and child's death	— 68
3.3	Non-payment	— 69
3.4	Insolvency	— 69
3.5	Salary	— 69
3.6	Period of imprisonment - warrant and Imprisonment	— 70
3.7	Independent power	— 71
3.8	Sub-section (3)	— 72
3.9	Starting point	— 72
3.10	Offer to maintain: Sub-section (3) Second proviso	— 73
3.11	Proviso applicable to whole section	— 73
3.12	Just ground and main application	— 75
3.13	Re-marriage	— 76

3.14	Decree for restitution	— 79
3.15	Inquiry into sufficiency of ground	— 81
3.16	Defence	— 82
3.17	Wife's living apart	— 83
3.18	Sub-section (3), Second proviso, Explanation (Second marriage)	— 85
3.19	Second marriage: Muslims	— 87
3.20	Personal Law	— 89
3.21	Second wife	— 91
3.22	What are not just grounds for living apart	— 91
3.23	Orders Importance	— 92
3.24	Orders under 1898 Code	— 92
3.25	Right of first wife	— 92
4.1	Section 125 (4)	— 94
4.2	Living in adultery	— 95
4.3	Desertion and adultery	— 97
4.4	Sufficient reason	— 98
4.5	Decree of divorce	— 99
5.1	Section 125 (5)	— 104
5.2	Cancellation of order	— 105
5.3	Plea of adultery when available	— 105
6.1	Second application	— 106
6.2	Remedy against orders (Revision)	— 107
6.3	Living in adultery	— 108
6.4	Legal assistance	— 108
6.5	Burden of proof and quantum of proof	— 109
6.6	Pleadings	— 109
6.7	Restoration of proceeding dismissed for default	— 110

EXTRACT FROM THE CODE OF CRIMINAL PROCEDURE
ORDER FOR MAINTENANCE OF WIVES,
CHILDREN AND PARENTS

125. *Order for maintenance of wives, children and parents—*

(1) If any person having sufficient means neglects or refuses to maintain—

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(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 of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the magistrate is satisfied that the husband of such minor female child, if married is not possessed of sufficient means.

*Explanation—*For the purposes of this Chapter:—

(a) "minor" means a person who under the provisions of the Indian Majority Act (19 of 1875) is deemed not to have attained his majority:

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

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

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's 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:

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

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

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

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

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

CHAPTER I

1.1. Object of section 125.

Section 125 is a measure of social justice, falling within the constitutional sweep of article 15 (3) of the Constitution, intended to protect the weaker sections like women and children: *Captain Ramesh Chander Kaushal v. Veena Kaushal*, A.I.R. 1978 S.C. 1807. The section has been described as a secular safeguard irrespective of the personal laws of the parties; *Fazlunbi v. K. Khader Vali*, A.I.R. 1980 S. C. 1730: (1980) 4 S.C.C. 125. The object of the section is to compel a man to perform the moral obligation which he owes to society, in respect of his wife and children, so that they are not left beggared and destituted on the scrapheap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence. The jurisdiction of the magistrate is preventive and not remedial. Certainly, it is not punitive.

The object of the section is to prevent destitution and vagrancy;

Parapatti, A.I.R. 1919 Mad 193; *Fakruddin*, I.L.R. 9 Bom 40; *Mt Kumli*, A.I.R. 1925 All 73; *Nagendranamma v. Ramkotayya*, A.I.R. 1954 Mad 714.

The section provides only a speedy remedy against starvation of a deserted wife or child. It is a summary procedure which does not cover entirely the same ground as the civil liability of a husband, father or son under his personal law to maintain his wife, child or parents. When substantial issues of civil law are raised, the remedy lies only in civil courts; *Kandaswami*, A.I.R. 1925 Mad. 346; *Ranchhoddas v Emp.* AIR 1949 Bom. 36.

1.2. Interpretation

Having a social purpose, section 125 and sister clauses must, in their interpretation, receive a compassionate expanse of the sense that the words permit; *Ramesh*, A.I.R. 1978 S.C. 1807; *Bai Tahira*, A.I.R. 1979 S.C. 362. In this "generous"

jurisdiction, a broader perception and appreciation of facts and their bearing must govern the verdict, not chopping little logic or tinkering with burden of proof. *Bai Tahira*, A.I.R. 1979 S.C. 362.

1.3. *Constitutionality*

Section 125 does not offend against article 14 or article 15 of the Constitution. It is intended to prevent the starvation of deserted wives and applies to all women; *Thamasi* AIR 1952 Mad. 529; *Gupteshwar v. Rani Peari*, AIR 1971, Pat. 181. (Section is meant for women's protection). The section is constitutionally valid. *Iqbal*, (1980)Cr.L.J. NOC 80 (All).

1.4. *Persons entitled*

Section 125 provides a swift and cheap remedy against any person who, despite sufficient means, neglects or refuses to maintain (a) his wife (which includes a woman *after, divorce* who has not remarried) [S. 125 (1) (a) and Expl. (b)] unable to maintain herself; (b) his minor child, legitimate or illegitimate, married or unmarried, unable to maintain itself, the liability in case of minor married daughter arising only when the husband is not possessed of sufficient means and until she becomes major; [S. 125 (1) (b)](c) his major child, legitimate or illegitimate (excepting married daughter), unable to maintain itself owing to any physical or mental abnormality or injury; [S. 125 (1) (c)] (d) his father or mother unable to maintain himself or herself. [S. 125(d)]. In all cases, emphasis has been laid on the "inability to maintain", because the primary object of the section is to prevent starvation and vagrancy.

A major married daughter has been wholly excluded from the operation of this section, as the responsibility of maintaining her should be on her husband.

1.5 *Meaning of "wife"*

Second wife whose marriage is void in view of sections

5 and 11 of the Hindu Marriage Act, 1955 is not entitled to claim maintenance. *Bajirao*, (1980) Cri.L.J. 473 (Bom.). Section 125 does not apply to a concubine or mistress. *Madhavan*, A.I.R. 1954 Mad. 513 (Somasundaram, J.).

In respect of a compromise entered into between the parties either before the filing of the application, or after the filing of the application under section 488 Code of Criminal Procedure, 1898 effect can be given only to that portion of it which can be enforced under that section. As, under section 488, a concubine or mistress cannot claim maintenance, therefore an agreement or a consent, by the person whose mistress the woman is, to pay maintenance cannot, be the subject of an order under section 488 Code of Criminal Procedure, 1898 *Madhavan v. Munir Begum*, A. I. R. 1954 Mad. 513 (Somasundaram, J.).

For proof of marriage under Muslim law, see *S. A. Kaisar*, (1980) Cri.L.J. 611 (Cal.).

The High Court of Gauhati has taken a more liberal view. A woman who comes in the lie of a man, gives herself to the man, takes the family life of the man and the man uses her as such, recognises her as his wife, must come within the fold of the term "wife" absence of ceremonial marriage notwithstanding. Acceptance of a woman as wife, declaration of the status directly or indirectly and acceptance of status by the woman are enough to bring her within the purview of section 125.

The girl was brought and kept in the house of the petitioner, the husband, as his wife for a few weeks, the village elders accepted her to be the wife of the petitioner. The recognition of the village elders that the girl was the wife of the petitioner was sanction and recognition of the society as to her marital status. Therefore, it could not be said that the marriage was not valid and the girl was not the wife of the petiti-

oner. *Boli Narayan Pawye v. Sidheswari Morang*, (1981) Cri. L. J. 674 (Gauhati) (K. Lahiri, J.).

1.6 *Minor wife.*

A Muslim wife who is 15 years old is entitled to apply under section 125 without a next friend. *Gulam Mustafa*, (1980) Cr. L. J. 125 (A. P.).

The term "wife" means only a legally wedded wife. A Hindu woman whose marriage is null and void under section 11 of the Hindu Marriage Act, 1955 for contravention of section 5 (i) of the Act (monogamy) is not entitled to maintenance. Above view was affirmed by the Supreme Court in *Yamunabai Anantrao Yadav v. Anantrao Shivram Yadav* (judgment dated 17 January, 1988), affirming *Yamunabai*, (1983) Cr. L. J. 259 (Bom.). Second wife's child is, however, eligible for maintenance under section 125. *Bakulabai v. Gangaram* (judgment of Supreme Court dated 27 January, 1988).

1.7. *Voidable marriage : pre-marital pregnancy.*

If the husband takes the plea that the marriage is voidable, because the pre-marital pregnancy of the wife had been concealed from him, the Magistrate cannot entertain such an objection. The husband should move the proper civil court to set aside the marriage. *Gabriel Antony v. Thressya Gracy*, (1987) Cr. L. J. 688 (Ker.).

1.8. *Validity of marriage disputed.*

The Karnataka High Court holds that if the opposite party disputes the validity of the marriage because of the violation of any of the three conditions referred to in clauses (i), (iv) and (v) of section 5 of the Hindu Marriage Act, the Magistrate should not sit like a civil court to decide such questions. At the same time, the Magistrate should not 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. 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 should award maintenance to the wife, leaving the husband to establish the invalidity of the marriage in a competent civil court. *Rudramma v. H. R. Puttaveerabhadrapa*, (1987) Cr. L. J. 677 (Karn.). It is submitted with respect, that this is not a sound approach. The inquiry may be summary. But the issue of legal validity cannot be totally avoided by the Magistrate.

1.9 Second wife.

A Hindu woman who has contracted a second marriage during the subsistence of her first marriage is not entitled to claim maintenance from the second husband as her marriage with him is void, in view of section 11 read with section 5 (1) of Hindu Marriage Act.

“Wife” contemplated in section 488 (1)* is the lawfully wedded wife and not any other woman, though she was living with another man as if she was his wife. When the term “wife” is used, it has to be taken as legitimate wife by reason of a valid marriage according to the law governing the parties. No “illegitimate” wife is given any such right to claim maintenance under section 488 (1)* of the Act. *Bai Bhanbai Mavji v. Kanbi Karshan Devraj*, A.I R. 1970 Guj. 137 (N. G. Shelat J.).

Marriage of Hindu husband solemnised with the second wife during continuance of his marriage with his former wife, is void on account of sections 5 (1) and 11 of the Hindu Marriage Act 1955. Second wife is not entitled to claim maintenance from her husband under section 488.*

It is well settled that a woman can claim maintenance under section 488,* only if she is a legally wedded wife of the man from whom she claims maintenance. The claim for maintenance under section 488,* however, has nothing to do

*Code of Criminal Procedure 1898

with the personal law and it entitles a lawfully married wife only to maintenance. *Naurang Singh Chuni Singh v. Sapla Devi*, A.I.R. 1968 All. 412 (R. Chandra and K. C. Puri JJ.).

1.10. *Maintenance of "wife"*.

"Wife" means a wife lawfully married according to the law governing the parties. *Bai Bhanbai Mavji v. Kanbi Karshan Devraj*, A.I.R. 1970 Guj. 137 (N.G. Shelat, J.); *Naurang*, A.I.R. 1968 All. 412. The expression may not apply if the marriage is void. (1981) Cr. L.J. 1433 (H.P.).

1.11. *Wife unable to maintain herself*.

The Supreme Court has held that the condition about wife's inability to maintain herself merely clarifies and makes explicit what was implicit earlier. *Bhagwan Dutt v Kamla Devi*, A.I.R. 1975 S.C. 83.

Wife's right to maintenance under section 488* is not absolute. In determining the amount, the Magistrate is competent to take into consideration the separate income and means of wife.

The mere fact that the language of section 488 (1)* does not expressly make the inability of a wife to maintain herself a condition precedent to the maintainability of her petition, does not imply that while determining her claim and fixing the amount of maintenance, the Magistrate is debarred from taking into consideration the wife's own separate income or means of support.

The object of the provisions of sections 488, 489 and 490* 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 needs and requirements of the wife for such moderate living can be fairly determined only if her separate income, also, is taken into account together with the earnings of the husband and his

*Code of Criminal Procedure 1898

commitments. *Bhagwan Dutt v. Kamla Devi*, A. I. R. 1975 S. C. 83.

Inability of the wife to maintain herself is a condition precedent to the maintainability of her petition for maintenance under section 488. Code of Criminal Procedure, 1898 Discretion has to be exercised on sound judicial principles, considering the equity of each case. Magistrates are competent to consider separate income and means of wife. *Sampoornam v. Arjunan*, (1975) Cri. L. J. 1456 (Mad.) (Ratnavelpandian, J.).

Section 125 has expressly provided that wife's inability to maintain herself is a condition precedent, without which the petition cannot be maintained. *Sampoornam*, (1975) Cri. L. J. 1466 (Mad.).

Under section 125 (1) (a), maintenance allowance cannot be granted to every wife who is neglected by husband or whose husband refuses to maintain her, but can only be granted to a wife who is unable to maintain herself. In the present case, be the wife has not mentioned in her petition that she is unable to maintain herself. In her statement also she did not say so. All that she said was that she was maintaining herself with some difficulty. This is not tantamount to her being unable to maintain herself.

In an Allahabad case the husband was keeping mistress at his house. Wife, living separate from husband, could not be said as living separately "by mutual consent" so as to operate as a bar to claim for maintenance allowance. *Bishambar Dass v. Anguri* (1978) Cr. L. J. 385 (All) (V. N. Varma J.).

If the wife is able bodied and possesses an earning potentiality, that does not necessarily mean that she is able to maintain herself. *Nirmala*, (1975) 17 G.L.R. 457, *Vimal*, (1978) Cr.L.J. 210 (Bom.).

The mere fact that the wife, who was normal in health and educated upto SSLC refused to her does not disentitle

her to maintenance though the fact may be taken into account in considering the quantum of maintenance. The terms of section 125 (1) (a) read with the explanation make this clear. *Abdul Munaf*, (1979) Cr.L.J. 172 (Kant.) (M.S. Nesargi, J.). A person may be able to earn, but there is no presumption that the earning would be sufficient for maintenance. *Ibid.* *Abdul Munaf*, (1979) Cr.L.J. 172 Kant. (M.S. Nesargi J.).

The husband is neglecting or refusing to maintain his wife, if he had been paying her something which is a mere pittance, something which is insufficient to maintain herself and which is inconsistent with her needs and also inconsistent with the income of her husband. *Daulatram*, (1978) Cr.L.J. 806 (A.P.). Impotency of the husband, though it may be a ground for divorce, does not amount to neglecting the wife. *Bundoo*, (1978) Cr.L.J. 1661 (AP).

1.12 *Mention in application.*

Wife must mention in her petition her inability to maintain herself —

- (a) according to the Allahabad view :
Bishambar Das v. Anguri, (1978) Cr.L.J. 385 (All.)
(V.N. Varma J.).

In another Single Judge ruling, Allahabad High Court has taken a different view. *Abdul Salim v. Najima Begum*, (1980) Cr.L.J. 233 (All.).

- (b) but not according to the Karnataka view,
Malen v. Baburao (1981) Cr.L.J. 184 (Karn.) (DB),
[overruling *Zubedabi v. Abdul Khader* (1978) Cr.L.J. 1555 (Karn)] and the Punjab view *Chanan Singh v. Jagir Kaur* (1983) H.L.R. 223 (DB) (P&H).

1.13 *Husband's income :—*

As the object of section 125 is to prevent vagrancy and destitution, it has to be found out what is required by the wife to maintain a standard of living which is neither luxur-

ious nor penurious, but is modestly consistent with the status of the family. The earnings of the husband and his capacity to earn and his commitments, are also relevant factors. *Raibari Behera v. Mangaraj Behera*, (1983) Cr. L. J. 125 (Ori.)

1.14 *Wife's private income.*

Under the old Code, it was held that it would be a wrong use of discretion to order maintenance when the wife had a private income sufficient to keep her from starvation or own income to maintain herself. *P. T. Ramankutty v. Kalyani Kutti*, A.I.R. 1971 Ker. 22; *Bhagwan Dutt v. Kamla Devi*, A.I.R. 1975 S. C. 83. Under the new Code, the Magistrate will have no power at all to order maintenance in such a case, as the wife is able to maintain herself. But a wife's petition cannot be dismissed, merely because she has relations or friends willing to maintain her. *Chanda* 16 Cr. L. J. 80. For the expression "unable to maintain herself" in the old and new Codes, see *Malen v. Baburao*, (1981) Cr. L. J. 184 (Kant.). The object of the provisions of sections 488, 489 and 490 (now sections 125 to 128) 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 needs and requirements of the wife for such moderate living can be fairly determined, only if her separate income also is taken into account together with the earnings of the husband and his commitments. *Bhagwan Dutt v. Kamla Devi*, A.I.R. 1975 S. C. 83; *Abdul Munaf*, (1979) Cr. L. J. 172 (Kant.); *G. Mariah*, (1979) Cr. L. J. 1226 (A. P.).

What is necessary is, that the wife herself should be in a position to maintain herself, not much below the status which she was used to, at her husband's place. *Abdul Salim v. Najima Begum*, (1980) Cr. L. J. 232 (All.). Standard of living

of the parties must also be taken into consideration. *Shakuntala v. Rattanlal*, (1981) Cr.L.J. 1420 (H.P.).

1.15 *Inadequate dower.*

Where Rs. 1100 was paid as mehar and maintenance was paid for *iddat* period and Rs. 60 p.m. paid to the son, husband getting not less than Rs. 450 p.m., the amount of mehar being too meagre, the wife was awarded maintenance at Rs. 90 p.m. after lapse of the *iddat* period (in addition to Rs. 60 p.m. to the son). *Kamarunisa v. Farid Gafur*, (1980) Cr.L.J. 1390 (Bom.) [*Bai Tahira*, A.I.R. 1979 S. C. 362 relied on]. See, however, now the Muslim Women (Protection of Rights on Divorce) Act.

1.16. *Factum of marriage.*

The existence and continuation of conjugal relationship [*Prakash v. Jaswant Kaur*, (1981) Cr.L.J. (NOC) 121 (P&H)] is the foundation of an order of maintenance [*Din Md.*, I.L.R. 5 (All.) 226, 229; *Janni Bibi v. Mohd. Abdul*, A.I.R. 1955 A.P. 1], along with the further key fact that the wife is unable to maintain herself. If the marriage is denied, it must be proved according to the personal law [*Gulabdas Bhaidas*, I.L.R. 16 Bom. 269; *Abdur Rahman*, I.L.R. 5 Cal. 558; *Behari*, I.L.R. 4 All. 128; *Lakshmi v. Andiammal*, A.I.R. 1938 Mad. 66] or custom. *Luddon Sohiba v. Mirza Kamar Kudar*, I.L.R. (1882) 8 Cal. 736; *Ramamija*, (1937) M.W.N. 735; *Bogis*, 34 Cr.L.J. 108.

1.17. *Proof of marriage.*

Where the factum of the marriage is disputed, the court can, and should decide the question, without leaving the woman to establish her status in a civil court. *Mangli*, A.I.R. 1932 Lah. 301; *Ganga Debi*, A.I.R. 1939 Lah. 24; *Mathura Rai v. Maracher Loer*, A.I.R. 1946 Pat. 176. Standard of proof of marriage need not be so high as in a proceeding under the Indian Divorce Act or sections 494, 495, 497 or 498, Indian Penal Code [*David*, A.I.R. 1953 Oudh 10; *Venajakshamma v. Gopala Krishna*, A.I.R. 1970 Mys. 305; *Mohit*, (1981) Cr.L.J.

(NOC) 48 (Cal.)] or in a prosecution for bigamy; *Sulekha*, (1981) Cr.L.J. (NOC) 40 (Ker.). When the marriage is established, maintenance should be awarded; if the legal validity of the marriage is questioned, it ought to be raised in a declaratory suit; *Sailendra*, 41 C.W.N. 898; *Palmarino*, A.I.R. 1927 Bom. 46; *Satish Ch.*, A.I.R. 1962 Tri. 61.

1.18 *Muslim Women*

Muslim wife's right to maintenance, conferred by section 125, is an additional right, independent of any right conferred by the Shariat Act. Hence the provisions of the Shariat Act cannot be imported in section 125 by invoking section 5 of the Code. Provisions of Shariat Act and section 125 are not inconsistent and can stand together.

Parties were living separately for several years and the husband was paying a paltry amount of Rs. 30/- p. m. to the wife. On the wife's filing an application for maintenance, divorce was pronounced by the husband. It was held that amount offered, and the subsequent conduct in pronouncing divorce, justified the conclusion of the court below, that the husband had refused and neglected to maintain the wife. *Lak Chanda Palkar v. Nyamatbi*, (1980) Cri.L.J. 1180 (Bom.) (Dharmadhikari and Bhonsale, JJ.).

However, the Muslim Women's (Protection of Rights on Divorce) Act, 1986 has made an important change in the entitlement of Muslim women to maintenance after divorce. Briefly speaking, by virtue of the Act, after the period of *iddat*, the remedy under section 125 ceases to be available against the husband, to the Muslim wife who has been divorced. Instead, she gets a substituted remedy against her own relatives, or failing them, against the Wakf Board.

However, the Gujarat High Court on a construction of the Act (and also having regard to the absence of a repeal clause) has taken the view in *Arab Ahomadbin Abdulla v. Arab*

Dail Mohmuna Saiyadbhan (1988) 24 Ind. Jud. Rep. Guj. 288 (M.B. Shah. J) 18 February, 1988) that Muslim Women are still entitled to claim maintenance from the husband even after the Iddat period under section 125 Cr. P. C. and that the Act of 1986 confers only additional rights.

1.19 *Living in adultery*

The expression 'is living in adultery' means shortly before or after the petition for maintenance.

While the words "is living in adultery" in sub-section (4) of section 125 Cr.P.C. would not take into its fold stray instances of lapses from virtue, it would not also mean that the wife should be living in adultery on the very date of the petition. The proper interpretation would be that there should be proof of adulterous living shortly before or after the petition, 'shortly' being interpreted in a reasonable manner, viewing it in the light of the facts of the case. In a Madras case, the petition claiming maintenance was filed on 28-5-75. There was proof regarding the petitioner's adulterous living with her husband's brother prior to the petition and as to the begetting of a child as a result thereof. There were proved the several letters written by the wife to the paramour (even subsequent to the petition), containing immoral thoughts and indicating that she continued to entertain carnal desire, expecting satisfaction in the company of her paramour. There was, however, no proof of any sexual act between them on the date of the petition or thereafter. It was held that in the circumstances, the wife had disentitled herself from claiming maintenance from the husband. *S. S. Manickam v Arputha Ehavani Rajam*, (1980) Cri. L. J. 354 (Mad) (Ratnavelu Pandian, J.)

1.20 *Criminal and civil courts*

Broadly stated, and as an abstract proposition, it is valid to assert, that a final determination of a civil right by a civil court must prevail against a like decision by a criminal court.

But this principle has no application to a case where, during the pendency of proceedings under section 125, Cr.P.C., a civil court passed an interim order of maintenance of the wife in proceedings for divorce by the husband. The reasons are (1) such a direction by the civil court is not a final determination under the Hindu Adoptions and Maintenance Act, 1956 but an order *pendente lite* under section 24, Hindu Marriage Act, 1955 and (2) the amount does not include the claim for maintenance of the children, although the order does advert to the fact that the wife and their custody. The Magistrate was, therefore, not in error in ignoring the civil court's order and had jurisdiction to award a higher maintenance for the wife and children. *Captain Ramesh Chander Kaushal v. Veena Kaushal*, AIR 1978 SC 1807 (Krishna Iyer & D.A.Desai, JJ.).

The Magistrate is not bound to make an order under sub-section (1) merely because the husband has not established any defences indicated by sub-section (4). The Magistrate's power to make an order is discretionary.

1.21. *Civil liability.*

Section 488 (Cr. P.C. 1898) provides only a speedy remedy against starvation for a deserted wife or child. It is only a summary procedure and does not cover entirely the same ground as the civil liability of a husband or father under his personal law to maintain his wife or child. When substantial issues of civil law are raised between the parties, their remedy lies only in the civil courts. *Mohd. Ali alias Barkat Ram*, AIR 1944 Lah. 392 (Blacker, J).

1.22. *Summary Procedure*

Section 125 provides a summary procedure. The findings recorded under the section are not final and the parties can agitate their rights in a civil court. *Nandlal Misra v. Kanhaiya Lal*, AIR 1960 S. C. 882; (1960) 3 S.C.R. 431. It is a distinct statutory right, independent of the right which the wife or child

(or now parents) may or may not have, under the personal law. *Luddon*, (1882) I.L.R. 8 Cal. 736; *Karivadan*, (1895), I.L.R. 19 Mad. 461; *Lingappa*, (1903) I. L. R. 27 Mad. 13; *Mad, Azizullah*. 36 Cr. L. J. 524. *Mg Tin*, I.L.R. 11 Rang 226 (FB); *Ranchhoddas Narottamdas v. Emp.* AIR 1949 Bom 36 (D.B). *Stella*, AIR 1966 Mad 225; *Nataraj:n*, AIR 1926 Mad 261; *Khurshid* (1976) Cr L. J. 1584 (Bom). The Shariat Act 1937 does not affect this right. *Isak Chanda v. Nyambathi* (1980) Cr LJ 1180 (DB) Bom. The section is valid. *Iqbal Ahmad v. Hafizan Bano* (1980) Cri L.J. NOC 80 AP.

1.23. Preliminary Inquiry

Section 488 *does not contemplate a preliminary enquiry before issuing a notice, but lays down that all evidence under that Chapter should be taken in the presence of the respondent or his pleader, indicating thereby that one enquiry only should be held after notice. Where on an application under section 488* by a child through her mother as guardian, for maintenance against the respondent on the allegation that he is his putative father, the magistrate before issuing notice to the respondent holds upon a preliminary inquiry by examining the mother guardian that he is not satisfied that the respondent is the father of the petitioner and rejects the application without sending notice to the respondent, the procedure adopted is illegal. *Nand Lal Misra v. Kanhaiya Lal Misra*, A. I. R. 1960 S. C. 882 (Subba Rao and J. C. Shah, JJ.).

1.24. Divorced Wife (Muslim)

By virtue of Explanation to section 125, a divorced wife has a right to claim maintenance so long as she does not get married again. According to the principles of Mohammedan Law, a divorced wife has a right to claim maintenance from her husband only upto the expiry of the period of iddat and not beyond that period. The additional benefits conferred under section 125 prevail over the benefits under personal law. The

*Code of Criminal Procedure, 1898

additional benefits do not at all conflict with the right, which she has under the Mohammedan Law. A statute can confer rights and benefits on persons, even though they happen to be more than what those persons are entitled to under their personal law.

A divorced wife is entitled to maintenance till such period as she chooses not to re-marry. Held, the period was likely to be long and hence the amount of maintenance to be fixed should not be such, as would tempt her to remain unmarried for a long time. *Umar Hayat Khan v. Mahaboobunnisa*, (1976) Cr.L.J. 395 (M. S. Nesarji, J.).

According to the Kerala High Court, to direct a person to give maintenance to his ex-wife divorced on the ground of adultery, is revolting to one's sense of justice, while, to deny maintenance to his ex-wife divorced on the ground of suffering from virulent disease, would be unjust. *Gopal Pillai*, (1978), K.L.T. 485.

1.25. *Daughter's right on marriage*

The right to maintenance under section 488* is a distinct statutory right, irrespective of the personal law of the parties. Consequently a daughter aged 15 years, does not *ip so facto* lose her right to maintenance under section 488*, upon her marriage. The real and only test is, whether that child is unable to maintain herself. It may be that her husband himself is a child or too poor to maintain her, in which case she would be entitled to maintenance. *Ranchhodas Narottamdas v. Emp.*, 1949 Bom 36 (Sen & Jahagirdar JJ.)

1.26. *Lunacy Act*

Lunacy Act, 1912 does not override the provisions of section 488*. It was held that the petition under section 488*, Code of Criminal Procedure, 1898, by a lunatic wife for maintenance, was proper and section 15 of Lunacy Act (4 of 1912)

*Code of Criminal Procedure, 1898

was not bar. *Rajalakshmi v. Kotandapani Pillai*, A.I.R. 1971 Mad. 149 (K. N. Mudaliyar, J.).

1.27. *Personal law.*

Neither personal law nor other salvatory plea will hold against the policy of public law pervading sections 125 and 127. *Fuzlumbi*, A. I. R. 1980 S. C. 1730: (1980) Cr. L. J. 1249.

1.28. *Order and its effect on civil court.*

Refusal to order maintenance under section 125 is no bar to a civil suit for it, *Ghana* I. L. R. 32 Cal. 479 and the decision in such a suit is binding on the criminal court. *Nafees Ara v. Arif Saadat Ali Khan*, A.I.R. 1963 All. 143.

1.29. *Hindu Adoptions and Maintenance Act*

Right of a Hindu wife to maintenance under section 125 is not excluded by sections 4 and 18 of the Hindu Adoptions and Maintenance Act. *Ram Singh v. State* AIR 1963 All 355.

1.30. *Hindu Law*

The right of maintenance under section 488, Cr. P.C. 1898 is a special right given under the Code. The mere fact that similar analogous remedy is available under the Hindu Adoptions and Maintenance Act in a civil court, does not take away the jurisdiction of the magistrate under section 488 to order maintenance to a Hindu wife.

The provisions of section 488* are by no means repugnant to any text, rule or interpretation of Hindu law or any custom or usage as part of that law, nor are they in any manner repugnant to, or inconsistent with, the provisions of Hindu Adoptions and Maintenance Act. Hence section 4 of that Act cannot override section 488 of Cr. P. C. *Ram Singh v. State*, AIR 1963 All 355 (Kailash Pasad J).

The Hindu Adoptions and Maintenance Act, 1956 does not repeal, or in any manner affect, the provisions of section

*Code of Criminal Procedure, 1898

488, Cr. P. C. 1898 (now section 125), as the scope of the two laws is different. *Nanakchand v. Chandra Kishore*, AIR 1970 S. C. 446.

1.31. *Muslim law*

That fact that the Muslim law makes no specific provision for granting or prohibiting the grant of maintenance to an illegitimate child against the father, does not lead to the inference that the criminal court or civil court has no jurisdiction to grant such maintenance. The provisions of the Cr. P.C. are part of the general law of the land.

In the absence of contrary provisions in the Muhammedan law, it is as binding on Muhammedans as on other citizens of this country. Therefore, apart from Mohammedan law, the illegitimate child has a right to grant of maintenance from the father. *Nafees Ara v. Asif Saadat Ali Khan*, A.I.R. 1963 All 143 (B. N. Nigam. J.).

Even by harmonising payments under personal and customary laws with the obligations under sections 125 to 127 of the Cr. P. C., the conclusion is clear that the liquidated sum paid at the time of divorce must be a reasonable and not an illusory amount and will release the quondam husband from the continuing liability only if the sum paid is realistically sufficient to maintain the ex-wife and salvage her from destitution. The payment of an amount, customary or otherwise, contemplated by the measure must inset the intent of preventing destitution and providing a sum which is more or less the present worth of the monthly maintenance allowances the divorcee may need until death or re-marriage overtakes her.

Indeed, dower (mehr) focusses on marital happiness and is an incident of connubial joy. Divorce is farthest from the thought of the bride and the bridegroom when the mehr is promised. Moreover, dower may be prompt and is payable during marriage and cannot, therefore, be a recompense for

divorce too distant and unpleasant for the bride and the bridegroom to envision on the nuptial bed. The language of section 127 (3) (b) appears to suggest that payment of the sum and the divorce should be essentially parts of the same transaction so as to make one the consideration for the other. However, the payment of money contemplated by section 127 (3) (b) should be so linked with the divorce as to become payable only in the event of the divorce. Mehr as understood in Mohammedan law cannot, under any circumstances, be considered as consideration for divorce or a payment made in lieu of loss of connubial relationship. *Fazlunbi v. K. Khader Vali*. (1980) Cr. L.J. 1249 : A.I.R. 1980 S. C. 1780 (Krishna Iyer, Chinnappa Reddy & A. P. Sen, JJ.)

1.32 Shariat Act

The Muslim personal law, viz., Shariat Act of 1937, does not lay down any special rule of criminal procedure, but merely lays down certain norms of rules as regards the applicability of Muslim personal law to Muslims. It cannot be disputed that the rights conferred by the Shariat Act would be enforced by the parties apart from the provisions of the Cr. P. C. Therefore, section 5 of the Cr. P. C. has no application to such a case. According to the provisions of the Mohammedan law, a divorced wife has got a right to claim maintenance only upto the expiry of the period of Iddat and not beyond that period; whereas section 125 of the Cr. P. C. has granted an additional right to a divorced Muslim woman for receiving maintenance allowance, even beyond the period of Iddat till such time as she has not married again after divorce. This additional benefit or right does not conflict with the right which is already conferred upon her under Muslim personal law. In these circumstances, the Shariat Act or any other personal law cannot control the said right, nor the provisions of the said Act can be imported into section 125 of the Cr. P. C. for defeating the right conferred by section 125. *Isak Chanda Palkar v. Nyamatbi* (1980) Cr. L.J. 1180 Bom D.B.

1.33 *Agreements to defeat the section*

The purpose of section 125 is not to recognise or create a right, as such, in favour of the wife. It is intended to ameliorate a social problem which concerns destitution or vagrancy. The primary object of section 125 is to prevent starvation and vagrancy of persons unable to maintain themselves. Thus, it is the public policy that a wife or child or father or mother, who is unable to maintain herself or himself should be paid maintenance by the husband or father concerned, if he can afford it. If he neglects to do so, he must be made to do it. It is a basic principle of law, that an agreement which is opposed to public policy, cannot be enforced in a court of law. If the object or consideration of an agreement would defeat the provisions of any law and if it is opposed to public policy, the agreement would be treated as unlawful and consequently void. Therefore, a clause in an agreement that the wife shall not be entitled to claim maintenance from the husband, cannot be used as a defence in proceedings under section 125. *Sadasivan Pillai v. Vijayalakshmi*, (1987) Cri. L.J. 755 (Ker.) (K. T. Thomas, J.).

Obligations under sections 125 and 127 being statutory, and being measures of social justice, no party can be permitted to contract himself out of such obligation. *Damodaran* (1979) K.L.T. 543.

1.34 *Agreement or decree, whether a bar.*

Existence of an agreement enforceable by civil suit is no bar to the award of maintenance. *Saraswati* (1932) 36 CWN 571; 33 Cri.L.J. 634. Nothing short of a decree of the civil court can bar the jurisdiction of the criminal court. *Saraswati*, (1932) 36 CWN 571; 33 Cr. L.J. 634, *Netram*, AIR 1949 Nag 337.

In Bombay, it has been held that even the mere existence of a decree of civil court awarding maintenance does not oust

the jurisdiction of the criminal court to make an order under section 125. In such a case, the Magistrate should make it clear that anything paid under the civil court decree will be taken into account against anything which he may order to be paid. *In re Taralakshmi Manuprasad*, AIR 1938 Bom. 499; 40 Cr. L. J. 91; (Beaumont & Sen J.J.), Compare AIR 1959 Punj 185. Existence of a decree for maintenance of a civil court does not bar the magistrate from entertaining a petition under section 125, according to the Madras view. *Linga Gounder v. Raman* (1978) Cri.L.J. 469 (Mad). See now a definite provision in section 127 (4).

A compromise between parties in proceedings under section 488, the order based on which has been declared to be unenforceable because it contains conditions other than for payment of a cash monthly allowance, does not oust the jurisdiction of the Magistrate to entertain and decide a second application under section 488*, even if a suit is brought on the basis of the compromise and is decreed.

Whether a particular compromise amounts to an agreement to live separately by mutual consent are not is a question of fact in each case. The words "mutual consent" as used in sub-section (4) of section 488 mean a consent on the part of the husband and wife to live apart, no matter what the circumstances may be. *Gurdial Kaur v. Jansingh*, A.I.R. 1959 Punj. 185 (S.B. Capoor, J.).

1.35 Earlier decree or order.

Existence of a decree for maintenance passed by a civil court does not bar the jurisdiction of a Magistrate to entertain a petition under section 125.

Civil Court's decree for maintenance was passed in 1970. Proceedings under section 125 took place in 1975. Quantum of maintenance could be fixed at a higher rate than what was granted in the decree. *Linga Gounder v. Raman* (1978) Cri.L.J. 469 (Mad.) (Natarajan, J.).

*Code of Criminal Procedure 1898

The existence of a previous order for alimony does not oust the jurisdiction to order maintenance under section 125. *Kent v. Kent* ILR 49 Mad. 891. A.I.R. 1926 Mad. 59. Section 44 of the Indian Divorce Act, 1869 does not entitle the court to make an order directing a party not to proceed with an application under section 125 in a criminal court. *Rowland*, A.I.R. 1959 Cal 703: 62 C.W.N. 221.

1.36 Insolvency :—

Where a decree for maintenance cannot be executed on account of the insolvency proceedings initiated by the husband, a magistrate can 4/5/25 Cr. P.C. pass an order for maintenance in *re Mohamed Ali Methaliar* 31 Cr L. J. 609, AIR 1930 Bom 144 cf. *Govinda Swami Mudaliar v. Muthulakshmi*. (1966) Cri. LJ 732 (Mad) and *Sathya Vathi v. Raju* (1979) Cri. LJ 114 NOC (Mad).

Maximum amount

Under section 488 of the Cr. P.C. 1898 a Magistrate could order a person to pay a monthly maintenance not exceeding Rs. 100 to each of the dependants, viz. wife and children. The words "in the whole" in the section do not mean that Rs. 100 is the maximum limit for all the dependants together, but mean "for all the kinds of expenses of each dependant." *Ramesh Chander v Veera Kaushal*, AIR 1978 SC 1807, 1810; *Ma Basir v Noor Jahan* (1971) Cri LJ 547, 551 (Cal) (Talukdar J); *Tulsi Das v Saraju Devi*, AIR 1933 Cal 406 (DB); *Prabhavati v Sumatllal*, AIR 1954 Bom 546 (DB).

1.37 Foreign decree.

An order for alimony for the wife passed by the Probate Court in England, which the wife is unable to execute against her husband, is no bar to the passing of an order under section 488 of the Cr.P.C. 898, *E.C. Kent v. E.E.L. Kent*, (1925) I. L. R. 49 Mad. 891; A. I. R. 1926 Mad. 59 (Devadoss J.)

1.38 Cancellation by civil courts.

A suit cannot be brought in a civil court for cancellation

of an order under section 125, *Subhadra*, I. L. R. 18 All 29; but a declaratory suit that the defendant is not his lawful wife or that the child is not of the plaintiff, is maintainable. *Deraje* I. L. R. 30 Mad. 400; *Md. Abid*, (1888) I. L. R. 14 Cal. 276; *Kailash*, A. L. R. 1914 Oudh 274; *Venkayya*, I. L. R. 36 Mad. 721. (As to fraud See infra)

1.39 *Fraud : civil suit.*

Validity of the order for maintenance can be questioned by civil suit on the ground of fraud. *Gouri*, A. I. R. 1970 All. 185.

1.40 *Injunction by city court*

A civil court cannot grant injunction restraining the magistrate from enforcing an order of maintenance. *Deruje* I.L.R. 30 Mad. 400. Civil court cannot, by injunction, restrain the wife from pursuing her application under section 125 when the husband has sued for restitution. *Krishna Govinda Chatterjee v. Kishoribala Devi*, 32 Ct. L.J. 232 : A.I.R. 1930 Cal. 753.

The Munsif court cannot grant such an injunction, for the injunction must be one to restrain the defendant from committing breach of contract or injury complained of, or or any breach of contract or relating to the same property or right. That does not cover an injunction restraining the defendant from proceeding with her application under section 488, Cr. P.C. *Krishna Govinda Chatterji v. Kishoribala Devi*, A I.R. 1930 Cal. 753 (Panckridge, J.).

1.41 *Ex parte proceedings.*

Where, during the pendency of divorce proceedings by the husband, the wife applies under section 125, and the husband fails to appear after service and fails to object, he cannot be allowed to raise the objection in revision. *Richard*, A.I.R. 1959 All. 489.

1.42. *Decree for conjugal rights or divorce.*

If, after a decree for restitution of conjugal rights is passed by a civil court, the husband so illtreats the wife that she is compelled to leave his house, the magistrate is justified in ordering maintenance in spite of the decree. *Rajpati v. Deoli*, (1924) I.L.R. 46 All. 877 (Boys, J.).

In November, 1922, R obtained a decree for restitution of conjugal rights against his wife D. Thirteen months afterward, R was found to be illtreating his wife, so much so, that she had to leave him, and she applied to a magistrate for an order for maintenance under section 488 of the Cr.P.C., 1898, which the magistrate granted, finding that the applicant was "quite justified in refusing to live with" her husband. It was held that the magistrate's order was a proper one and he could not be considered to be bound for an indefinite period by the decree of the civil court. *Rajpati v. Deoli*, (1924) I.L.R. 46 All. 877 (Boys, J.).

1.43 *Allegations of adultery.*

In a Lahore case, the trial court found that although, as a matter of law, a woman would not be entitled to an order under section 488, Cr. P.C., when a decree for restitution of conjugal rights was in force against her, yet as the husband was making unfounded allegations of adultery against her, and she was justified in refusing to live with him and she was, therefore, entitled to maintenance. The High Court held that in view of the history of the parties and precedent, the High Court would not interfere with the order of the Magistrate. The fact that the parties were Muhammedans and the husband could, if he wished to do so, divorce his wife, was another reason for upholding the order of the magistrate, *Sher Khan v. Mt. Bakhat Bohari*, 33 Cr.L.J. 748 (Lahore) (Harrison, J.).

1.44. *Decree for restitution.*

A more decree for restitution of conjugal rights in

favour of the husband does not automatically bar the wife from claiming maintenance under section 125, though the decree cannot be ignored. The magistrate has a discretion to decide, on the evidence adduced before him by the parties, whether the wife is entitled to maintenance, despite the fact that the husband has got a decree for restitution of conjugal rights.

In an Andhra Pradesh case, the evidence as to ill-treatment adduced by the wife, was accepted by the magistrate and by the Sessions Judge. Even after obtaining a decree for restitution of conjugal rights, the husband could not assure the wife that he would treat her with due respect. It was held that the discretion exercised by the magistrate in granting maintenance was not open to challenge. *Sayed Ghulam sajjad v. Parveen Fatima* (1981) Cr.L.J. NOC 2 (A.P.) (Ramachandran Røju, J.)

The mere institution of a suit for restitution of conjugal rights should not be enough to throw out the application of the wife. The magistrate ought to record a finding on the evidence as to whether the wife had been living apart by mutual consent and the remedy under section 488 was barred to her under section 488 (4) of the Code of 1898. *Sheopari v. Devi Prasad*, A.I.R. 1954 All. 21 (R. Singh, J).

1-45. *Foreign divorce*

The validity of a foreign judgment rendered in a civil proceeding must be determined in India on the terms of section 13, C.P.C. The judgment will be open to collateral attack on the grounds mentioned in section 13. It is beside the point that the validity of the judgment is questioned in a criminal court and not in a civil court. Thus, a foreign decree of divorce obtained by the husband from the Nevada State Court in U.S.A. in absence of the wife and without her submitting to its jurisdiction will not be valid and binding on a criminal court in proceedings for maintenance under section 488 Cr.P.C.

when it is found from the facts on record that the decree of divorce was obtained by fraud or by making a false representation as to a jurisdictional fact viz., that the husband was a bona fide resident and was domiciled in Nevada. The decree being open to collateral attack on the jurisdictional fact, the recital in the judgment of the Nevada court that the respondent was a bona fide resident of and domiciled in Nevada is not conclusive and can be contradicted by satisfactory proof. *Satya v. Teja Singh*, A. I. R. 1975 S. C. 105 (H. R. Khanna & Chandrachud, JJ).

1.46. *Nature of the proceedings.*

Proceedings under section 125 are of a civil nature, even though they are in a criminal court, [*Chanan Singh v. Jagir Kaur*, (1983) H.L.R. 223, 226 (P & H); *Nandlal v. Kanhaiya Lal*, A.I.R. 1960 S.C. 882; *Jagir Kaur*, A.I.R. 1963 S.C. 1521]; and the remedy is a summary one. *Jagir Kaur*, A.I.R. 1963 S.C. 1521. Application under section 125 is not a "complaint" as contemplated by the Code of Criminal Procedure. Verification of the application is not necessary. *Jugtamba Lal*, (1978)17 G.L.R. 335; *Pannammal*, I.L.R. 16 Mad. 234; *Ma Sow*, A.I.R. 1935 Rang. 277; *Jaswant, Singhji v. Kesuba*, 56 Bom. L. R. 819.

Proceedings under section 488, Cr. P. C., 1898 are not "complaints" and, hence, it is not legally necessary for the wife to be examined. *Nur Mohd. v. Mt. Hazran*, A.I.R. 1934 Lah. 946 (Addison, J.). But when a husband expresses his willingness to take back the wife and child, it is the duty of the magistrate to enquire from the wife about her reasons for not going back to her husband and failure to do so amounts to an illegality.

The mere fact that some three years ago, the husband beat the wife and turned her out is no reason for holding that the subsequent offer to take her back, was not bona fide. Unless the Magistrate finds that the offer is not bona fide or

that the reason given by the wife for not going back to her husband is sufficient, he should not make an order for maintenance. *Nur Mohd. v. Mt. Hajran*, (1934) 36 Cr. L. J. 792 (Lahore) (Addison, J.) : A.I.R. 1934 Lah. 946 (Addison, J.).

But, according to the Delhi High Court, the proceedings under section 488, Cr. P.C. are criminal proceedings for the purposes of article 134 of the Constitution, though the person in default, against whom maintenance order is sought, may not be an accused person whose examination without oath is mandatory as prescribed by section 342 of the Code and he may be entitled to appear as a witness as well.

Chapter 7 A of Vol. III of Rules and Orders of the Punjab High Court dealing with the maintenance cases also recites that proceedings under section 488 of the Code of Criminal procedure are of a criminal character and the provisions contained therein must, therefore, be strictly followed. The expression "criminal proceedings" in article 134 of the Constitution is wide enough to include maintenance proceedings adjudicated upon by the magistrates initiated under Chapter 36. Such maintenance proceedings are criminal proceedings. *Harbhajan Kaur v. Major Sant Singh*, A. I. R. 1969 Delhi 298 (I. D. Dua, C. J.).

1.47. *Inquiry and dismissal*

The opposite party in a proceeding for maintenance is not an "accused" *Mehr Khan*, 29 Cr. L.J. 1002 ; *Parbati*, 1 Cr. L.J., 865. It cannot be dismissed for want of process-fees. *Ponnammal*, I. L. R. 16 Mad. 234. The opposite party may give evidence on his behalf. *Rozario*, I. L. R. 18 Bom 468. The inquiry should be made by the magistrate himself. *Bibi Zainab, v. Anwar Khan*, A.I.R. 1946 Pat, 104 (Pande, J.). It cannot be referred for inquiry under section 202, Cr. P. C., 1898. *Makhan*, 29 Cr. L.J. 909.

1.48. *Nationality and Religion*

The right to maintenance conferred by section 125 is

irrespective of the nationality or creed of the parties. *Luddon*, (1882) I.L.R. 8 Cal. 736 ; *Din Md.*, I.L.R. 5 All. 226, A Hindu husband converted to Islam continues under an obligation to maintain his wife and children. *M. A. Rahaman*, (1979) M.L.J. (Cr. 638).

A Hindu not divided from his father can be ordered to maintain his wife under section 488 of the Code of Criminal Procedure, 1898 (present section 125). *Q. E. Ramasami*, 1889 I.L.R. 13 Mad. 17 (Collins, C. J. & Parker, J.).

Where the husband is the member of a joint Hindu family and is represented by his father in proceedings under section 488, though the magistrate has to consider the property of the family in determining what sum he should award the wife for maintenance, the order should be passed against the husband himself and not against the joint family. A wife, however, cannot be deprived of her right to maintenance, nor can she be debarred from obtaining an order of maintenance nor can she be deprived of her right to enforce the order, even if necessary, by an order sentencing the husband to imprisonment for failure to pay maintenance, merely on the ground that the husband is a member of a joint Hindu family. *Hemibai v. Kundibai*, A.I.R. 1940 Sind 222 (Davis, C. J. and Lobo, J.).

1.49. *Daughter*

The liability to provide maintenance to father and mother is that of the son, and not of the daughter. *Rajkumari*, (1978) Cr. L. J. 500 (P & H). See, however, the later Supreme Court judgment relating to daughter, which overrules this view.

1.50. *Persons who can be ordered: joint family*

Maintenance order cannot be passed against the father-in-law or against any other member of the joint family. *Waryam*, 15 Cr.L.J. 1577; *Sohna*, A.I.R. 1931 Lah. 532.

An order of maintenance of a wife under section 488,

Cr.P.C., 1898 cannot be passed against the father of the husband. *Ghulam Mohammad v. Ghulam Fatima*, (1928) 30 Cr.L.J. 135 (Lahore) (Jai Lal, J.).

1.51. *Offer to maintain is filed.*

The first and second proviso to Sub-section (3) is also a proviso to sub-section (1). So, if, in an application under sub-section (1), there is an offer to maintain the wife, then her refusal to live with the husband on any alleged just ground, or on the ground of another marriage or the keeping of a mistress [sub-section (3), second proviso, Explanation] has also to be considered before awarding maintenance under sub-section (1). It is not that the matters referred to in the first and second proviso to sub-section (3) have to be considered only when the maintenance order is enforced under sub-section (3).

Once refusal or neglect to maintain in the past is proved, an offer by the husband at the trial to maintain in future does not oust the jurisdiction of the magistrate to make an order for maintenance, *Kent*, I.L.R. 49 Mad. 891; *Sasoon*, I.L.R. 49 Bom. 562; *Sarfaraz*, 29 Cr.L.J. 1052; *Zahura*, 32 Cr.L.J. 247; see, however, *Sardar*, 18 Cr.L.J. 811; *Sultan*, 27 Cr. L.J. 1319. See now section 125 (3), second proviso.

1.52. *Sufficiency of means*

'Means' does not signify only visible means. It includes earning capacity. If one is healthy and able-bodied, one must be held to have 'means' to support his wife. *Mwing Tin, v. M. Hamin*, A.I.R. 1933 Rang. 138, 140 (FB); *U. Thiri v. Ma Pwa Yi*, 24 Cr. L.J. 368 : A.I.R. 1923 Rang. 131 : *Dhaniram v. Ram Das*, A.I.R. 1955 All. 320 (Asthana, J.) ; *Nirmala*, (1976) 17 G.L.R. 457. "Means" includes capacity to earn. *Ganga Devi*, A.I.R. 1933 Lah. 24; *Muni*, I.L.R. 56 Bom. 260; *Md. Basir v. Noor Jehan*, (1971) Cr.L.R. 547 (Cal.); *Shyama Charan v. Anguri Devi*, A.I.R. 1938 All. 253; *Kandaswami v. Angammal*, A I.R. 1960 Mad. 348, 349.

The ability of the wife to maintain herself was not intended by the legislature to deprive her of the right of maintenance conferred by section 488, if she is otherwise found entitled to it. The use of the word "may" in the context does not confer an absolute discretion on the court to refuse to the wife maintenance, if she has otherwise brought her case within the purview of the section. But even if the power conferred on the Magistrate be assumed to be discretionary, the discretion has to be exercised on sound judicial principles, considering the exquities of each case.

There is no rigid rule of law that the only right which a wife possesses under section 488, Cr. P.C. is to claim just subsistence allowance which should merely provide bare food, residence and raiment, and that also only if she has not other means or source. *Joginder Singh v. Bibi Raj Mohinder Kaur*, A.I.R. 1960 Punj. 249 (I. D. Dua, J.).

A man, by merely professing to be a monk, cannot rid himself of the obligation of maintaining. *Muni Kantivijayji*, I L R 56 Bom. 262 (Beaumont, C.J.). The onus is on the husband or the father (i.e. the opposite party) to show want of means *Me Tha v. Niga San* 13 Cr. L.J. 162 quoted by Page CJ in *Maung Thin v. Hmin*, AIR 1938 Rang 138, 140 (FB).

The possession of property is not at all the criterion for awarding maintenance under section 488. It is independent of possession of property. So long as a man is able-bodied and can work and earn his livelihood, it is his duty to support his wife. Therefore, notwithstanding the fact that a husband may be an insolvent or a professional beggar or a minor or is a Sadhu or a monk. He must support his wife, so long as he is able-bodied and can eke out his livelihood and support his wife. In fact, even under the Hindu law, the obligation which attaches from the moment of marriage is independent of the possession of property. *Kandaswami Moopan v. Angammal*, A. I. R. 1960 Mad 348 (Ramaswami, J). Contrast sections 24 and 25 Hindu Marriage Act 1955 which speak of

the "income" *Dev Raj v. Harnit Kaur* (1981) H L R 416, 417 (PH).

An able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and children, 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 the family standard. 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. When the husband does not disclose to the court, the exact amount of his income, the presumption will be easily permissible against him.

It is permissible to the court to make an order of maintenance even if the husband offers to maintain his wife on the condition of her living with him, if the court is satisfied that there is a just ground for doing so. A wife has just ground for declining to stay with the husband if he has no scruple in making a false accusation of adultery against her not it is supported by any evidence. *Chander Parkash Bodh Raj v. Shila Rani Chander Parkash*, A.I.R. 1968 Del. 174 (I. D. Dua, C. J.).

The words "sufficient means" should not be confined to the actual pecuniary resource, but should have reference to the earning capacity. The husband was a vigorous man in the prime of life and was able to earn sufficient if he wishes. *Abdul Wahab v. Mt. Sugrabi*, (1934) 37 Cr. L. J. 86 (Griver A. J. C.)

A man by merely becoming a Sadhu is not in law excused from maintaining his wife, but if he can prove that by reason of the vows which he has taken he is incapable of holding any property or earning any money which will enable him to maintain his wife, without incurring such serious consequences that no court could expect him to incur them, then he cannot be said to have sufficient means to maintain his wife.

The word "means" includes a capacity to earn money; and if a man can be shown to be capable of earning money then he has the means to maintain his wife within the meaning of the section. *Muni Kantvijayji v. Lilawati*, I. L. R. 56 Bom. 260 (Beaumont, C. J.)

Section 488, (1898 code) provides only a speedy remedy against starvation for a deserted wife or child. It is only a summary procedure and does not cover entirely the same ground as the civil liability of a husband or father under his personal law to maintain his wife or child. When substantial issues of civil law are raised between the parties, their remedy lies only in the civil courts.

"Means" in section 488 includes capacity to earn, but the capacity of a middle aged man who has lost his employment on account of ill-health can hardly be considered to be very great. *Mohd. Ali v. Sakina Begum*, A. I. R. 1944 Lah, 392 (Paker J.).

The husband's indebtedness is no ground for dismissing the wife's application for maintenance. *Valliammai Ammal v. Dharmalinga Muthirian*, A. I. R. 1941 Mad. 762 (2) (Lakshmana Rao, J.).

1.53. *Neglects or refuses to maintain.*

Section 125 requires, as a *sine qua non* for its application, neglect by the husband or father to maintain the wife or child. *Bai Tahira v. Ali*, A. I. R. 1979 S. C. 361; (1980) H. L. R. 766. Neglect or refusal to maintain is the first essential to be proved, in order to get maintenance. *Sita*, A. I. R. 1920 Lah. 886; *Intazar*, A. I. R. 1925 Oudh 294; *Graham*, A. I. R. 1925 Rang. 205.

An order for maintenance cannot be made unless it is proved that the husband neglects or refuses to maintain his wife or child as the case may be. A wife refusing without any sufficient reason to live with her husband, is not at all entitled to receive any allowance. After the wife's petition for maintenance, the husband and wife had entered into a compromise,

by which both had agreed to live together and the husband had, on the condition of his providing a residence for the wife, undertaken to properly maintain and feed her or to give Rs. 5 monthly as maintenance. It cannot, in any circumstances be said that the husband was neglecting or refusing to maintain the wife and therefore the only proper order that the Magistrate can make was to dismiss the petition. *Roshan Bano v. Azim*, A.I.R. 1943 Lah. 59 (Din Mohammad and Blacker, JJ.).

A wife refusing without any sufficient reason to live with her husband is not at all entitled to receive any allowance under the Code. The husband and wife had entered into a compromise, by which both had agreed to live together; and the husband, on condition of his providing a residence for the wife, had undertaken to properly maintain and feed her or to give Rs. 5/- monthly as maintenance. It cannot, in any circumstance, be said that the husband was "neglecting or refusing to maintain" the wife. The only proper order that the Magistrate can make, is to dismiss the petition in such circumstances. *Roshan Bano v. Azim*, A.I.R. 1943 Lah. 59 (Din Mohammad and Blacker, JJ.).

1.54. *Implied neglect.*

Neglect or refusal to maintain may be express or implied. *Bhikaji*, 5 Cr. L. J. 33.

1.55 *Child*

A father is liable to maintain his child, legitimate or illegitimate. Under the new Code, only minor children unable to maintain themselves would be entitled and in the case of major children only those who, through some mental or physical defect or injury are unable to maintain themselves will get the benefit of this section,

1.56 *Married Daughters*

As regards married daughters, a minor daughter, as long as she remains minor and her husband is not possessed of

sufficient means, may also get the benefit. But a major married daughter will be wholly debarred from getting the benefit as the responsibility of maintaining her will be on her husband. Hence the old conflict of laws as to whether "child" means only a minor child or means any issue irrespective of age has now been settled.

1.57 *Child unable to maintain itself*

The High Court of Allahabad has held that in determining whether the child is unable to maintain itself, regard must be had to the particular circumstances of each family and its status. *Abdul Hai Quadir Bux v. Kazra Sikander*, A I R 1965 All 125.

The operation of section 125 does not depend on personal law and accordingly, the Allahabad High Court has held that the fact that there is no provision in Muslim Law does not debar relief under section 125. *Nafeez Ara v. Asif Sadat Ali Khan*, AIR 1963 All 143.

1.57 "Child unable to maintain itself"

A father is liable to maintain his child, legitimate or illegitimate. Under the new Code, only minor children unable to maintain themselves would come under this section and, in the case of major children, only those who, through some mental or physical defect or injury, are unable to maintain themselves, will get the benefit of this section. As regards married daughters, a minor daughter, as long as she remains minor and if her husband is not possessed of sufficient means, may also get the benefit, but a major married daughter will be wholly debarred from getting the benefit, as the responsibility of maintaining her will be on her husband. Hence the old conflict of rulings as to whether "child" in the section means only a minor child or also covers an adult no longer survives. For the old law, see *Nanakehand* AIR 1969 Del 235, on appeal, AIR 1970 SC 446.

It has been held that to find inability to maintain, regard

must be had to particular circumstances obtaining in each family and its status. *Abdul Hai v. Arza Sikandar*, A.I.R. 1965 All. 125. The fact that the mother who has custody of the child has sufficient means, is of no avail. The father must still pay maintenance. *Mascreen*, A.I.R. 1956 Mad. 154.

The absence of any provision in Muslim law to maintain an illegitimate child is no bar to the application under section 125. *Nafees Ara*, A. I. R. 1963 All. 143. In the case of a legitimate child, marriage should be proved. The conclusive presumption of legitimacy under section 112, Evidence Act applies, unless it is displaced by proof of non-access. *Janamma*, A.I.R. 1959 Ker. 366; *Raghavan*, A.I.R. 1960 Ker. 119. When a wife is driven away by her husband on the discovery of pregnancy soon after marriage and a child is born, she can apply for maintenance against its putative father, because the basis of the claim is paternity, and not legitimacy. *Abdul Rahiman Kutty v. Ayesha*, A.I.R. 1960 Ker. 101. For proof of paternity of an illegitimate child, see *Sulekha*, (1981) Cr. L.J. (NOC) 40 (Ker.). Claim for maintenance cannot be negatived merely on the ground that the divorce deed absolved the husband from liability to maintain his child. *Janamma*, A.I.R. 1959 Ker. 366.

The basis of an application for maintenance of a child is its paternity, irrespective of legitimacy or illegitimacy. *Nur Md.*, I.L.R. 16 Cal. 781. Where a child was born 5 months after the wife's elopement, then in the absence of any material that any other person had any access to the woman, the child is entitled to maintenance. *Boli Narayan*, (1981) Cr.L.J. 674 (Gau.) 1.58. *Legitimacy and paternity.*

In the case of a child claiming as a legitimate child, marriage should be proved. But the conclusive presumption of legitimacy under section 112, Evidence Act applies, unless it is displaced by proof of non-access, *Janamma v. Kuttappa*, A.I.R. 1959 Ker. 366, 367 para 3, *Raghavan Pillai*, A.I.R. 1960

Ker. 119. *Krishnappa v. Venkatappa*, A. I. R. 1943 Mad. 632 (Chandra Sekhara Ayyar J.) When a wife is driven away by her husband on the discovery of pregnancy a few days after marriage, and a child is born within 4 months as a result of her sexual intercourse with another person, she can apply for maintenance for the child against its putative father. *Abdul Rahimankutty v. Ayesha Bevi*, A I.R. 1960 Ker. 101, para 67. claim for maintenance of a child cannot be negated, merely on the ground that the divorce deed had absolved the husband from liability to maintain his child. *Janamma v. Kuttappa*, A.I.R. 1959 Ker. 366, 367, para 3 (Koshi CJ).

Where a married woman applies against a third person for the maintenance of her child, paternity of the child must be proved. *Rajibai v. Mo'ammad Nathar*, A. I. R. 1942 Mad. 251, 252.

1.59 *Mother's ability.*

The father is bound to maintain the child even though its mother may be able to maintain. *Mi Thein*, 15 Cr. L.J. 1278. A girl earning her living by prostitution is "unable to maintain herself", as prostitution cannot be treated as a profession. *Krishnaswamy*, I. L. R. 37 Mad 565. The fact that the mother has separate earnings of her own, is of no relevance, according to the Kerala High Court. *C. M. Mani*, (1981) Cr. L.J. (NOC) 76 (Ker)

The fact that the mother, who has custody of the child, has sufficient means, is of no avail and the father must still pay maintenance to the child if the conditions of section 125 are satisfied. *H. J. Mascreeen v. Dr. Mrs. R. K. Mascreeen*. AIR 1956 Mad 154

A divorced wife entitled to the custody of her children is entitled to get their maintenance. *Ayshabai*, 6 Bom L. R. 536; *Allah Rakhi v. Karn Ilam*, I.L.R. 14 Lah 770. Adoptive father is not liable to pay maintenance to the adoptive child. *Nanu*, AIR 1937 Mad 547; *Ma E.* AIR 1937 Rang 370.

1.60 *Liability of father*

As to the liability of the father to maintain a child when the child belongs to a tarwad, see *Parathi*, 14 Cr L. J. 597; *Raman*, 34 Cr L.J. 1159; *Chanta*, I. L. R. 39 Mad 957; *Thillu*, 20 Cr L. J. 733.

1.61 *Child born after 7 months*

In a case decided by the Supreme Court, the husband and the wife were close relations and were not strangers before marriage. Their marriage lasted only for about 17 months. Then the husband divorced his wife. However, when the parties were in wedlock, the appellant wife delivered a female child. The child was born in 7 months time from the date of marriage. The wife did not allege that the child was prematurely born. The child birth took place in the house of the husband. The husband did not divorce the wife immediately after the child birth, or even two or three months later, but he divorced her only after 10 months. The wife filed a claim for maintenance for the child. The husband refuted his liability to provide maintenance to the child, on the ground that he was not the father of the child and that the child had been conceived before marriage. It was held that on the sole ground that the child had been born in about 7 months time after the marriage, it could not be concluded that the child could have been conceived before the marriage. Giving birth to a viable child after 28 weeks duration of pregnancy is not biologically an improbable or impossible event. The refusal of the claim for maintenance for the child was therefore improper. The wife was a rustic and illiterate woman and, as such, her opinion that the child was not born prematurely, could suffer from error of judgment. *Dukhtar Jahan v. Mohammed Farooq*, (1987) Cr L. J. 849: AIR 1987 S. C. 1049.

1.62 *Child of second wife.*

Child of second wife, even if illegitimate, can claim

maintenance under section 125. *Bakulabai v Gangaram* (SG) (Judgment dated 27 January, 1988).

1.63 Parents

A step-mother cannot claim maintenance from her step-son. *Ramabai*, (1976) Mah L.J. 565 *A. S. V. Prasad Ram*, (1989) Cr L.J. 673 AP 256. But the Gujarat High Court holds, that the word "mother" includes a woman who has the status of a step-mother by reason of lawful marriage with father. *Horobin*, (1978) 19 G. L. R. 237. The word "mother" includes adoptive mother. *Baban*, (1978) Cr L. J. 1436. Claim of maintenance by the father against children is not dependent on his having discharged parental obligations during the childhood of the children. *Pandurang*, (1980) Cr L. J. 256 (Bom). A married daughter must maintain her indigent father. *Dr Mrs Vija, a Arbat*, AIR 1987 SC 1100.

1.64 Daughter's duty

There can be no doubt that it is the moral obligation of a son or a daughter to maintain his or her parents. It is not desirable that even though a son or a daughter has sufficient means, his or her parents should strave. A part from any law, the Indian society casts a duty on the children of a person to maintain their parents if they are not in a position to maintain themselves. It is also their duty to look after their parents, when they become old and infirm.

It is true that section 125 (1) (d), Cr. P. C. has used the expression "his father or mother". But the use of the word "his" does not exclude the parents claiming maintenance from their daughter. In view of the provisions of section 2 (j) of Cr. P. C. read with section 8 of the Penal Code and section 13 (1) of the General Clauses Act, the pronoun 'his' as used in clause (d) of section 125 (1), Cr. P. C. includes both a male and a female. In other words, the parents will be entitled to claim maintenance against their daughter provided, however, the

other conditions as mentioned in the section are fulfilled. *Dr. Mrs. Vijaya Manohar Arbat v. Kashirao Rajaram Sawai*, A.I.R. 1987 S.C, 1100 (June) (G.L. Oza and M.M. Dutt, JJ.). Daughter is bound to maintain poor father. *M. Aneefa*, (1983) Cr. L. J. 412 (Ker.).

When an order of maintenance is passed against any one under section 125, it is not intended to punish that person for the past neglect or failure to maintain. The object is merely to prevent the starvation of the person in whose favour the order is passed. The procedure has been simplified under section 125 so that the cumbersome procedure that has necessarily to be followed in enforcing a civil right of maintenance may be avoided. The jurisdiction of the criminal court being summary in nature, is independent of and auxiliary to that of the civil court. The parent who is unable to maintain himself or herself and who has a child, who has means, can resort to the above section for securing maintenance. The liability of a son to pay maintenance under the above provision is distinct from and independent of the liability of the other children in the family to maintain the parents. It cannot, therefore, be accepted as a proposition of law that unless all the children are made parties in a claim for maintenance by the parent, the latter would not be entitled for an order of maintenance. *A. Ahathinamiligai v. Arumugham*, 1988 Cr.L.J. 6 (Feb.).

Though section 125 benefits a distressed father also, main thrust of the provision is to assist women and children in distress. That is fully consistent with article 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. Article 39 of the Constitution also can be taken note of which states, inter alia, that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right 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. *Balan Nair v. Bhavani Amma Valsamma*, (1988) Cr.L.J. 399 (Ker.) (FB) (Feb.).

1.65. *Meaning of maintenance.*

Some cases held that "maintenance" means bare subsistence i.e. food, clothing and lodging. *Nqa Hla*, 11 Cr. L. J. 40 *Md. Ali*, AIR 1944 Lah. 392; *Md. Ali*, AIR 1944 Lah. 392. The other view was, that in a civilised State, mere maintenance of the body is not sufficient, provision has also to be made for the education of child. *Mg. Sher*, 40 Cr.L.J. 440. *Tekchand*, A.I.R. 1941 Sind 214; *Purnasashi v. Nagendranath* A.I.R. 1950 Cal. 465 (DB).

1.66 *Education*

The 'educational expenses' of a child do not come within the terms 'maintenance' as used in section 488, Cr P.C. according to Allahabad view. The object of proceedings for maintenance is to prevent vagrancy, and that object is attained by the provision of lodging, food and clothing. A husband is bound to 'maintain' his wife but he is not bound to do supply her with any thing more than the lodging, fooding and clothing, *Kumli v Emp* (1924) 25 Cri LJ 1249 (All) (Boys J)

The father is bound to maintain a child, if he is not able to maintain himself. But if the child wants to better his prospects by staying on in school, he has no right to force his father to comply with his wishes. *Abdul Rahim v Shwe May*, AIR 1923 Rang 45 (1) (Maung Kin J). But see the contrary view in *Shanno Devi* 35 Cr L.J 473. (Lah.)

A boy below 18 years of age can be considered a child so long as he is not able to maintain himself. A boy can ask for maintenance from his parent, so long as he is unable to

earn his own living, even though that inability results from his taking an educational course, provided the said education course is not being under-gone with the object of enhancement of the burden of maintenance upon the parents.

The parties to a maintenance order can always move the Magistrate again, when there is a change of circumstances. *Shanno Devi v Daya Ram* (1933) 35 Cr L.J 473 (Lah) (Addeson J).

In a wife's application for maintenance under section 488 of the Cr. P.C., 1898 the husband offered maintenance in his house, provided she lived in a separate room and did not associate herself with the other family members. The lower court up held the wife's refusal to accept maintenance on such conditions, and ordered the maintenance prayed for. It was held that section 488 of the Code had nothing to do with ordinary conjugal rights, as "maintenance" means nothing more than appropriate food, clothing and lodging, and that the wife had no sufficient grounds for refusing the offer, as she could not claim to be treated "as a wife" under section 488. Therefore, the order for payment of separate maintenance was not supportable and was set aside. *Arunadhala Ansari v Anandnyammal* (1933) ILR 56 Mad 913 (Burn J).

The ability of the wife to maintain herself was not intended by the legislature to deprive her of the right of maintenance conferred by the code 488, if she is otherwise found entitled to it. The use of the word "may" in the context, does not confer an absolute discretion on the court to refuse to the wife maintenance if she has otherwise brought her case within the purview of the section.

There is no rigid rule that the only right which a wife possesses is to claim just subsistence allowance which should merely provide bare food, residence and garments and that also only if she has no other means or source. *Joginder Singh v Bibi Raj Mohinder Kar*, AIR 1960 Pun 249 (I. D. Dua J).

When the law says "neglects or refuses to maintain", it cannot but mean "neglects or refuses to maintain *Properly*." Therefore, were a Magistrate finds that the maintenance which had been given by the husband is inadequate, he has jurisdiction to pass a proper order under section 488 (1).

It is not correct to say, that in no case can maintenance be thought to include anything more than food, clothing and lodging. Thus, the cost of ordinary education can, in the case of a middle class family, be considered to form part of maintenance. *Purnasashi Devi v. Nagendra Noth*, A I R 1950 Cal 465 (DB).

The purpose of the section is to prevent vagrancy, and there cannot be anything more likely to make a child a vagrant than that it should be merely clothed and fed and lodged and its mind to be *utterly* untrained. It must include board and lodging, boarding and lodging on such a scale as to enable a frugal thrifty mother to save sufficient for a simple and necessary education of her child. *Tekchand v. Kalavanti-bai*, AIR 1941 Sind 214 (Davis CJ and Weston J).

The concept of providing a wife merely with food, clothing and lodging as if she were only a chattel and has to depend on the sweet will and mercy of the husband, has now become completely outdated and absolutely archaic. *Siraj Mohmed Khan v Haprzunnissa* (1981) Cr L. J. 1430 (SC) (case of impotence) *Nanak Chand v Chander Kishor*, AIR 1969 Del 235 affirmed in AIR 1970 SC 446.

1.67 *Impotence*

Where it is proved to the satisfaction of the Court that a husband is impotent and is unable to discharge his marital obligations, this would amount to both legal and mental "cruelty" which would undoubtedly be a just ground as contemplated by the second proviso to section 125 (3) for the wife's refusal to live with her husband and the wife would be entitled to maintenance from her husband according to his means. In

these circumstances, therefore, it would be pusillanimous to ignore such a valuable safeguard which has been provided by the legislature to a neglected wife.

If the husband was impotent and unable to discharge his marital obligations, how could he fulfil the main object of marriage, more particularly, under the Mohamedan Law where marriage is a sacrosanct contract and not a purely religious ceremony as in the case of Hindu law? This would certainly be a very just and reasonable ground on the part of the wife for refusing to live with her husband, as also in the cases under the Hindu law or other laws. *Sirajmohmed Khan v. Hafizunnisa* 1981 Cri. L. J. 1430 (SC).

1.68. *Affluent husband.*

A husband who is in affluent circumstances, or who later become so, should pay maintenance in accordance with the status of the spouses. *Gangamma v. Subbararudu*, AIR 1951 AP 510. (Munikanniah J)

Costs for medical attendance for an invalid wife come within "maintenance" *Ramanathan, Chettiar v. Alamelu Archi*, AIR 1943 Mad. 342. See also *Raj Mohander* AIR 1960 Punj 254.

1.69. *Medical expenses.*

In the case of a wife who is admittedly an invalid and requires medical attention, it cannot be said that the expenses of a reasonable amount of medical attention appropriate to her status in life are not within the meaning of the word 'maintenance' as used in section 488. *N. K. Ramanathan Chettiar v. Alamelu Archi*, AIR 1943 Mad 342 (Byers, J.)

The word "maintenance" means the most reasonable requirements for the existence of a person to live separate. Reasonable amount for constant (i.e. recurring) medical expenses can be included, along with expenditure broadly on

food, nourishment, clothing and residence, *Ramanlal*, A.I.R. 1968 Guj. 171.

1.70. *Amount of maintenance.*

In determining the amount of maintenance, the necessities of life should be considered according to the station in life of the applicant and the means of the respondent. *Dragon*, 13 Cr. L. J. 55, Ma E, AIR 1937 Ranj. Amount of maintenance has to be fixed after taking into consideration all the circumstances of the case. *Ashish*, A.I.R. 1970 Delhi 98.

The fact of mentioning of Rs. 100 per month as the maximum amount of maintenance to be allowed shows that section 488 Cr. P. C, does not contemplate a mere maintenance for food, clothing, and lodging but the allowance to be governed by other considerations.

In awarding maintenance under section 488, Cr. P. C., Magistrates must award a reasonable amount taking into consideration the means of the person required to maintain the wife where the allowance is grossly inadequate. *Ma E. Mya v. Koko Gyi* A.I.R. 1937 Raug 370 (Mackney, J.).

Net earning of the husband should be taken into account in fixing the maintenance. *Tekchand*, A.I.R. 1941 Sind 214. Not only the needs of the applicant, but also the paying capacity and circumstances of the husband, should be considered. *Chameli v. Gajraj*, A. I. R. 1954 All. 33 (Randhir Singh, J.). Where the father earned Rs. 450 p m net, an amount of Rs. 150 p.m. for three children was held to be reasonable. *C.M. Mani v. Esther*, (1981) Cr. L. J. (NOC) 76 (Ker.) (U. L. Bhat, J.).

In an English case, on a summons taken out by a wife against her husband under the Summary Jurisdiction (Separation and Maintenance) Acts 1895 to 1949, the husband admitted that he was guilty of adultery and desertion an evidence was given that his average weekly earnings, were between £ 11.8s. & £ 12 16s. The Justices found that his basic wage, excluding over-

time pay, was between +9 and 10+ and, on that basis, awarded the wife the sum of +1.10.5 a week for her maintenance. It was held that in assessing the amount of maintenance, the justices ought to take into account, not merely the husband's basic wage, but also his *earning capacity*, and, to eliminate from their calculations overtime pay or the capacity to earn, was a misdirection in law. *Klucinski v. Klucinski* (1953) 1 All E.R. 683 (Lord Merriman, P. and Collingwood, J.).

Though a woman is of bad character, she is entitled to an order for maintenance of her illegitimate child, if she proves that the opposite party was the father. *Hiralal*, I.L.R. 18 All. 107, 108; *Lingappa*, I.L.R. 27 Mad. 13, 15. So, a wife living an unchaste life is entitled to maintenance for a child who is admittedly her husband's, *Muniamal*, A.I.R. 1943 Mad. 768.

1.72 *Divorced wife and custody*

A divorced wife entitled to the custody of her children is entitled to get their maintenance. *Ayshabal*, 6 Bom. L. R. 536; *Allah Rakhi*, I.L.R. 14 Lah. 779.

Adoptive father

Adoptive father is not liable to pay maintenance to adoptive child. *Nanu*, A.I.R. 1937 Mad. 547; *Ma E.*, A.I.R. 1937 Rang. 370.

1.73 *Paternity*

The burden of proving paternity is on the applicant. *Prasad*, A.I.R. 1941 Pat. 444. Although it may not always be prudent to accept the statement of the mother as to paternity without corroboration *Avedantachari*, A.I.R. 1926 Mad. 1130; *Prasae*, A.I.R. 1941 Pat. 444; *Thakur*, A.I.R. 1951 Pat. 514, there is no hard and fast rule as to corroboration of the mother's evidence. *Bathulu*, 41 Cr. L. J. 718.

Paternity test

The basis of an application for maintenance of a child

is its paternity, irrespective of its legitimacy or illegitimacy. *Nur Mohammad v. Bismullah*, (1889) I.L.R. 16 Cal. 781. *Wahad v. Kadiru*, 69 CWN 511. Where the child was born to a woman 5 months after elopement, in the absence of any material that any other person had any access to the woman, the child is entitled to maintenance; *Boli Narayan*, (1981) Cr.L.J. 674 (Gau). *Abdul Rahimankutty*, A.I.R. 1960 Ker. 101 Though a woman is of bad character, she is entitled to an order for maintenance for her illegitimate child, if she proves that the opposite party was the father. *Hiralal*, I.L.R. 18 All. 107, 108; *Lingappa*, I.L.R. 27 Mad. 13, 15. Hence a wife, even if living an unchaste life, is entitled to maintenance for a child who is admittedly her husband's. *Munniammal*, A.I.R. 1943 Mad. 768.

As to proof of paternity of illegitimate child, see *Sulekha*, (1981) Cr.L.J. (NOC) 40 (Ker.). Where a married woman applies against a third person for the maintenance of her child, paternity of the child must be proved. *Rajibai v. Nathar Mohammad*, A.I.R. 1942 Mad. 251, 252.

The burden of proving paternity of the child is on the applicant. *Prasad Gareri v. Kesari*, A. I. R. 1941 Pat. 444. It may not always be prudent to accept the statement of the mother as to paternity, without corroboration; *Prasad Gareri v. Kesari*, A.I.R. 1941 Pat. 444; *Thakur*, A.I.R. 1951 514. But there is no hard and fast rule as to the need for such corroboration; *Bathulu*, 41 Cr.L.J. 718. In the case of an application by a married woman against a third person for the maintenance of his child, paternity must be proved; *Rajibai v. Mohammad Nathar*, A.I.R. 1942 Mad. 251. Husband cannot be compelled to maintain a child about whom the wife herself says that it was not born of access by the husband. *K. P. Pothumma*, (1985) Cri. L. J. 219 (Ker.).

1.74 Unable to maintain

Proof is required in the case of an application by a

married woman against a third person for maintenance of his child. *Rajbai*, A.I.R. 1942 Mad. 251. The father is bound to maintain the child, even, though its mother may be liable to maintain. *Mi Thein*, 15 Cr. L. J. 278. A girl earning by prostitution is "unable to maintain herself", as prostitution cannot be treated as a profession. *Krishnasamy*, I. L. R. 37 Mad. 565.

1.75 *Tarwad*

As to liability of the father to maintain, when the child belongs to a tarwad, see *Parathi*, 14 Cr. L. J. 597; *Raman*, 34 Cr. L. J. 1159; *Chanta*, 39 Mad. 957; *Thillu*, 20 Cr. L. J. 733; *Bharata*, 46 M.L.J. 324. The fact that the mother has separate earning, is of no relevance. *C. M. Mani*, (1981) Cr. L. J. (NOC) 76 (Ker.).

1.76 *Maintenance of father or mother*

A step-mother cannot claim maintenance from her step-son, *Ramabai*, (1976) Mah. L. J. 565. But the Gujarat view is that the word "mother" includes a woman who has the status of a step-mother by reason of lawful marriage with father. *Horobin* (1978) 19 G.L.R. 237.

1.77 *Adoptive mother*

The word "mother" includes an adoptive mother. *Baban*, (1978) Cr. L. J. 1436. Claim an of maintenance by the father against his children is not dependent on his having discharged parental obligations during the childhood of the children. *Pandurang*, (1980) Cr. L. J. 256 (Bom.).

1.78 *Offer to maintain children*

Neglect on the part of the father entitles the children to get an order against their father for their maintenance. A mere offer by the father at the trial, to maintain the children does not justify rejection of the petition of the children. *Kambu Ammal v. J. Ranganathan*, A. I. R. 1924 Mad. 624 (Krishnan, J.).

A father cannot refuse to maintain his children merely because the children are living with their lawful guardian or mother. If he wants custody, he must seek enforcement of his right in a civil court. *Mg Sam*, A.I.R. 1932 Rang. 183 (refusal of the mother to live with husband, after decree for restitution of conjugal rights); *Ma Shwe*, 38 Cr.L.J. 872 (Rang); *Murugesu*, 16 Cr.L.J. 65,

Where a woman, who is the legal guardian of her children, leaves her husband without any reasonable excuse, although the husband is willing to maintain her, then she is not entitled to any maintenance, but the children, being in her custody, should be granted maintenance. *Mohideen Bi Bashu Sahib*, A.I.R. 1937 Mad. 809 (King J.).

If, in fact, the children are living with the wife, and if, in fact, the father is refusing or neglecting to maintain them where they are living, the magistrate has jurisdiction to make an order. If the father's case is that the children ought not to be living with the wife, but ought to be living with him or under his direction, then he must take proper proceedings in a civil court to get the children removed from the custody of the mother. *Ebrahim Mohamed Mukri v. Khurshedbai Ebrahim Mukri*, A.I.R. 1941 Vom. 267 (Beaumont C.J. & Sen. J.).

As long as a child is with the mother, the mother must be given an amount sufficient to maintain the child. If the father has a right to the custody of the child, he can, at any time, institute proceedings for that purpose. An adult can be coerced into coming into proper custody by refusing maintenance; but a child has not such choice; it must remain with whomsoever takes it. Hence it would be improper for the court to refuse maintenance for the child, merely because the court was of opinion that the mother had no right to the custody of the child. *Kuppala Krishtappa v. Premaleelamani*, AIR 1942 Mad. 705 (Horwill, J.). *Allah Rakhi v. Karam Illahi*, A. I. R. 1933 Lah. 696; *Zahura*, A. I. R. 1930 Lah. 1043; *Rose*

Mary, A. I. R. 1948 Mad. 509; *Rchimunissa*, A. I. R. 1956 Hyd. 14; *Sarfaraz*, 29 Cr. L. J. 1052; *Krishtappa*, A. I. R. 1942 Mad. 705; *Akhtari*, A. I. R. 1937 Lah. 236; *Kochukrishnan*, A. I. R. 1954 T. C. 225; *Bashiran*, A. I. R. 1960 Raj. 255; See, however *Ralia*, A. I. R. 1914 Lah. 417; *Sita Devi*, (1930), 33 Cri. L. J. 196.

1.79 *Minor Children*

The position of a child who has not attained the age of discretion, or who is not of its own free will or volition living away from the father, is peculiar. If such a child is kept in custody by the mother and is prevented from returning to the father, it cannot be said that the child is at fault and that its conduct has disentitled it to maintenance. Even if a child prefers to live with the mother owing to natural affection or attachment for her, that would not affect the liability of the father to maintain the child. In such circumstances, where the father objects to the custody of the child and asserts his own legal right, the proper course for the father would be to apply for its custody, but so long as the custody of the child remains with the mother, he cannot refuse to pay maintenance for the child, irrespective of the question whether or not the mother has a right to be maintained by him. The question whether the mother or the father is entitled to the custody of the children cannot be decided in a summary manner in proceedings for maintenance. *Abnash Chander Kanshi Ram v. Sushila Devi*, A. I. R. 1962 Punj. 274 (Gurdev Singh J.).

1.80 *Propriety of custody.*

In a proceeding under section 488, so far as the maintenance of a child is concerned, the criminal court is concerned only with the fact of its custody and not with propriety of that custody. But when the matter comes before a civil court, it has to consider whether the father is not the lawful guardian of the child and whether, for any reason, he is unfit to have its custody. The right to custody can be a good defence to a claim

for the separate maintenance of a child in a civil suit, provided the father has expressed his bona fide willingness to keep and maintain the child. When the custody of a child is wrongfully withheld from its father when he is its legal guardian, it would be unfair to require him to pay for its maintenance and drive him to a separate action for recovering its custody, when the question of his right and fitness to have its custody can be decided in the same suit. *Dinsab Kasimsab v. Mohammad Hussien Dinsab*, A.I.R. 1945 Bom. 390 (Divatia and Lokur, JJ.)

1.81 *Children nearing majority*

The word 'child' has been deliberately used to leave the courts free to order maintenance for such sons and daughters as are unable to earn livelihood for themselves, having due regard to the class of society to which they belong and other surrounding circumstances. Therefore, the fact that the son is 17, 18 or 19 is no ground for refusing maintenance on this account. *Purnasashi Devi v. Nagendra Nath Bhattacharjee*, A. I. R. 1950 Cal. 465 (Das Gupta and Lahiri, JJ.). (Under the present Code, maintenance cannot be ordered as regards a major child unless it is handicapped).

Denying the paternity of a child amounts to neglect to maintain. The neglect or refusal may be by words or by conduct. It may be express or implied, and when the opponent has denied the paternity of a child, that is a fact from which court may infer neglect to maintain. *Hidayat Khatun v. Mohamed Hayat*, (1912) 14 Cr. L.J. 303 (Sind) (Fratt. J. C. and Fawcett, A. J. C.)

The right of maintenance under section 488, Cr. P. C. is a special right given under the Code. The mere fact that similar analogous remedy is available under the Hindu Adoptions and Maintenance Act in a civil court, does not take away the jurisdiction of the Magistrate under section 488, Cr. P. C. to order maintenance to a Hindu wife. The provisions of section 488 are by no means, a text rule or interpretation of Hindu law

or any custom or usage as part of the law; nor are they, in any manner, repugnant to, or inconsistent with the provisions of the Hindu Adoptions and Maintenance Act. Hence section 4 of that Act cannot override section 488, Cr. P. C. *Ram Singh v. State* AIR 1963 All 355.

Amount of maintenance has to be fixed having due regard to income of husband and other facts necessary to be considered. Amount awarded without fixing the income of husband was held arbitrary. *Ram Singh v. State*, A.I.R. 1963 All. 355 (Kailash Prasad, J.).

1.82 *Mixed orders*

Only two kinds of orders are allowed: (1) a monthly allowance, or (2) dismissal of the petition. Mixed award in cash and kind is illegal. *Mukta v. Datta Mahadev*, 25 Cr. L.J. 965 A. I. R. 1924 Bom 332.

1.83 *Period*

The section contemplates maintenance only at a monthly rate. Annual allowance cannot be given under the section. *Purnasashi*, A. I. R. 1950 Cal. 465; *Thankappan v. Pankajakshi*, A. I. R. 1960 Ker. 66.

1.84 *Conditional order*

Conditional order of maintenance is illegal. *Roshan* A. I. R. 1943 Lah. 59; *Mukta v. Dutta* A. I. R., 1924 Bom. 332 *Atru*, A. I. R. 1925 Lah. 142; *Ahi Rani*, A.I.R. 1953 Sau. 2.

A conditional order of maintenance is illegal, e. g. to pay a certain sum as maintenance in the event of turning the wife out, *Natha*, 27 Cr. L. J. 556; *Ramzan*, 29 Cr. L. J. 895; *Jamia*, 18 Cr. L. J. 528. Magistrate cannot impose a condition that the wife should reside in the husband's village. *Basant Kaur v. Hari Singh*, (1928) 30 Cr.L.J. 51 (Lah) (Addisson, J.).

1.85 *Joint award*

Joint award of maintenance to wife and child is not legal *Thankappan v. Pankajakshi*, A.I.R. 1960 Ker. 66.

1.86 *Payment in kind*

Any agreement between the parties to provide house, ornament, grain & c. is unenforceable. *Viramma*, I.L.R. 6 Mad 283; *Masta*, 21 Cr. L. J. 612. If any compromise provides for annual payment in grain, the court should commute it into monthly cash payment. *Annapurna v. Satrugna Mahakud*, A.I.R. 1960 Ori. 94 (R. L. Narasimhan, C. J.).

1.87 *Progressive increase*

Maintenance must be ordered at a fixed monthly rate. An order for maintenance at a progressively increasing rate as the child grows older, cannot be made. *Upendra*, (1885) I L.R. 12 Cal. 535.

A Magistrate has no power to make an order for maintenance at a progressively increasing rate, but the fact that the child has grown older, might constitute a "change in circumstances", calling for a variation in the rate. *Ramayee in re*, (1890) I.L.R. 14 Mad. 398 (Shephard and Handley, JJ.).

1.88 *Discretion*

The power under the section 125 is discretionary, as the use of the word 'may' indicates. A neglected wife cannot, as of right, claim an order of maintenance against the husband. The magistrate has to exercise his discretion in a judicial manner consistently with the language of the statute and with due regard to other relevant circumstances. *Bhagwan Dutt v. Kamla Devi*, A.I.R. 1975 S.C. 83 (Chandrachud, Sarkaria & Gupta JJ.). The magistrate is not bound to order maintenance, even if the husband could not establish any of the defences in the section. *Md. Ali*, A.I.R. 1944 Lah. 342.

1.89 *Reasons for the order.*

The order to be passed under section, 125 shall contain the points for determination, the decision thereon and the reasons for the decision [Section 354 (6)].

1.90 *Maximum amount meaning of on the whole.*

The words "In the whole", in the context, do not mean that the total award for wife, child, mother and father together cannot exceed Rs. 500/-. They mean that the court cannot grant more than Rs. 500/- for each one of the claimants. *Ramesh Chander Kaushal v. Veena Kaushal*, A. I. R. 1978 S. C., 1807.

The ceiling of "five hundred rupees in the whole" as enjoined in section 488 (1) is not the total amount of maintenance that can be awarded by the magistrate to all the claimants taken together in a proceeding. It is the sum-total of the different items of maintenance in the case of each claimant. It can very well, exceed the maximum of rupees five hundred, if there be a number of claimants. Any other inter-pretation will be opposed to the clear wordings of the section.

The ceiling of five hundred rupees is not for all the claimants in a proceeding, taken together. *Md. Basir v. Noor Jahan Begum*, (1971) Cr. L.J. 547 (Cal.) (N. C. Talukdar, J.).

The word "in the whole" in section 488, Cr. P. C. are intended to prevent the court from exceeding the statutory limit in the case of any of particular dependant & are not intended to restrict the powers of the court to ordering a monthly allowance of Rs. 100 in respect of the maintenance of all the dependants. Consequently, an order can be passed awarding a monthly allowance of Rs. 100/- for the maintenance of the wife and a monthly allowance of Rs. 30/- in respect of each of five minor children. *Tulsi Das Barman v. Sarajn Del Devi*, (1933) 34 Cr. L.J. 590 (Cal.), 37 C. W. N., 655 (Panckridge & Patterson, JJ.).

The magistrate can order the father to pay as much as the maximum for each of the children (if they also have applied for maintenance), in addition to the amount payable for the wife. The limit is fixed, not for all the dependants, but for

each dependent. *Kent* I. L. R. 40 Mad. 891; *Bulteel*, A. I. R. 1938 Mad. 72; *Prabhabati*, A. I. R. 1954 Bom. 546 ; (1954) Cri. L. J. 1734 (F. B.), approved in *Ramesh*, A. I. R. 1978 S. C. 1807.

1.92 *Civil Courts*

Broadly stated, and as an abstract proposition, it is valid to assert that a final determination of a civil right by a civil court must prevail against a like decision by a criminal court. But this principle has not application to a case where, during the pendency of proceedings under section 125 Cr. P. C., a civil court passes an interim order of maintenance of the wife in proceedings for divorce by the husband. The reasons are (1) the direction by the civil court is not a final determination under the Hindu Adoptions And Maintenance Act, but is an order *Pendente lite* under section 24, Hindu Marriage Act; and (2) the amount does not include the claim for maintenance of the children, although the order adverts to the fact that the wife had their custody. The Magistrate is not in error in ignoring the order of the civil court in such circumstances. He has jurisdiction to award a higher maintenance to the wife and children. *Ramesh Chander Kaushal v. Veena Kaushal*, A.I.R. 1978 S C 1807 (V. R. Krishna Iyer and D. A. Desai, JJ.).

1.93 *Amount Payable to each*

If a total sum is fixed for the maintenance of the wife and children, the order should specify the amount payable to each person. *Thumbswami*, 18 Cr. L. J. 103.

1.94 *Additional maintenance by civil court*

A civil court has jurisdiction to pass a separate order for additional maintenance, if it thinks that the amount awarded by the magistrate is inadequate. *Intayari*, (1924) I.L.R. 51 Cal. 603. If the wife has received a lump sum by way of compromise in proceedings under section 125 Cr. P. C., she cannot claim maintenance under section 24, Hindu Marriage

Act. *Pritam Singh v. Rajinder Kaur* (1983) H.L.R. 265, 266 (P. & H.)

1.95 *Proportion of 1/3rd—*

Where the income of the husband was Rs. 1,000/- per month, the grant of maintenance of Rs. 500/- p. m. was held to be excessive. A sum of Rs. 300/- per month, i. e. one-third of the income, was regarded as just and equitable. *Harvinder Singh v. Amrit Kaur* (1983) Cr. L.J. 1390 (Pat) (A.P. Sinha J.).

1.96 *Separate sums for each claimant*

In dealing with an application under section 488, Cr.P.C. submitted by more persons than one, the Magistrate should, if he is satisfied that they are entitled to maintenance, make an order directing payment of maintenance at specified rates in favour of each of the persons whom the respondent is bound to maintain. An order which directs a consolidated payment to be made for the benefit of several persons entitled to maintenance under section 488 is an irregular order. But if the order has been made and acquiesced in, it cannot be said that the order is inexecutable under section 490 of the Code. *In re Kalavantibai Tekchand Ehavani* (1953) Cr. L. J. 146 (Shah, J.)

In the proceedings under section 125, the magistrate had initially sent notice to the husband and yet, the husband had been wilfully neglecting to attend the court, even though his personal attendance had not been dispensed with by the Court. The plea was raised by the husband that there was non-compliance of the provisions of section 126 (2) and that the evidence was not recorded in his presence. It was held that the plea was not maintainable and the magistrate was justified in rejecting the application under section 126 (2). *Harvinder Singh v. Amrit Kaur*, (1983) Cr. L. J. 1390 (Patna) (Anand Prasad Sinha, J.)

1.97 *Consent orders*

When the parties file a petition of compromise, stating

the amount of monthly maintenance agreed (and provided there is no other extraneous matter), the court can pass an order fixing that amount as maintenance. *Sundaram*, (1955) And. W. R. 441 : AIR 1956 NOC (AP) 4456; *Thayumanuvar* AIR 1958 Mys. 190; *Bhagwati* AIR 1935 All. 294; *Birch*, 34 Cr. L. J. 238. The Lahore High Court takes a contrary view. *Hakim*. AIR 1930 Lah. 524.

But where the compromise petition (besides the rate of) maintenance contains matters outside the purview of section 125, (e.g. terms as to provision for separate residence) the enforcement of the agreement is a matter for the civil court and not for the criminal court. In such a case, the application for maintenance should be dismissed, on the basis that the husband no longer refuses to maintain the wife. *Budhu*. AIR 1926 Lah. 469; *Pal Singh*, AIR 1932 Lah. 349; *Ramsaran Roshan* AIR 1943 Lah 59. *Madhavan*, AIR 1954 Mad. 513; *Calbert*, (1935) C. W. N. 736.

In proceedings under section 488, where a petition for compromise fixing maintenance allowance is filed by both the parties, the proper order to be passed by the magistrate in such a case is, "petition of compromise, filed. Order in terms of compromise", and not "case amicably settled. Petition of compromise filed".

In some cases, it has been held that a maintenance order on terms agreed to by the parties can be enforced. *Ramsaran*, A. I. R. 1937 All 115; *Punnadeb*, A. I. R. 1950 All. 454; *Mangayamma*, A.I.R. 1931 Mad. 185; *Birch*, A I.R. 1933 Oudh 122.

1.98 *Enforcing consent orders*

An order of maintenance based on a compromise to the effect that the husband and wife should live separately, was upheld in a Calcutta case. *Nirmala*, 37 C.W.N. 538; so also, a maintenance order on a compromise that the husband should provide a separate house for the wife. *Bhagwan*, 40 Cr.L.J. 794.

However, without such consent, the husband cannot be ordered to provide a house to the wife. *Roshan Eako v. Amin*, A.I.R. 1943 Lah. 59 (Din Mohammad & Blacker, JJ.).

In an application under section 488, when parties come to an understanding as regards the quantum of maintenance, it only helps the Magistrate in coming to a decision on the question of proper maintenance to be awarded. An order of court based on such an agreement is valid and can be enforced. When execution is levied against the defaulting party, it is not the compromise that is the subject-matter of execution, but the order of the court.

An agreement to pay maintenance will amount to an admission that the husband has failed or neglected to maintain his wife so as to attract the provisions of section 488. *G. D. Sundaram v. Ratnavathi Ammal*, A.I.R. 1955 N.U.C. (Andhra) 4466 (Chandra Reddy, J.).

An order under section 488 (1) present section 125 cannot be made unless it is proved that the husband neglects or refuses to maintain his wife or child, as the case may be. A wife refusing without any sufficient reason to live with her husband is not at all entitled to receive any allowance under section 488 (1). Consequently, when after the wife's petition under section 488 for maintenance, the husband and wife had entered into a compromise by which both had agreed to live together and the husband had, on condition of his providing a residence for the wife, undertaken to properly maintain and feed her or to give Rs. 5/- monthly as maintenance, it cannot, in any circumstances, be said that the husband was neglecting or refusing to maintain the wife and therefore the only proper order that the Magistrate can make is to dismiss the petition. *Roshan Bano v. Amim*, A.I.R. 1943 Lah. 59 (Din Mohammad and Blacker, JJ.).

1.99 *Compromise with a concubine*

In respect of a compromise entered into between the

parties, either before or after the filing of the application under section 488, only that portion of it which can be enforced under that section can be given effect to. As a concubine or mistress cannot claim maintenance, an agreement or a consent (by the person whose mistress the woman is) to pay maintenance to the concubine cannot, therefore, be the subject of an order under section 488. *P. Madhavan v. Munir Begum*, A.I.R. 1954 Mad. 513 (Somasundaram, J.).

1.100 *Lump sum contracting out*

The parties cannot contract themselves out of the statutory obligation to maintain children under the Code of Criminal Procedure. But an order in terms of compromise can be enforced. *Vasudevan Nair v. Gouri Amma*, (1970) K. L. T. 308, 310, relying, *inter alia*, on *Punn Deb v. Bishuli*, (1955) All. L. J. 454. The fact that section 488 (1) refers to monthly allowances, merely shows that the court has taken the month as a convenient unit whereby to calculate allowances. It does not show that independently of an order of the court, as where the matter has been referred to arbitration, *lump sums cannot be paid for the maintenance of a child*. If, at any time, the wife finds that she has nothing left of this sum, she can apply to the court for a *fresh order for maintenance* and there will then be no obstacle to this fresh order from the fact that this lump sum had been paid on a previous occasion. *Maung Tin U v. Ma Hla Kyi*, A.I.R. 1937 Rang. 246 (Spargo, J.).

1.101 *Offer to maintain*

The court is required to consider the husband's offer to maintain the wife if she lives with him, and in doing so, to also take into account the wife's refusal and the grounds on which that refusal is based. If the husband's offer is bona fide and genuine and if there are no justifiable grounds for the wife's refusal, then the court may not award her any maintenance. Even after the order of maintenance is made if the husband makes a bona fide offer and the wife refuses to live with him

without justifiable grounds, the Magistrate may not enforce the order. *Govindram Narandas v. Ratanbai Nathuram* A.I.R. 1956 Saur. 105 (Shah, C.J. and Baxi, J.).

1.102 *Binding effect of compromise*

An agreement compromising a dispute is binding on the parties. Therefore, where the wife agreed to drop her application for maintenance against the husband which was pending before the Magistrate, in consideration of the husband's promise to pay her a maintenance allowance of a certain sum, it is a contract enforceable by law. *Kastoori Devi v. Chiranjil Lal*, A.I.R. 1960 All. 446 (S.S. Dhavan, J.).

The Magistrate is under no necessity to pass an order under section 488, where the compromise is entirely independent of the court. But, if there is a compromise of which the essential part is the passing of an order under section 488, such order can be enforced under section 488. *Mangayamma v. Appalaswami*, A.I.R. 1931 Mad. 185 (Jackson, J.).

An order lawfully made by a magistrate under section 488, whether made on compromise or otherwise, is enforced, under section 488 (3) Cr.P.C. 1898. It was held that the words "execution according to law" meant in accordance with the provisions of section 488 (3). *Debjani Biswas v. Rasik Lal Biswas*, A.I.R. 1941 Cal. 558 (Derbyshire C.J. & Bartley, J.).

Addison J. has held that where, in application under section 488, the parties arrive at a compromise, the proper course for the court is to dismiss the application, leaving the parties to enforce the compromise in civil courts. Such a compromise is a bar to an application under section 489. An order of maintenance passed in accordance with a compromise cannot be enforced by a criminal court. *Sham Singh v. Hukam Devi* A.I.R. 1930. Lah 524.

1.103 *Ex-Parte order*

Where a party, alongwith his pleader, is present in the

court, an *ex parte* order against him without hearing him, is not justified and should be set aside. *Sham Singh v. Hukam Devi* A.I.R 1930 Lah. 524 (Addison, J.).

1.104 *Contracting out Consent orders*

Parties cannot contract out of the statutory obligation (under section 125) to maintain children. Lump sum may, under an arrangement, be paid for the maintenance of the child; but if the mother finds that there is nothing left of it, she can come again for an order for maintenance. *MgTin* AIR 1937 Rang. 246.

1.105 *Incorporation of compromise*

When the wife's petition for maintenance is compromised, but without incorporation in the order of the terms thereof and it is simply "filed", a subsequent petition by the wife is maintainable. *Barasram*, AIR 1956 Sau, 15 *Kastoori*, AIR. 1960 All. 446.

1.106 *Living separately*

The condition, in the order, that the husband would provide a house for his wife where she would live separately, from his second wife did not amount to the husband and wife "living separately by mutual consent". It was open to the husband to live either with her or with his second wife. No question of "living separately by mutual consent" was involved in the condition embodied in the compromise. *Bhagwan Singh v. Gurcharan Kaur*, (1939) 40 Cii. L. J. 794 (Lahore) (Abdul Rashid, J.)

If the husband has contracted another marriage and the wife chooses to live apart (because of the second marriage), such separate living would not be deemed to be the result of mutual consent. *Gurdial Kaur v. Jang Singh*, AIR 1959 Punj. 185, 189 Para 38 (S. B. Kapoor, J.)

1.107 *Conditional compromise*

A compromise was declared unenforceable because it

contained conditions other than payment of cash. It was held (a) that wife could still file a second application for maintenance (civil suit was not the only remedy) and (b) even a civil decree is no bar. *Gurdial Singh v. Jang Singh*, AIR 1959 Punj 185, 189, Para 36, 37 (S. B. Kapoor J.) (In *re Taralakshmi*, J. AIR 1938 Bom. 499 followed on the second point)

Where the mutual agreement to live separately is anterior to the order passed in the maintenance proceedings and the husband submitted to it, he could not challenge it in execution proceedings. Moreover, since the husband had made an allegation against the character of the wife in the execution proceedings, the wife apart from the mutual agreement, had sufficient cause to live separately. Therefore, in either view, the wife, was entitled to execute the maintenance order. Section 125 (5) had no application, as there was no agreement to live separately after the passing of the maintenance order. *Kalavati v. Ansan*, (1981) Cri. L. J. 74 (All) (Mahavir Singh, J.)

The magistrate's function is restricted to passing an order as to the amount of maintenance and the order should not embody the restrictive conditions in the compromise which could not be enforced in criminal proceedings. *Coelho*, A.I.R. 1936 All. 228.

1.108 *Form of final formal order*

Section 125 does not prescribe any particular form in which the final order of the magistrate should be passed while granting maintenance allowance to the wife.

Where the magistrate mentioned in the order that the case was decided in terms of the compromise and the terms of the compromise were not vague, it obviously implied a direction that each and every condition incorporated in the compromise would be a part of the order and binding upon the parties. No other inference was reasonably possible. Further, when the condition of the compromise were not complied with then the

wife was entitled to apply for execution of the order under section 125 (3) and the magistrate would be deemed to have jurisdiction to enforce its compliance by issue of warrant. *Hasim Hussain v. Rukaiya Bano*, (1979) Cr. L. J. 1143 (All.) (P. N. Bakshi, J.).

1.109. *Divorced wife*

[Sub-section (1), Expl. (b)]. Every divorced wife, otherwise eligible, is entitled to the benefit of maintenance allowance and the dissolution of marriage makes no difference to this right. In the normal course, an order for maintenance must follow. *Bai Tahira*, A.I.R. 1979 S.C. 362; (1980) H.L.R. (S.C.).

The Explanation (b) relating to divorcee wife was inserted by the Joint Committee of Parliament. See *Raza Khan v. Mumtaz*, (1976) Cr. L. J. 905 (A. P.).

The expression "otherwise eligible" cannot be related to the manner in which the wife became divorced, but relates only to indigency and other conditions contemplated in section 125. Accordingly, a wife who became a divorcee by mutual consent, by executing a document, would fall within the scope of the inclusive definition of "wife" and would be entitled to claim maintenance. *Padmanabhan*, (1981) Cr. L. J. 826 (Ker.); *K. Shammu Khan*, (1981) Cr. L. J. 830 (Ker.) The expressions "divorced" and "dissolution" are two facets of the same situation. *Zohra Khatoon v. Mohd. Ibrahim*, (1981) H. L. R. 289, 299 (S. C.).

1.110 *Statutory right of divorced wife*

A new statutory right has been created in favour of a divorcee, as a projection of public policy, by the 1973 Code. No settlement of claims, which does not contemplate the special statutory right of the divorcee under section 125, can operate to negate that claim. Thus, a consent decree of 1962, resolving all disputes and settling all claims then available between the divorced wife and her husband, cannot operate to negate the claim under section 125. *Bai Tahira*, A.I.R. 1979

S.C. 362. Compromise deed and divorce deed, incorporating a statement by the wife that she has no further subsisting rights, executed before the coming into force of the 1973 Code, would not bar her application for maintenance under section 125. *Rabindran*. (1978) Cr.L.J. 1049 (Ker.).

A divorced wife's claim for maintenance qua "wife" under Explanation (b) continues, unless the parties make adjustments and come to terms. *Ramesh*, A.I.R. 1978 S.C. 1807.

The wife staying separately in view of a decree of judicial separation under the Hindu Marriage Act is entitled to maintenance under section 125 *Bai Ramilaben*, (1976) G.L.R. 29. Upon a decree for judicial separation on the ground of desertion by the wife under section 10, Hindu Marriage Act, the wife is not entitled to maintenance under section 125, Cr.P.C. *Sharad*, (1978) Maha. L.J. 123.

Under the Explanation to section 125 (1), the wife continues to be a "wife" even though she has been divorced or has otherwise obtained a divorce and has not remarried. *Khatoon v. Mohd. Hashan*, (1981) Cr. I. J. 754 (S.C.): (1981) H. L. R. 289 (S.C.) Woman obtaining a divorce under the Dissolution of Muslim Marriage Act, 1939 continues to be a "wife" for the purpose of getting maintenance. *Khatoon v. Mohd. Hasan*, (1981) Cr. L. J. 754 (S. C.). The two limbs of clause (b) have separate and different legal incidents. One is reflected in section 127 (3) (b) and the other in section 127 (3) (c). *Zohra Khatoon v. Mohd. Hashan*, (1981) Cr.L.J. 754 (S. C.). A divorced Muslim woman can claim maintenance so long as she remains unmarried, even after the *iddat* period, against her quondam husband. *Khurshid*, (1976) Cr. L.J. 1584 (Bom.); *Umar Hayath*, (1976) Cr. L. J. 395 (Kant.). The Muslim Women (Protection of Rights on Divorce) Act, 1986 now gives the wife a right against specified other relatives of the wife, and failing them, against the Vakf Board. To that extent it seems to modify the position resulting from section 125 (1) as regards Muslim women.

The Explanation is applicable to divorces effected before or after the coming into force of the Code of 1973. *Tejinder*, (1978) Cr.L.J. 604 (P & H), *Mushaque, Mondal v. Joysun Bibi*, (1977) Cr. L. J. 484 (Cal.), *Md. Hanif v. Aneesha Khan*, (1976) Cr.L.J. 520 (All.), *Roza Khan v. Mumtaz Khatoon*, (1976) Cr. L.J. 905, (1976) HLR 58 (DB) (AP) *Mohammad Khan v. Mehrunnissa* (1977) Cr.L.J. 123, 924, (Karn.) (D.B. Lal, J.).

1.111 Magisterial order

In *Satya Rani v. Nani Gopal*, (1988) 16 Rep. (Gau) 327, Mr. Justice Manisana of the Gauhati High Court had to construe not a provision of the Code, but a magisterial order. The Magistrate, under section 125, Cr.P.C., had ordered maintenance in favour of the wife "until their relationship is judicially determined and severed". The husband later on obtained a decree of divorce. After the decree of divorce, when the wife sought to realise maintenance, the successor Magistrate rejected the application on the ground that their relationship had been judicially severed. In revision, the High Court held that by virtue of section 125 (1), Explanation (b) and section 125 (3) and 125 (5), Cr.P.C., the right of the woman continues until she re-marries or until the order is cancelled. Hence, the expression "until their relationship is judicially determined and severed" should be construed as connoting termination of the relationship either by re-marriage of the divorced woman or cancellation of the order.

2.1. Sub-section (2) effective date.

Maintenance can be made payable from the date of application but not for prior period. *Enamul Hagi v. Commissioner*, A. I. R. 1967 Pat. 344, 345, 346, para 6 (Anwar Ahmad J.) or date of order, but not from the date of birth of a child. *Janamma v. Kuttappa*, AIR 1959 Ker 366, 368 para 6. If the order is silent as to date, it will be effective from date of the order and it is not necessary to record reasons (*C. M. Mani*,) (1981) Cr. L. J. (NOC) 76 (Ker).

The Delhi High Court has held that the Magistrate should award maintenance from the date of application (and not from the date of the order). *Makhdum*, (1982) Cri L. J. 111 (Delhi).

Expenses of the child's education should not be allowed from the date of petition, without proof of the expenses so incurred *Joginder Singh v. Raj Mohinder Kaur*, A I R 1960 Punj 249. Past maintenance cannot be allowed *Rose Graeper v. Emp.* A I R 1928 Mad. 899 ; *Abdul Rahim*, A I R 1926 Lah 532.

Where the wife was maintaining children herself by selling ornaments and collecting funds, maintenance was granted from the date of application and not the date of order. *S. A. Kaiser v. Noor Jahan*, (1980) Cri L. J. 611, 612 para 4 (Mrs. Jytirmoyee Nag J).

2.2 Duration

The order granting maintenance will remain in force so long as none of the disqualifying causes in sub-section (5) arises, or till there is a change of circumstances.

Until the original order is modified etc by the High Court or vacated in terms of section 125 (4) or section 127 (5), its validity survives. No plea that there has been cohabitation in the interregnum or that there has been a compromise can hold good as a valid defence. *Bhupinder Singh v. Daljit Kaur*, AIR 1979 SC 442 (1979) Cri L. J. 198, 199 para 7, approving *Fazal Din*, A I R 1932 Lah 45:33 Cri L. J. 121 (Shadilal C J.). The Supreme Court observed "We are concerned with a Code which is complete on the topic and any defence against an order passed under section 125 must be founded on a provision in the Code.

2.3 Interim Orders

According to earlier view, there is no scope for granting interim maintenance pendente lite. *Bano*, (1981) Cr. L. J.

(NOC) 44 (Raj.). But the Supreme Court has now held that even though there is no provision for interim maintenance in section 125, yet, having regard to the nature of the jurisdiction, such a power must be implied *Savitri v. Govind Singh Rawat*, A.I.R. 1986 S.C. 985.

2.4 Death

The order awarding maintenance ceases on the respondent's death and cannot be enforced against his estate. *Eady*, (1914) I.L.R. 41 Cal. 88; *Ambadas*, A. I. R. 1953 Nag. 248.

A right under section 125 does not survive the death of the defendant, but a right under the personal law may be enforced also against the estate of the deceased. *Lingappa*, (1913) I. L. R. 27 Mad. 131.

2.5 Personal right

Right to receive maintenance is a purely personal right; it creates no charge on any property. Arrears of maintenance are not either a debt nor saleable property within section 60, C. P. C. *Giribala*, (1935) 39 C.W.N. 281.

3.1 Section 125 (3): Enforcement of order

There is conflict of views on the question whether a husband who fails to apply for alteration or cancellation of the order on the ground of wife's adultery, or other circumstance mentioned in section 125 (4), can still raise an objection to execution of the order on the above grounds. According to the High Courts of Bombay, Calcutta, Madras and Mysore he can. *Khardekar*, A. I. R. 1942 Bom. 258; *Kamala*. 56 CWN 843; (1953) Cr. L. J. 814; *Suryanarayana*, A. I. R. 1943 Mad. 416; *Bhag Sultan*, 30 Cr. L. J. 719; A. I. R. 1930 Lah. 99 (Zafar Ali, J.); *State v. Shiv Shankar*, A. I. R. 1966 Mys. 173 (Sukul, J.). But the Calcutta decision in *Tari Bala v. Kilol Ram*, A. I. R. 1938 Cal 144, seems to be to the contrary.

According to the other view, once execution is taken out, such a plea is not admissible. *Ram Kishore v. Bimla Devi*,

A. I. R. 1957 All. 658, 660, 661, para 10, 11 (Mulla, J.) (reviews case law. Mahmood J. in *Laratti v. Ram Dial* I. L. R. 5 All. 224 relied (in this context) on the principle of *res judicata*. Some rulings make a distinction between adultery committed after the order. *State v. Shivashankar*, A. I. R. 1966 Mys. 173;

Even in the other High Courts of Calcutta and Madras, some earlier rulings took the view that a maintenance order, once passed, stands good until cancelled or modified by the court. *Taraibala v. Kubal Ram*, A. I. R. 1938 Cal. 144; 39 Cr. L. J. 357; *Kanagammal*, A. I. R. 1927 Mad. 376; 28 Cr. L. J. 271.

3.2 *Sufficient cause*

The words "without sufficient cause" mean a sufficient cause for not carrying out the order to pay maintenance. *Richard*, AIR 1959 Pat. 489. Under "sufficient cause", a party cannot—

- (a) challenge the validity of the order; *Richard*, AIR 1959 Pat. 489; or
- (b) consider those very questions which could have been raised or which were decided, when the order for maintenance was passed. *Gupteswar Pandey v. Ram Peari*, AIR 1971 Pat 181, 183, 184, para 6. In the Patna case, of 1971, mentioned above it is observed that "in a proceeding under sub-section (3) of section 488, the Magistrate cannot be called upon to reconsider or go once again into those very questions which could be raised or which were decided at the earlier stage when the claim for maintenance was upheld.

3.2A. *Composite order and child's death*

Where a total sum is ordered as maintenance for wife and child then, if the child dies or comes of age the wife's maintenance cannot be enforced and a fresh application for the wife should be made. *Thambuswamy*, 18 Cr. L. J. 103;

Ma Khi, A.I.R. 1941 Rang. 46. But the Bombay High Court holds that the court can modify the order under section 128 fixing the wife's maintenance in such circumstances. *Kalavanti-bai*, A.I.R. 1953 Bom. 366; *Hazara*, A.I.R. 1957 Pepsu 24.

3.3. Non payment

Part payment by the opposite party, coupled with offer of land, does not justify refusal of enforcement for arrears. *Multan*, 37 Cr.L.J. 347. Though it is not said in so many words that the Magistrate must make an inquiry before issuing a warrant, that is the legislative intention. He must have evidence to satisfy himself that a warrant should be issued. Notice to the husband is mandatory *Laxmi Narain v. State*, A.I.R. 1959 All. 556 (MC Desai J.).

(iii) Mortgagee of the respondent cannot be directed to pay maintenance. *Lalit*, (1932) 35 C.W.N. 692.

3.4. Insolvency

An order of adjudication in insolvency or a protection order is not, in itself, conclusive of the defendant's inability to pay the maintenance. The question is one of fact, to be decided by the Magistrate and if he finds that there is no sufficient cause for non-compliance, he can proceed under sub-section (3). The section does not speak of wilful neglect. *Radharani v. Matilal*, A.I.R. 1940 Cal. 569, column 2; 42 Cri.L.J. 250; *Md. Hussain*, A.I.R. 1940 Bom. 344; 42 Cri.L.J. 101; *Muni Krishnayya*, A.I.R. 1940 Mad. 697; 41 Cri.L.J. 785; *Shyama Charan*, A.I.R. 1938 All. 253; *Kochu Kunja*, A.I.R. 1957 T-C 49. The contrary view in *Tokee Bibee*, 5 Cal. 536 and *Yahia*, A.I.R. 1936 Mad. 793 is no longer good law.

Issue of a warrant for the attachment of salary for the recovery of arrears of maintenance is permissible. *Ahmed Pasha v. Wajid Unnissa*, (1983) Cr. L. J. 479, 480 (A. P.) (Punnayya J), dissenting from *Baldevi v. Ram Nath*, AIR 1955 Raj 61; (1955) Cr. L. J. 621; *Ali Khan v. Hairanubi*, (1981) Cr.

L. J. 682 (Goa). Where the salary of the defaulting husband is to be attached, the provisions of section 421 (1) (b) (of the Code of 1898) have to be followed *Rajendra*, AIR 1956 Cal 135.

3.6 *Period of imprisonment : warrant and imprisonment*

The period of imprisonment in default of payment is—

- (a) one month, for each month's arrears;
- (b) one more month, for the balance of arrears for a portion of a month.

Allapichai, I L R 20 Mad. 3; *Bhiku Khan v. Zahuran*, (1898) I L R 25 Cal. 291; *Moddari Bin v. Sukdeo*, AIR 1967 Cal. 136.

One warrant may be issued for the arrears of several months. *Emp v. Beni*, AIR 1938 All. 386 39 Cr. L. J 720 (FB) *Kantappa*, AIR 1967 Mys. 8.

Sentencing the defaulter straightaway, to term of imprisonment, without first applying the mode of realisation under the Code, is improper. *K. Nithyanandan*, (1980) Cr. L. J. 1191 (Ker.); *Raghavan*, (1981) Cr. L. J. (NOC) 75 (Ker.). The first thing that must be done, is to issue a distress warrant and it is only for the amount that remains unpaid after such warrant, that imprisonment may be awarded. *Jagannath*, AIR. 1968 Ori. 35. But the Madhya Pradesh view is, that an order for imprisonment can be passed without first issuing a distress warrant for levying the amount due. *Bhure v. Gomatibai*, (1981) Cr. L. J. 789, 790, para 4 (M. D. Bhat, J.). In the Madhya Pradesh case mentioned above, the husband had been playing "hide and seek" and the court took the view, that no useful purpose would have been served by issuing distress before awarding imprisonment.

Maximum period of imprisonment for default is 12 months, *Moddari Bin v. Sukdeo Bin*, AIR 1967 Cal. 136, 140 (DB); *Jagannath*, AIR 1968 Or. 35. Imprisonment ceases on

payment of arrears. *Siddheshwar v. Gyanoda*, (1895) ILR 22 Cal. 291. See *Moddari Bin v. Sukdeo Bin*, AIR 1967 Cal. 136, 142, para 22. Imprisonment may be simple or rigorous [General Clauses Act, section 3 (27)]. A person suffering imprisonment for failure to pay certain arrears cannot be sentenced to imprisonment a second time, for default in respect of the same arrears. *Mg Tun*, AIR 1941 Rang. 247 No notice to show cause is necessary before issuing warrant. *Moddari v. Sukdeo*. AIR 1967 Cal. 136 (case law reviewed). Magistrate can sentence the defaulter after execution of warrant, even if the warrant is infructuous. *Moddari v. Sukdeo*, AIR 1967 Cal. 136. (D. B.)

3.6A *Husband not shown cause*

Where the husband does not show cause, the court ordering imprisonment is not bound to inquire into the circumstances in which the husband has failed to maintain his wife. *Ratilal* AIR 1971 Guj. 124.

3.7 *Independent powers*

Sub-section (3) confers two independent powers ; (i) to issue a warrant and (ii) to sentence the person also. The power to sentence is not dependent on the issue of the warrant. The power is in respect of the whole or any part of each month's allowance remaining unpaid to sentence the person for a term not exceeding one month. Two months imprisonment for non-payment of four months allowance is legal. *K.R. Chowla v. State*, AIR 1958 Bom 99 para 3 (FB) 59 Bom, L. R. 136 cf. *Emp. v. Beni*, AIR 1938 All 386. Issue of warrant is a condition precedent to the levy of amount due, according to the Kerala High Court. *K. Nithiyandan*, (1980) Cr. L. J. 1991 (Ker.).

SENTENCING A DEFAULTER TO IMPRISONMENT BEFORE THE issue of a warrant for levy of the amount of fine is in violation of section 125 (3) of the Code. *Basanta Kumar v. Sumati*, (1983) Cr.L.J. 1384 (Or.). (B. K. Behere, J.).

In a Madras case, the order granting maintenance was passed on 19.10.78. The application for collection of arrears of maintenance was made on 24.2.81 under section 128. In the circumstances, the warrant would not be void for the reason that it had stated that the amount of arrears was due from 19.10.78. The warrant had to be restricted to the recovery of maintenance from one year prior to the date of application. Before issuing warrant for levying the amount due, the court has to satisfy itself that the amount remains unpaid and that the person ordered has no sufficient cause for non payment. *Sardar Beg Sahib v. Sidhani Bi*, (1987) Cr.L.J. 1779 Mad.

3.8. Limitation : sub-section (3), first proviso

Sub-section (3), first proviso, provides limitation for the recovery of arrears. *Chetibat*, A. I. R. 1938 Sind 151. Where an application made within a year is dismissed for default, another application may be granted, although made after one year mentioned in the proviso. *Kirparam*, A.I.R. 1960 M. P. 241. Application for four month's arrears was closed, as the defendant could not be traced. Second application for fifteen months from starting date of the first application is maintainable. *U Hpay*, A.I.R. 1935 Rang. 407, If the amount claimed includes an amount which was for a period more than one year old, but which, though claimed previously within time, could not then be realised, limitation is saved, as it is a continuation of the former application. *Jagatbandhu*, A.I.R. 1958 Or. 257. In a Calcutta case, the maintenance ordered was at Rs. 50 p.m. and as execution was levied for Rs. 1150.00 (i. e., more than a year), it was contended that it could not be for more than a year i. e. Rs. 600/-. It was held that the objection could not be raised in the execution court. *Shambhulal*, A. I. R. 1959 Cal. 784. Failure to enforce the order within one year does not deprive the wife of the right of maintenance *Jasodabai*, AIR 1939 Sind. 180.

3.9. Starting point

Although maintenance becomes due from a back date,

limitation can run only from the date when the order granting it is passed. *Gupteshwar*, A. I. R. 1971 Pat. 181. Only such arrears as related to one year prior to the date of filing the application can be recovered by attachment and the sale of the defaulter's property. But there is no such limitation regarding the second alternative of sentencing the defaulter to imprisonment for the recovery of arrears which may extend beyond this period. However, the first method (attachment and sale) must be adopted first and, if it fails to satisfy the amount due, then only the alternative method (imprisonment) should be resorted to *Istekhar*, (1980) Cr. L. J. 1212 (All.).

3.10 *Offer to maintain (Sub-section (3) second proviso).*

Under sub-section (3), second proviso the magistrate must consider the grounds of refusal by the wife, and make an order for maintenance if he is satisfied that there is "just ground" for the wife refusing to live with the husband. The Explanation to the second proviso widens the scope and ambit of the term "just ground" as occurring in the proviso.

3.11 *Proviso as governing the whole section*

Although section 125 (3), second proviso, is so placed as to make it appear that it is confined to sub-section (3) (which primarily addressess itself to the *Stage of enforcement*), really speaking, the propositions underlying this proviso are relevant to the entire section. These propositions are—

- (i) If a husband offers to maintain his wife, the court can consider the offer, before awarding maintenance to the wife.
- (ii) If the offer is accompanied by a condition that the wife must live with the husband, then the court may still consider whether the wife has a just ground for refusing to live with him.

*See also "Just ground and main application" infra.

- (iii) If the wife has such a just ground, then the order for separate maintenance may be passed in favour of the wife, not with standing the husbands offer.
- (iv) If the wife has no such just ground, then an order to give her separate maintenance may be refused by the court, in the light of the offer of the husband.

There are obiter dicta to the effect that where the wife has a reasonable apprehension arising from the conduct of the husband, that she is likely to be physically harmed owing to persistent demands of dowry from her husband's Parents or relations, then such an apprehension also would be manifestly a reasonable justification for the wife's refusal to live with her husband, *Siraj mohammed Khan v Hafizummissa*, (1981) Cr L J. 1430 (SC).

On remarriage of the husband, the wife is entitled to live separately and to claim maintenance. She need not further prove "neglect or refusal to maintain. Remarriage of a husband *ipso facto* constitutes a sufficient cause for his wife's refusal to live with him, entitling her to claim separate maintenance. *Aziz mohd v Sayda Begum*, (1981) Cr L. J. 267 (J & K).

Capacity to earn

Visible assets are not necessary before the husband is made to pay maintenance to his wife. His capacity is sufficient, and that itself is a resource. But there must be a reasonable assessment of that capacity. There is no specific criterion to measure it. The fact that a young advocate has the whole world and the future before him, is both encouraging and discouraging. He may make his mark, or he may lose himself in the wilderness. It is no use ignoring the realities of life. While the capacity to earn is a good ground for providing maintenance at a minimum rate, actual earning is necessary to provide for a comparatively decent rate. Again, in awarding maintenance under section 488, Cr. P. C., the court should see

that the rate is not such as would tempt the wife to permanently from her husband. There should be a reasonable assessment of the capacity. *Syed Ahmad v. Naghath Parveen Taj Begum*, AIR 1958 Mys 128, 131, 132 para 8 (K. S. Hegde J) Personal law cannot overrule the case. *Malik v. Hemraj*, AIR 1954 All 30.

3.12 *Just ground and main application*

If the wife has a just ground for living apart, her maintenance can be ordered against the husband under sub-section (1) which is concerned with the main application and its disposal on the merits. Conversely, if she has no just ground for living apart, then maintenance may be refused. Indeed the same result would follow by virtue of section 125 (4) which *inter alia* debar the wife from claiming maintenance if the wife "without sufficient reason refused to live with the husband.

The second proviso (previously, the first proviso) with its Explanation, is also a proviso to sub-section (1), so that the offer to maintain by the husband, or the wife's refusal to live with him on any alleged "just ground" or on any of the grounds given in the Explanation, has to be considered by the magistrate, not only at the time of enforcement of the maintenance order under sub-section (3), but also (initially) when an application is made under sub-section (1)— *Syed Ahmed v. N. P. Taj Begum*, AIR 1958 Mys 128 (Hegde J) *Senapathi v. Deviraman*, AIR 1950 Mad 357 (Pancharakesa Ayyar J) (If the husband has remarried the offer to maintain cannot be regarded as sincere).

Explanation to the second proviso to sub-section (3) applies to main proceedings for maintenance under sub-section (1). It is undoubtedly true that the application, 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 pro-

viso to sub-section (3) of section 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. But even though the Explanation can be said to be attached to, and arise from the said second proviso yet reading section 125 as a whole, there would be absolutely no scope for any doubt that this Explanation governs the whole of section 125. The result is 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 the wife's refusal to live with her husband was based on a just ground or not. This is so because, if, after the order of maintenance is passed, and at the stage when it is sought to be executed, the wife can reject the husband's offer to reside 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 even initially she had a just ground to refuse to go and reside with him. This conclusion is supported by the wording of sub-section (4) also. *Ghasitu v. Durga Devi*, (1980) Cr.L.J. 885 (HP).

3.1.3 Remarriage

Ordinarily, remarriage of the husband is sufficient ground for the wife refusing to live with the husband. *Kandaswami v. Nachammal*, AIR 1963 Mad. 263, 264 para 4 (*Sadasivam J.*); *Ramji Malivya v. Munnidevi*, AIR 1959 All. 767; (1959) Cr.L.J. 1386, Contrary view in *Iqbalunnisa v. Habib Pasha*, AIR 1961 AP 445 not with respect correct.

A husband can, in an application under section 488, Cr. P. C., (New section 125) take the plea that he is willing to maintain his wife if she lives with him. It is a good defence,

if it is a bona fide one. If the main proviso is available in proceedings under sub-section (1), then it necessarily follows that the amendments made to that proviso will also be applicable to such cases. If the husband can plead that he is willing to maintain the wife, she, in her turn, can plead that she is not willing to live with him on the ground that he has taken a second wife. There is no particular reason why such a plea should be available only at the time of enforcement of the order and not at the time of its passing. Neglect or no neglect, the husband is liable to pay separate maintenance to his wife on the sole ground that he has taken second wife. It is true that the personal law of the Muslims allowing four wives as such has not been changed. But if the parties come within the mischief of section 488, Cr. P. C., they shall be governed by its provisions notwithstanding their personal law. *Syed Ahmed v. Naghath Parveen Taj Begum*, AIR 1958 Mys 125.

According to the High Court of Himanchal Pradesh on a plain reading of the Explanation, it is evident that in all cases where a husband has contracted marriage with another woman whether before or after his marriage with the woman who claims maintenance under section 125, the Explanation applies with full force. *Ghasitu v Durga Devi*, (1980) Cr. L. J. 885 (HP).

In *Deochand*, AIR 1974 S. C. 1488, it was held that if the husband marries again then the wife can refuse to live with him and may claim maintenance. The second proviso with the Explanation was applied as an independent enacting provision, governing not only sub-section (3), but also section 125 as a whole, as discussed in *Aziz Mohd*, (1981) Cr. L. J. 267 (J & K) (FB) and also *Ghasitu* (1980) Cr. L. J 885 (H. P.) This also was the view of the majority of the High Courts.¹ See

1. See also note "Proviso applicable to whole section" *infra*.

also *Sulochona*, (1981) Cr. L. J 1899 (Ker), where it has been held that the proviso applies to the whole of the section.

Before a Magistrate can pass an order, he must be satisfied with regard to two matters, namely, that the husband has sufficient means and that the husband has neglected or refused to maintain his wife or child. There is, however, nothing to indicate how neglect or refusal is to be established where the husband offers to maintain his wife only on the condition of her living with him and if the court finds that the refusal by the wife to go and live with her husband is justified. Such a conditional offer by itself would really amount to refusal on the part of the husband to maintain his wife if she continued to live away from him. Thus, where the husband has taken a second wife and he refuses to maintain his first wife when the first wife is agreeable to go and live with him, this circumstance by itself will be sufficient to establish refusal of the husband. Thus, in practice, the existence of a second wife or the keeping of a mistress would, unless there is something else proved against the wife, result in the acceptance of the petition of the wife for the grant of the maintenance. *Ranjit Kaur v Avtar Singh*, AIR 1960 Punj 221.

Revision against execution

In an Allahabad case, there was an order of the Resident Magistrate, directing the father of a minor son aged about 6 years, to pay maintenance allowance. The order was not challenged on the ground of want of jurisdiction. The Sessions judge confirmed the order. Objection about the Magistrate's jurisdiction to pass the order cannot be allowed to be raised at the belated stage of revision against execution of the order.

Courts of law are handmaids of justice. A court of revision in particular, is not meant for interfering with impugned orders, merely on technicalities and illegalities. The pri-

1. See below, "Just ground and main application".

mary consideration before the revisional court is miscarriage of justice. *Sulochana Devi v Ramkumar Chauhan*, (1981) Cr. L. J. 493 (All).

Maintenance of child

So far as the maintenance of a child is concerned, the criminal court is concerned only with the fact of its custody and not with the propriety of that custody. But, when the mother comes before a civil court, the court has to consider whether the father is not the lawful guardian of the child and whether, for any reason, he is unfit to have its custody. The right to custody can be a good defence to claim for the separate maintenance of the child in a civil suit, provided the father has expressed his bona fide willingness to keep and maintain the child. When the custody of child is wrongfully withheld from its father when he is its legal guardian, it would be unfair to require him to pay for its maintenance and drive him to a separate action for recovering its custody, when the question of his right and fitness to have its custody can be decided in the same suit. *Dinsab Kasimsab v, Mahomed Hussen*, A. I. R. 1945 Bom. 390.

3.14. *Decree for restitution*

The social object of section 125 compels a liberal construction. In the absence of any statutory bar, the wife's application for maintenance under section 125 cannot be rejected merely because the husband has obtained a decree for restitution of conjugal rights against her and she declines to comply with it. The second proviso to section 125 (3) is, in fact, intended to meet such a case and the Magistrate can decide if her refusal is justified. *Babulal v Sunita*, (1988) Cr. L. J. 525 (M. P.)

Decree for restitution of conjugal rights is not, by itself, a ground to refuse maintenance to the wife. *Sayed-Ghulam*, (1981) Cr. L. J. (NOC) 2 (A. P.)

Maintenance is the wife's right. If the wife has been able to establish it under section 125, the right cannot be denied, merely because the husband has obtained a decree for restitution of conjugal rights against her. Proceeding under section 125 and under the respective (Muslim) personal laws of the spouses, operate in different spheres though, in a limited area, they do overlap. In the presence of a decree for restitution of conjugal rights against the wife, she can still claim maintenance if the conduct of the husband is such as obstructs her to obey such a decree. However, the order for grant of maintenance under section 125 is not to be made merely for the asking, but only on certain conditions being satisfied. It is therefore necessary and mandatory for the party claiming maintenance to establish neglect or refusal to maintain on the part of the opponent. The husband is not obliged to maintain his wife, if she is not willing to live with him and to discharge her marital obligations without any justification. *Mohd. Shakeel v. Sharlana Parveen*, (1987) Cr. L. J. 1539 (Delhi) (M. K. Chawla J.).

Personal law

The right given by section 488 is a statutory right independent of the personal law of the parties and is not affected or governed by personal law. In order to entitle a wife to claim maintenance from her husband, all that she has to prove is that he has sufficient means and that he has neglected or refused to maintain her. If she is living separately from her husband and without any sufficient reason refuses to live with him, the right to claim maintenance from him is barred by sub-section (4). *Dewan Singh v. Harbans Kaur* A. I. R. 1962 Punj. 247.

Re-marriage after desertion

Ordinarily, remarriage is a sufficient ground for the wife refusing to live with the husband, but not if it is a natural and direct consequence of her prior refusal, without any suffi-

cient reason, to live with him. She cannot take advantage of her own wrong; she cannot equip herself with a "sufficient reason" by refusing to live with the husband without any sufficient reason and thereby compelling him to remarry. *Ramji v Munnidevi*, AIR 1959 All 767.

The wife is not entitled to claim maintenance under sub-section (1), if she became disentitled to any maintenance from the husband when she deserted him. The husband's subsequent remarriage did not restore her to the right which she had prior to the desertion. *Ramji v Munnidevi*, AIR 1957 All 768 explained in *Kandaswami v. Nachammal*, AIR 1963 Mad 263, 265 para 4 (Sadasivan J).

The provision that remarriage by the husband is a just ground for the wife's refusal to live with him lays down a general principle, which must be borne in mind when the question to be considered is whether the wife's refusal to live with her husband is without any reason. A wife who refuses to live with her husband on account of his remarriage is, therefore, not prevented from claiming maintenance allowance. *Kandaswami v. Nachammal*, A.I.R. 1963 Mad. 263.

Taking second wife

It is permissible for a court dealing with a petition under section 488 to have regard to the personal law of the parties. Where, under the personal law, the first wife is entitled to live separately and claim separate allowance when her husband takes a second wife and she lawfully resides separately upon his taking a second wife, the duty of the husband is to give her separate maintenance and his refusal to do so would justify the awarding of separate maintenance under sub-section 488 (1). If husband marries again, order for separate maintenance to be given to wife is proper, even if husband offers to maintain the wife. *Senapathi v. Deivanal Ammal*, A. I. R. 1950 Mad. 357.

3.15 *Inquiry into sufficiency of ground*

Where the husband's offer to maintain the wife, if she

would live with him, is rejected by her, the wife's application should not be dismissed without a careful enquiry and finding as to whether there was sufficient ground for her not living with the husband. *Nooran*, 40 Cr. L. J. 496; *Sollammale*, AIR 1943 Mad. 647; *Said Bibi*, A.I.R. 1930 Lah. 464; *Ram Kishore*, A.I.R. 1957 All. 658. Offer to maintain. The offer to maintain must be a bona fide one and not one made with the object of escaping the obligation of maintenance. *Teastall*, A. I. R. 1958 Cal. 623; 39 Cr. L. J. 696; *Mammad Kunhi*, (1978) Cr. L. J. 1645 (Ker.).

The offer should be to maintain *as a wife*, with the amount of decency and dignity, appropriate to her class. *Ramakishore* AIR 1957 All 658. *Manatha*, 1890 ILR 17 Cal. 250 *Sakrulla*, 25 Cri. L. J, 453.

The offer must be to maintain the wife in the husband's own house and not an offer of separate residence. *Bai Majek*, 29 Cri. L. J, 1049. If there was former ill treatment which drove the wife away, or desertion and there is reason to believe that there will be repetition of it if the wife returned, then a subsequent offer by the husband to keep her in his house, cannot be taken to be *bona fide*. Such lastminute offers to take back a wife are open to scepticism. *Kaluram*, A. I. R. 1943 Nag. 183; *Bathulu*, 41 Cri. L. J. 718; *Teastall*, A. I. R. 1938 Cal. 623; 39 Cri. L. J. 695; *Shamsher*, A. I. R. 1953 All. 720; *Kishanlal*, A. I. R. 1968 Raj. 86; *Kandaswami*, A. I. R. 1960 Mad, 348.

3·16 Defence

Offer to maintain the wife, if not bona fide, is of no effect.

In *Bhagirathi v. Lakshmi Devi*, A. I. R. 1940 Patna 242; 41 Cr.L.J. 715, Harries, C. J. observed:—

“In a claim for maintenance, it is no defence for a husband to say that he is prepared to take his wife back,

if the facts show that the wife has reasonable cause for fearing to return to the husband's home. If the wife has been ill-treated and there is ground for believing that if she returns the ill-treatment will continue, then the wife is entitled to live apart from her husband.....Causing a wife to leave the protection of the husband by ill-treatment is tantamount to driving the wife deliberately from the home".

It has been held in *Senapathi v. Deviraman*, AIR 1950 Mad. 357, 358, that if the husband marries second wife, separate maintenance to the first wife can be ordered. The offer to take back cannot be taken to be sincere. "Even if he takes back will only make her an unpaid cook and maid".

3.17 *Wife's living Apart*

The wife is entitled to separate maintenance, if she has some good reason for living apart. The only point for consideration is, whether the reason given by the wife for living apart is just. The court will, no doubt, consider cruel or barbarous treatment by the husband, safety of life and inadequacy of food or clothing, but it is not essential for the court to consider what constitutes "habitual cruelty" or legal cruelty. The words "just ground" invest the court with a large discretion. A systematic course of ill treatment, beating, or oppression by the husband is a good ground for the wife's refusal. *Kalviya v. Hira*, AIR 1929 All 950 (Sen. J); *Bhagirathi v. Lakshmi Devi*, AIR 1940 Pat 242; 41 Cr. L. J. 715 (Harries C. J). *Ganesh Sao v. Sheomali*, AIR 1950 Nag. 168, 169, para 5 (Hemeon, J). Habitual ill treatment of the wife need not be proved. *Ignatious*, AIR 1935 Rang 102. Where ill treatment is likely to continue even if the wife comes back, the husband's willingness to take her back is of no avail. *Bhagirathi v. Lakshmi Devi*, AIR 1940 Pat 242, 41 Cr L. J 715 (Harries C.J.)

What is sufficient ground must be determined with reference to the circumstances of each individual case and

with due regard to the social ideas and customs of the community to which the parties belong. *Gantapalli*, I. L. R. 20 Mad 470, 476 (FB).

Illness of the wife is a just ground for residing apart *Ram Khelawan*, AIR 1952 All. 958. So is an agreement by the husband to live in her house. *Nizamul*. A I R 1966 Cal. 465. *Ram Khelawan*, AIR 1952 All 958.

3.17A. *What are just grounds*

The following are just grounds for the wife's living apart.

- (a) Physical cruelty by the husband. *Rajpati*, 31 Cr. L.J. 3 ;
- (b) reasonable apprehension of physical ill-treatment, *Sundarammal*, AIR 1940 Mad 292;
- (c) systematic ill-treatment, *Kalviya*, A. I. R. 1929 All 950 ;
- (d) violent behaviour towards the wife, *Ignatiours*, AIR 1935 Rang. 102;
- (e) venereal disease of the husband, *Sellamal*, AIR 1943 Mad 647 ;
- (f) Adultery by the husband, *Gantapalli*, ILR 20 Mad 470 *De Castro*, 11 L R 13 All 348.

Apprehension by the wife of physical harm due to persistent demands of dowry is a just ground for living apart. *Siraj Mohammed Khan*, (1981) Cri LJ 1430 (SC).

Imputation of unchastity, made for the first time in reply to claim for maintenance, though it is a subsequent event, must be considered and another application is not necessary, *Shakuntla*, (1981) Cr LJ 1420 (H. P).

Deliberately false attribution of immorality to a wife, is a just ground for her living apart.

Pancho v. Ram Prasad, AIR 1956 All. 41, 42 para 3
(D. N. Roy J.)

Narayanan, (1953) Cri LJ 72

Chander, AIR 1968 Del 174

Gangamma, AIR 1950 Mad 385

Subbamma, AIR 1950 Mad 394

Where the husband offers to maintain the wife on condition of her living with him, she is entitled to maintenance, only if there is *just ground* for refusal to live with him. Where, because of the living in conjugal home not being smooth, the husband sent his wife to her parental home and did not bother to bring her back (though she was willing to return to her husband's home,) the husband must be held to have neglected to maintain her, and when, on the wife's application for maintenance, the husband made no offer to maintain her on condition of her living with him and subsequently even filed an application for divorce, then wife must be held to have "just ground" for her refusal to live with the husband and was entitled to claim maintenance under section 125. The wife's omission to state in her evidence that she was unable to maintain herself would not be fatal to her claim. Where the finding of fact recorded by the lower court that the wife had been willing to come back to her husband's home and the husband had neglected to maintain her was on firm foundation, the High Court would not interfere in revision. *Girishchandra v. Sushilabai*, (1987) Cri LJ 1815 (M.P.)

3.18 *Sub-section (3), second proviso. Explanation.*

(Second marriage or keeping concubine)

Under section 125 (3), second proviso, Explanation, the mere fact that the husband had contracted another marriage or has a mistress is a just ground for the wife to live separately and to claim separate maintenance. *Deochand*, AIR 1974 S.C. 1488. Second marriage by the husband, or the keeping of a concubine by the husband is, also a ground in section 18 (2)

(d) and (e) of the Hindu Adoptions and Maintenance Act, 1956 (formerly, section 2 of the Hindu Women's Right to Separate Residence and Maintenance Act, 1946), for the wife's residing separately and claiming maintenance. If the second marriage took place before the Hindu Women's Right to separate Residence and Maintenance Act, 1946, a Hindu wife is not entitled to separate residence and maintenance in Hindu law *Palaniswamy*, AIR 1956 Mad 337 (FB).

It is not necessary that the mistress should live in the same house. Further, the wife need not prove neglect or refusal by the husband to maintain. Where the husband has taken a second wife, the husband's offer (after the wife's application for maintenance) to maintain the first wife if she lives with him, is of no avail. *Mafik*, AIR 1954 All 30; *Bayamma*, AIR 1954 Mad 226; *Rajeswaramma*, AIR 1954 Mys 31; *Senapathi*, AIR 1950 Mad 357; *Bhanwarlal*, AIR 1957 M. P. 221.

Syed Ahmad, AIR 1958 Mys. 128; *Ranjit*, AIR 1960 Punj 221.

Kandaswami, AIR 1963 Mad 263.

Shambu, AIR 1966 Mys. 311; *Aziz Mtd.*, (1981) Cr. L. J. 267 (J & K) (FB) This view was also taken in a Calcutta case *Panchugopal*, 59 C. W. N. 767 second marriage provides a just ground for the wife's refusal to live with the husband, if the husband either neglects or refuses to provide separate residence that amounts to neglect and refusal *Gouribala*, A.I.R. 1965 Cal. 190: 68 C.W.N. 1173. Another Division Bench in Calcutta held that the mere fact of another marriage does not entitle a wife to claim maintenance without proof of neglect or refusal to maintain her. *Bela Rani*, 60 C.W.N. 212; A.I.R. 1956 Cal. 134; followed by *Rupchand*, A.I.R. 1966 Cal. 83. To the same effect are the decisions in *Anwarbi*, A. I. R. 1953 Nag. 133; *Ishar*, A.I.R. 1959 Punj. 265; *Desbati*, A. I. R. 1960 M. P. 245; *Dhankour*, A. I. R. 1960 Punj. 595; *Iqbalunniso*, A. I. R. 1961 A. P. 445.

Second marriage, even with the consent of the first wife, is a just ground for the first wife living separate and claiming maintenance. *Abdul Gaffar*, A. I. R. 1968 Pat. 307. If, after infructuous execution of a decree for the restitution of conjugal rights, the husband marries another woman, an order for maintenance to the first wife can be made without enquiry under the second proviso to section 125 (3). *G. Subban Basha v. Shan Shunnisa*, (1980) Cri. L. J. 376 (A. P.) (Muktadar, J.). Second wife, marrying with the knowledge that the husband has another wife living with him, can still claim maintenance and separate residence, according to the Himachal Pradesh view. *Ghasitu*, (1980) Cri. L. J. 885 (H.P.). It is submitted, with respect, that this does not appear to be correct. Such a woman not being lawfully married, is not a "wife". See *Yamunabai v. Anant Rao*, (1983) Cri. L. J. 250 (Bom.) (FB), dissenting from *Boli Narayan v. Sidheshtwar*, (1981) Cri. L. J. 674 (Gauhati).

3.19. *Second marriage: Muslim Law*

Before the Supreme Court, the question had come up for consideration whether a Muslim wife whose husband has married again, is worse off than a Muslim wife whose husband has taken a mistress, to claim maintenance from her husband. The main defence raised was, that since the husband is permitted by Muslim law to take more than one wife, his second marriage cannot afford a legal ground to the first wife to live separately and claim maintenance. The Supreme Court, however, held that irrespective of the husband's right under his personal law to take more than one wife, his first wife would be entitled to claim maintenance and separate residence, if he takes a second wife. *Begum Subanu alia Seiro Banu v. A. M. Abdul Gaffoor*, AIR 1981 SC 1103 (from Kerala).

It was held in the above case that under the Explanation to section 125 (3), a right has been conferred on the wife to live live separately and to claim maintenance from the husband,

if he breaks his vow of fidelity and marries another woman or takes a mistress. It matter not, whether the women chosen by the husband to replace the wife is a legally married wife or a mistress. Therefore, it can not be said that the husband's taking another wife will not entitle the wife to claim separate maintenance and residence. The Explanation is of uniform application to all wives, including Muslim wives, whose husbands have either married another wife or have taken a mistress. In this connection, any offer to take the first wife back cannot be considered to be a *bona fide* offer unless the husband offers to set up a separate residence for her, for a husband who marries again cannot compel the first wife to share the conjugal home with the co-wife.

According to the Bombay High Court, the second wife of a Muslim can claim maintenance, as the presence of the first wife would itself constitute refusal or neglect to maintain her. The husband cannot resist the claim simply because there is a decree for restitution of conjugal rights under Muslim law. *Hafijabi* (1983) Cri. LJ 831 932, 933 Godgre J (Bom) dissenting from *Rupchad, v, Charablat* A I R 1966 Cal. 83 (1966) Cri. L J 143.

A second wife can claim maintenance from husband as the fact that the husband has a first wife, would itself constitute refusal or neglect to maintain the said wife. Under the Mohamedan law, a wife would not be entitled successfully to defend a suit for restitution of conjugal rights on the basis of a simple fact that the husband has another wife. Even if such a defence is raised, the suit will be decreed. Thus, the position is that a decree for restitution of conjugal rights can be passed, even though the husband has taken another wife. But the matter is quite different when one has to consider the provisions of section 125 of Cr. P. C. The Explanation to subsection (3) makes it abundantly clear that if the husband has contracted a marriage, with another woman, that itself would

be a just ground for his wife for refusal to live with him. Consequently when a claim for maintenance under section 125 is made the fact of the husband having the second wife will be relevant for the purpose of deciding as to whether the wife has a just ground to live separately from the husband. *Hafijabi A. Aziz v. Abdul Aziz*, 1983 Cri. L. J. 931 (Bom).

No other ground for wife's refusal to live with the husband need be looked into if there is good ground of husband's contracting another marriage. The fact that the wife came once or twice to live with her husband even after his remarriage, does not improve matters in favour of the husband. *Malki v. Hemraj*, AIR 1954 All 30 (Randhir Singh, J).

3.20 *Personal law*

Although the personal law of the Muslims allows four wives, yet under the Explanation to section 125 (3), the wife is entitled to maintenance if another marriage is contracted by her husband. *Badruddin*, (1957) A. L. J. 300; *Mehbubahbi*, (1976) Mah. L. J. 631. 1983, Cr. L. J. 1382 (Guj).

The second proviso to section 488 (3) governs the whole section 488, Cr. P. C. and therefore, a wife who refuses to live with her husband on account of his remarriage, is not prevented from claiming maintenance under sub-section (1) of section 488. The proviso does not make any difference between one party or the other. Nor is there any indication to show that it applies only to parties governed by the law of monogamy. On the other hand, the Cr. P. C. is a general law giving summary and speedy relief to the destitute wife and the children who are entitled to be maintained by the husband. One cannot read into the proviso what is not found in it merely because some hardship or inconvenience is caused to a husband governed by the personal law. The aggrieved husband can certainly file a suit to set aside the order of maintenance passed by the criminal court, if he could successfully make

out that, under the personal law, the wife will not be entitled to get maintenance on the ground that he had taken a second wife. *Mohamed Haneefa v. Marian Bi*, AIR 1969 Mad. 414, 415 para 5 (Krishnaswami Reddy, J.) (It is submitted that the obiter dictum that the civil court can set aside the order on the above ground, is not sound. The Cr. P. C. would override personal law. See *Syed Ahmad v. N. P. Tara Begum*, AIR 1958 Mys 128. (Hegde J.)

According to the Calcutta High Court whatever might be the personal law of any wife, she must, in order to entitle her to an order under sub-section (1) of section 488 (1898 Code) establish *inter alia*, that there is a *present* neglect or refusal on the part of her husband to maintain her. The mere fact of a second marriage cannot ipso facto establish "such neglect or refusal" within the meaning of sub-section (1) of section 488, for a man may marry a second time and still not refuse to maintain his first wife. The mere fact that a husband has contracted marriage with another wife or keeps a mistress cannot, without more, be said to amount to neglect or refusal on the part of the husband to maintain his wife. *Bela Rani v. Bhopal Chandra*, AIR 1956 Cal. 134 (J. P. Mitter & R. Mukherjee J J).

It is however submitted that this view is no longer enable in the light of subsequent decision to the contrary.

A husband can, in an application under section 488, take the plea that he is willing to maintain his wife if she lives with him. It is a good defence, if it is a bona fide one. If the main proviso is available in proceedings under sub-section (1), then it necessarily follows that an amendment made to that proviso will also be applicable to such cases. If the husband can plead that he is willing to maintain the wife, she in her turn can plead that she is not willing to live with him on the ground that he has taken a second wife. Neglect or no neglect, the husband is liable to pay separate maintenance to his wife on

the sole ground that he has taken second wife. It is true that the personal law of the Muslims allowing four wives, as such, has not been changed. But if the parties come within the mischief of section 488, C. P. C. they shall be governed by its provisions notwithstanding their personal law, *Syed Ahmed v. Naghath Parveen Taj Begum*, AIR 1958 Mys. 128 (K. S. Hegde, J).

3.21 Position of second wife

The second proviso by section 488 (3) places the wife on a stronger footing. It does not mean that it benefits only the first wife, when the husband takes a second wife. The word "contracts" is sufficiently wide to benefit the second wife, even where the husband, without marrying a third time, is living with the first wife. *Kuntibala*, AIR 1955 Cal. 108; *Tejabai*, AIR 1966 Bom. 48.

322. What are not just grounds for living apart

A custom that the husband is to live with the wife's parents is not a just ground for the wife living apart. *Qadir*, AIR 1957 J & K 37.

Incompatibility of temper is not a just ground for living apart, according to the Bombay High Court. *Gulabdas*, ILR 16 Bom. 269. But see *Nihan* 15 Cr. LJ 554.

The non-payment by the husband of prompt dower may be a good and sufficient reason under the Mohammedan law for a married woman to withhold her person from her husband but it does not follow that such non-payment is sufficient and good enough ground within the meaning of section 488 to empower court to pass a decree for maintenance to a Mohamedan wife against a husband who is willing to maintain her upon the condition of living with him. Section 488 provides a statutory right and cannot be affected by personal law. The right conferred upon the wife by the provisions of section 488 is independent of personal law and to claim

protection of the Mohamedan law in derogation of the statutory provisions of the Cr. P. C. is not permissible. *Muhammed Azizullah*, AIR 1935 Oudh 285 (Thomas, J.).

There is nothing in the Code which compels the criminal court to award separate maintenance to a wife whom the husband agrees to protect and maintain in a manner suitable to her position in life, simply because he refuses to cohabit with her. *J. Basawammia v. J. Seetreddi*, AIR 1922 Mad. 209, 23 Cri. L. J. 336 (Kumarswami Sstri, J.).

Circumstances may arise when the court may consider that it would not be proper for the wife to live with her husband and the wife may be permitted to live separately and yet claim maintenance. All such grounds have reference to the comfort and safety of the wife. Conjugal relations are hardly relevant to the order for maintenance under section 488. A wife is not entitled to live apart from her husband and claim maintenance merely on the ground that her husband is impotent and unable to perform his marital duties. *Emp v. Doulat Raibhan*, AIR 1948 Nag. 69 (Hidayatullah, J.).

3.23. *Impotence*

Impotence of the husband is not a "just ground" for living separate, according to earlier rulings. *Doulat*, AIR 1948 Nag. 69. But a subsequent decision of the Supreme Court has held impotence to be "cruelty" for the purpose of matrimonial law.

3.24. *Orders under 1898 Code*

Order of maintenance passed under section 488 of the old Code (of 1898) must be deemed to be made under section 125 of the new Code, by reason of section 484 (2) (b). It can be cancelled under section 127 of the new Code. *Jagir Singh*, AIR 1979 SC 381.

3.25 *Right of first wife*

Where a Muslim contracts a second marriage, the first

wife's claim for maintenance is not barred, merely because Muslim law permits four wives at a time. *Banabibi*, (1983) Cr. L.J. 1382 (Guj.).¹

Section 125 refers to a stage *prior* to the passing of the order in maintenance proceedings, whereas sub-section (5) refers to a stage *after* the order has been passed. *Kalavati*, (1981) Cri. L. J. (All) K. Jagmalah (1976) Cri. L. J. 219 (AP). It is an exception to the general liability to maintain, referred to in section 125 (1). He who claims exemption has to prove this existence of circumstances for putting forward such a claim. *Sarala*, (1977) K. L. T 942; *Mammad Kunhi*, (1978) Cri. L. J. 1645 (Ker.).

In the petition by the wife for maintenance, ten parties by mutual consent agreed to live separately and the husband agreed to pay Rs. 30 p. m. as maintenance. On the basis of the mutual agreement, the court passed an order, directing the husband to pay Rs. 30 p. m. as maintenance. It was held that the mutual agreement to live separately being anterior to the order passed in the maintenance proceedings, and the husband having submitted to it, he could not challenge it in execution proceedings. Moreover, since the husband had made allegations against the character of the wife in the execution proceedings the wife, apart from the mutual agreement, had sufficient cause to live separately. Therefore, in either view, the wife was entitled to execute the maintenance order. Section 125 (5) had no application, as there was no agreement to live separately after the passing of the maintenance order *Kalavati v. Ansan*, (1981) Cri LJ 74 (All) (Mahabir Singh J).

When a Muslim husband takes second wife, the first wife has every right to stay away and claim maintenance. *Mahubabi*, (1976) Mah L. J. 631.

1. See also Second Marriage Muslim Law supra.

Sub-sections (4) and (5) of section 488, 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) covers the period subsequent to the passing of order for maintenance. Therefore, an order cancelling the order for maintenance, made under sub-section (5), on the ground that the wife "is living in adultery", takes effect only from the date of that order of cancellation, and the wife is entitled to recover maintenance for the period up to the date of cancellation. Further, in the instant case, the husband's plea that the wife had been living in adultery, was disbelieved and maintenance was ordered. Therefore, the order, which was *res judicata* was not liable to be reopened. *Jagmaiah v. K. Seshirekhamma*, (1976) Cri LJ 219 (AP) (A Sambasiva Rao Ag CJ).

Though the proviso (1) to sub-section (3) of section 488 governs only sub-section (3), the provision that remarriage by the husband is a just ground for the wife's refusal to live with him, lays down a general principle, which must be borne in mind when it is to be considered whether the wife's refusal to live with her husband is without any reason within the meaning of sub-section (4). A wife who refuses to live with her husband on account of his remarriage is, therefore, not prevented by sub-section (4) from claiming maintenance allowance under sub-section (1). Where, under the personal law, the first wife is entitled to live separately and to claim separate allowance when her husband takes a second wife, and accordingly, she lawfully resides separately upon his taking a second wife, the duty of the husband is to give her separate maintenance, and his refusal to do so would justify the awarding of separate maintenance under section 488 (1). *Kandaswami Gounder v. Nachammai*, AIR 1963 Mad 263 (Sadasivam J).

When the wife gets an order for maintenance, that does not mean that she will continue to get maintenance for ever.

The continuance of the payment of maintenance depends upon a number of circumstances. Either before the order for maintenance was passed or after that, the husband can offer to maintain his wife, if she agrees to live with him. Even at the stage of proceedings for the recovery of unpaid maintenance, if the husband is given an opportunity to offer to maintain his wife if she agrees to live with him, then by no stretch of imagination it can be said that an offer made before the maintenance petition was ordered, was a belated one. The scheme of the provisions is such, that in maintenance cases, no question of rejecting an offer as "belated" arises. *Mummatty v. Beepothumma*, (1981) Cri. L.J. 1355 (Kerala) (K. K. Narendran J).

Section 125 (1) confers on any wife unable to maintain herself right to claim maintenance from her husband, if he has sufficient means but neglects or refuses to maintain her. It is not every indigent wife that is so entitled to maintenance. Apart from showing that the husband has sufficient means, it must further be shown that he neglects or refuses to maintain his wife. If a person is willing to maintain his wife in accordance with his civil obligation, there is neither neglect nor refusal. Where a wife is unreasonably refusing to live with her husband who is prepared to provide her with a matrimonial home, that is a matter which must go into reckoning, in passing an order under section 125 (1). *Mammad Kunhi v Rukhiya*, (1978) Cri. L.J. 645 (Ker) (P. S. Poti J).

4.2 *Living in adultery.*

"Living in adultery" means a continued adulterous conduct and not a single or occasional lapse from virtue. *Gantapalli*, ILR 20 Mad. 470 (FB); *Gopaldeb*, AIR 1929 Nag. 238; *Ma Mya*, AIR 1936 Rang. 466; *Gulchand*, ILR 52 Bom. 160; *Patala*, ILR 30 Mad. 332; *Kanniappan* AIR 1954 Mad. 427; *Chetibai*, 39 Cr. L. J. 847; *Samila*, (1978) Cr. L. J. (NOC) 175 (HP); *Kasthuri*, (1977) Cr. L. J. 741 (Mad); *Urmila*, (1981)

Cr. L. J. (NOC) 89 (All). The burden of proof of unchastity is on the husband. *Kista*, AIR 1938 Mad. 833; *Raghupathula*, AIR 1954 Mad. 90.

Unless it is found that at the relevant time, the wife was actually living in adultery, she is not disentitled to maintenance. *Samila*, (1978) Cr. L. J. (NOC) 176 (H. P.). Adultery is not limited to the definition in section 497 IPC *Kaniappan* AIR 1954 Mad 427. The words "living in adultery" were also used in section 13, Hindu Marriage Act, 1955 before its amendment and the same meaning attaches to them in the Criminal Procedure Code *Rajani*, AIR 1958 Bom. 264: Bom. L.R., 577.

Adultery, if pleaded as a ground for refusal to maintain must be at or about the date of the application for maintenance. *Kallu* ILR 26 All. 326.

S. S. Manickam (1980) Cr LJ 354 Mad. *Kista Pillai v. Amrithanumal* AIR 1938 Mad. 833 39 Cr LJ 951.

It is nowhere said in the section (and there is no need to introduce additional words therein), that "living in adultery" must be in the house of the adulterer. The words "living in adultery" are merely indication of the principle that *occasional* lapses from virtue are not a sufficient reason for refusing maintenance. *Continued* adulterous conduct is what is meant by "Living in adultery" The question, therefore, for the Magistrate to decide in such a case is whether there had been such adulterous conduct on the part of the wife at or about the time of the application.

In a case of claim for maintenance, the respondent, who puts forward a charge of "living in adultery" against the petitioner as his only defence to the claim for maintenance, ought to begin his case and the petitioner against whom this charge is made ought to have an opportunity of adducing rebutting evidence.

Kista Pillai v. Amrithammal, AIR 1938 Mad 833, 39 Cr LJ 951 (Pandurana Rao J).

According to a Madras case, expulsion from caste for an act of adultery disentitles a wife to maintenance. *Ponnajee*, ILR 31 Mad. 185; see, however, *Yesubai*, AIR 1933 Bom. 21.

The fact that the wife had an illegitimate child some time ago, is not enough to show that she is "living" in adultery, *Kallu*, I. L. R. 26 All. 326.

Unless continuity of conduct is established, it cannot be inferred from a single act of adultery that the woman is "living in adultery". In a Calcutta Court case, it was held that although the woman had given birth to an illegitimate child, it was open to the Magistrate to find that apart from that circumstance, she was not "living in adultery" *Jatindra Nath v. Gouri Bala*, A. I. R. 1925 Cal. 794 (Sanderson, CJ and Chotzner, J.).

4.3 *Desertion and adultery.*

A man cannot desert his wife and tempt her to unchastity and then resist her claim on the ground of unchastity. *A. T. Lakshmi Ambalam v. Andiammal*, A. I. R. 1938 Mad. 66.

The High Court will be very loath to interfere with a finding of fact as to whether there was a valid marriage between the parties, for the party aggrieved by the finding may always file a suit. But the High Court must interfere, if the Magistrate awards maintenance to a woman and does not justify his action by a definite finding that she is the wife of the person ordered, to pay her maintenance. For, only legally married woman are entitled to maintenance.

The phrase "living in adultery" means something quite different from living an unchaste life. The principle is that a husband is absolved from the obligation to maintain his wife when his wife has a de facto protector, with whom she lives and by whom she is being maintained as if she were his wife. No woman can fairly claim a right to be kept by two

men. *A. T. Lakshmi Ambalam v. Andiammal* A. I. R. 1938 Mad. 66 (Newsam, J).

In England, under section 6, Summary Jurisdiction (Married Woman) Act, 1895, the husband cannot maintain a defence based on an alleged belief in the wife's adultery, if the wife's conduct was brought about by wilful neglect or activity promoted by him *Hartley v. Hartley* H. (1955) 1 All E. R. 625. (Lord Merriman & Collingwood).

In answer to a complaint made under the summary Jurisdiction (Separation and Maintenance) Act, 1895 to 1949, by a wife against her husband that he had wilfully neglected to provide reasonable maintenance for her, he asserted that he reasonably believed that she had committed adultery. It was held that he cannot maintain a defence based on that alleged belief, if the wife's conduct has been brought about or actively promoted by him. It is immaterial whether this principle is founded on analogy to the defences of connivance at the adultery or of conduct conducing to the adultery, which defences are mentioned in section 6 of the Summary Jurisdiction (Married Women) Act, 1895, or is an illustration of the maxim *volenti non fit injuria*.

It was held on the fact that neither had H connived at, nor had he by his conduct conduced to, the conduct of his wife with P, but there was evidence to support the justices' conclusion that H had reasonably and honestly drawn the inference, induced by his wife's conduct, that she had committed adultery with P, and the appeal would be dismissed. *Hartley v. Hartley*, (1955) 1 All E. R. 625 (Lord Merriman, P. and Collingwood, J.)

4.4. *Sufficient reason.*

It is for the court to determine what is sufficient ground for the wife's refusing to live with husband. The allegation of such refusal since the order of maintenance was passed must also be adjudicated. *Shani*, (1882) A. W. N. 168. The words

"without sufficient reason" are objective and not subjective. *Ram Singh*, A.I.R. 1943 Lah. 223. On general principles, it is for the husband to prove the circumstances mentioned in the section (4) of adultery. *Ram Singh v. Ram Bai*, A. I. R. 1943 Lah. 223, Where adultery is not the only ground on which the petition is resisted, the wife should lead evidence. *Balraj*, A. I. R. 1962 Punj. 266.

Where the husband makes an allegation that the wife was living in adultery and makes that his defence for resisting the claim of the wife for maintenance, the husband ought to begin the case and let in evidence of unchastity and then an opportunity has to be given to the wife to rebut the case of the husband. *R. Subbayama v. R. Venkata Rao*, A.I.R. 1954 Mad. 90. (Somasundaram, J.).

4.5 Decree of divorce.

In a Calcutta case, the husband had obtained a decree for divorce on the ground of desertion by the wife, during the pendency of a maintenance petition filed by the wife against the husband. But, in the maintenance proceedings, it was proved that the husband ill-treated his wife and never took her to his house from her parents house, and, in the evidence also, he declined to take her to his house after the decree for divorce. It was held that the wife, who was divorced, was entitled to get maintenance allowance, as the husband himself in his evidence before the court had refused to take her to his house after the decree for divorce. It could not be said in such circumstances that the wife had after divorce refused to live with the husband without sufficient cause.

Section 125 (4) does not bar grant of maintenance allowance to the wife as a divorcee, from a date subsequent to the date of the decree for divorce passed by the matrimonial court. *Sukumar Dhihar v Anjali Dasi*, (1983) Cri. L.J. 36 (Cal) (Amitabha Dutta, J).

submit by circumstances or the attitude of the other party to agree to separate living. It was held that owing to her mental illness, the petitioner was not capable of giving consent to living separately in her father's house. The order of the Additional District Magistrate did not absolve the respondent from maintaining his wife. By refusing to do so, the husband had neglected her and hence, he was liable under section 488, to pay for the maintenance of his wife. *Amar Nath Kapur v. Pran Nath Khanna*, AIR 1968 Delhi 217 (H. R. Khanna J)

Where a wife lives separately on account of her husband's cruelty or husband's keeping a woman or for re-marriage by the husband, it can not be said that they are living apart by mutual consent. *Ramsaran*, A. I. R. 1937 All. 115.

If a husband takes another wife, and he had the first wife mutually agree that she should live separately, it is not mutual consent within the section, as her right to live separately on the husband's contracting another marriage cannot be defeated. *Mukand Lal v. Jyotishmali*, A. I. R. 1958 Punj. 390 (A. N. Grover, J.)

If the parties adopt separate living by consent, an application for maintenance is barred. But mere agreement to pay maintenance or to live separate would not bar an application under section 125. *Chameli v. Gajraj Bahadur Gupta*, AIR 1954 All. 33; *Saraswati*, AIR 1932 Cal. 698; 33 Cri L. J. 634. Where there was mutual agreement between the spouses to live separately and the husband was required to pay Rs. 30 as maintenance, the court can pass a maintenance order and the husband cannot challenge it in execution. *Kalavati*, (1981) Cr. L.J. 74 (All).

An agreement to pay half of salary to the wife for maintenance does not imply a mutual consent to live apart. *Teasdale*, AIR 1938 Cal. 644.

A wife who lives apart by accepting a lump sum, lives separately by mutual consent. *Ramshashi*, A. I. R. 1948 Cal. 186.

If one of the parties, living separately by mutual consent, decides to put a stop to separate living, the wife gets a right to claim maintenance. *Narasimha*, A. I. R. 1947 Mad. 794.

If a husband decides to marry another wife and has actually married one, the first wife can legitimately claim to live separately, and if the husband and the wife mutually have agreed that she should do so, it cannot mean that the wife is living separately by mutual consent in the sense in which these words are used in sub-section (4) of section 488. The right which the law gives to the wife, in section 488, to live separately if the husband contracts a second marriage, will be defeated, if living separately by mutual consent is to be given the meaning that whenever husband and wife decide to do so, whatever the compelling necessity for the same, it must be considered that they are living separately by mutual consent.

Mutual consent would apply to separate living if such separate living was the result of a desire of both the parties. This desire should be based on the volition of both the parties without any element of impelling or compelling circumstances. If a wife knows that the husband is determined to break up the marriage and to take another woman as his wife, and if she decides to live separately because of that reason, it cannot be said that the separate living is the result of any desire on her part to live away from her hearth and home willingly and without the element of compulsion forcing the decision against her will. *Mukand Lal v. Jyotishmati*, A. I. R. 1958 Punj. 390 (A. N. Grover, J.).

The words "mutual consent" in section 488(4) would apply to separate living if such separate living was the result of a desire of both the parties and mere agreement to pay maintenance or to live separate would not bar an application under section 488 of the Code of 1898. *Chameli v. Gafraj Bahadur Gupta*, A. I. R. 1954 All. 33 (Randhir Singh, J.).

Agreement for maintenance was made between the husband and the wife, but not acted upon. It was held the jurisdiction under section 488 is not ousted. Anything short of a decree entitling the wife to maintenance, is not sufficient to take away the jurisdiction of the Magistrate; the mere existence of an agreement between husband and wife, which is not acted upon, does not oust the jurisdiction of criminal courts. *Saraswati Debi v. Narayan Das Chatterjee*, AIR 1932 Cal. 693 (Mitter J.).

With reference to section 125 (3), proviso (2), Explanation, there is an Allahabad case in which the husband was keeping a mistress at his house. It was held that in these circumstances, the wife living separate from husband could not be said as living separately by mutual consent, so as to operate as a bar to claiming maintenance allowance. *Bishambhar Das v. Anguri*, (1978) Cr LJ 385 (All) (V. N. Varma J).

Though a divorced woman may be understood by the term "wife" by reason of explanation (b) to section 125 (1), the person who was her husband prior to such divorce will not be embraced within the term 'husband'. Section 125 (4) refers to the right of the wife to receive an allowance from her husband. If the definition has not the effect of treating the person who is really not a husband as the husband, then sub-section (4) will not be applicable to the case of a divorced woman. 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. Sub-section (4) of section 125 conceives refusal to live with the husband without sufficient reason as a sufficient justification for refusing maintenance. This pre-supposes a right and an obligation to live with the husband. Such a right and such an obligation cannot be assumed in the case of a divorced woman, nor can

a corresponding obligation in the erstwhile husband to keep the woman in his house be assumed. *Mariyamma v. Mohd Ibrahim*, AIR 1978 Ker 231.

In a previous proceeding under section 488, the husband denied that the petitioner was his wife and that he would not keep her. The proceedings were, however, dropped as a result of compromise under which the wife consented to give up her claims to live with her husband in lieu of a certain sum of money. Since then, the parties lived apart. It was held that the parties were living separately by mutual consent and therefore section 488 (4) was a bar to the wife being granted any allowance on a subsequent application under section 488. *Kamsashi Mondal v. Nirode Barani Das*, A. I. R. 1948 Cal. 186 (Lodge, J.)

So is the case with the provision that if the husband and wife are living separately by mutual consent, the wife shall not be entitled to receive the allowance. No question of mutual consent would arise in the case of parties to a marriage which is dissolved. That clause is also evidently inapplicable to the case of a divorced woman. *Mariyamma v. Mohammad Ibrahim*, A. I. R. 1978 Ker. 231 (FB).

Sub-sections (4) and (5) do not apply to a divorced wife *K. Shanmukhan*, (1981) Cr. L. J. 930 (Ker.); *S. S. Manickam*, (1980) Cr. L. J. 354 (Mad.).

Where it is sought, under section 488, sub-sections (4) and (5), of the Code of Criminal Procedure, 1898 to have an order passed under sub-section (1) of section 488 set aside, such application must be made to the Magistrate who passed the original order or to his successor in office, who, and who only, has jurisdiction in the matter.

5.1 Section 125 (5) : Reunion after order.

In an order of maintenance has been made under section 125, it will operate until it is vacated or altered in terms of sub-sections (4) and (5) of section 125 or section 127 and it is

enforceable, and no plea of cohabitation in the interregnum, or of compromise, can hold good as a valid defence to the execution of the order. *Bhupinder*, (1978) Cr. L. J, 198 : A. I. R. 1979 S. C. 442,

5.2 Cancellation of order.

Sub-section (5) concerns the period subsequent to the passing of the order for maintenance. The order cancelling award of maintenance is effective, only from the date of the order of cancellation. Hence the wife is entitled to get maintenance upto the date of the order of cancellation. *K. Jagmaiah*, (1976) Cr. L. J. 219 (A. P.).

Effect of divorce.

The grounds of cancellation given in sub-section (5) are not exhaustive. *Peareylal*, 37 Cr. L. J. 62. Thus, an order can be cancelled after divorce. *Shah Abu*, I. L. R. 19 All. 50; *Ludden*, I. L. R. 14 Cal. 276; *Ahmad Kasim*, (1932) I. L. R. 59 Cal. 833; *Abdul Ali*, I. L. R. 7 Bom. 180; *Jaini*, A. I. R. 1955 A. P. 1; *Md. Rahimutullah*, A. I. R. 1947 Mad. 961.

Even after an order of separate maintenance has been in force for some years, the husband can apply for cancellation on the ground that he is willing to take the wife back. The wife can resist the application only on the ground that there was sufficient cause to live apart. *Appayyanma*, A.I.R. 1948 Mad. 101.

5.3 Plea of adultery

When the maintenance order is cancelled for adultery arrears of past maintenance are also irrecoverable according to one view. *Khandekar*, AIR 1942 Bom 258. *Rukmini*, A.I.R. 1963 AP 407. But some High Courts take a different view. *Tari Bala*, A.I.R. 1938 Cal 144 *Bhog Sultan*, A.I.R. 1930 Lah. 99.

If an application seeking recovery of arrears of maintenance is filed, the magistrate is not entitled to go into the

question of the wife's adultery prior to the order of maintenance. But, when adultery committed after the passing of the order is alleged, it should be gone into under sub-section (5); and, if the maintenance order is cancelled on this ground, then, according to the Calcutta High Court, it means as if there was no such order and past maintenance cannot be recovered. *Kalyani* A.I.R. 1957 Cal. 115.

Adultery must, in any case, be sufficiently proved, *Kuwanti*, A.I.R. 1948 Pat 285 *Jatindra*, 29 C.W.N. 640.

6.1 *Second application when not permissible :*

Where an application under section 125 is dismissed on the merits, the magistrate cannot entertain a second application on the same facts. *Mutesari*, A. I. R. 1917 Cal. 608; 17 Cr. L. J. 106; *Sadrudin*, 18 Cr. L. J. 326; *Lalratan*, I. L. R 5 All 224:

Second application when allowed.

But a second application is permissible where the first application was dismissed for default without going into the merits. *Manmohan*, 24 C.W.N. 32; *Mehra*, A.I.R. 1929 Lah. 32.

If the order passed on the basis of a compromise is unenforceable, a second application can be entertained, even if a suit is brought on the basis of the compromise and is decreed. *Gurdial*, A.I.R. 1959 Punj. 185. When a previous application is dismissed on the basis of compromise, a second application is not barred. *Nathuram*, A.I.R. 1965 All. 129.

Also, a subsequent application can be entertained on new grounds, on account of change of circumstances. *Mg Hla*, 28 Cr.L.J. 912; A.I.R. 1927 Rang. 328.

The principle of "autrefois convict" does not apply to an application for maintenance, which is not a "trial" though ordinarily a second application should not be allowed on the same facts. *Nafees Ara*, A.I.R. 1963 All. 143; *Khan*, A.I.R. 1950 Nag. 45; *Ramchand*, A.I.R. 1958 Punj. 431.

6.2. Remedy against an order

The following remedies are barred in respect of the Magistrates order :-

- (a) appeal (because there is no provision);
- (b) review by the Magistrate. *Nanda*, (1897) 21 C.W.N. 344.

If any error is committed, the proceedings should be submitted to the High Court, for rectification. *Saw Gwan*, A.I.R. 1940 Rang. 222. It may be mentioned that now the Sessions Judge has powers of revision.

An *ex parte* order without service of notice will be set aside. *Pahirajrai*, A.I.R. 1959 Pat. 433.

The High Court (or the Sessions Judge) will not approach the matter as if it were a court of appeal. *Ignatious*, 36 Cr.L.J. 1044. Revisional court will be very loth to interfere with a finding of fact, as the party aggrieved may file a suit. But it will interfere with a maintenance order, where there is no definite finding that the applicant is the wife. *Lakshmi Ambalam*, 39 Cr.L.J. 228; A.I.R. 1938 Mad. 66, or when the amount is grossly inadequate. *Ma. E.*, A.I.R. 1937 Rang. 370.

Where the prayer is for cancellation of order on the ground of invalidity of marriage, the High Court (or the Sessions Judge) will not interfere, as the petitioner ought to go to civil court for a declaration. *Palmerino*, 28 Cr.L.J. 51; *Sailendra*, 41 C.W.N. 898.

The only right a party has in revision is to bring its case before the court and it has no right to demand adjudication on question of facts or law or both. The quantum of maintenance allowance granted to the wife under section 125 can not be challenged in revision which is not to be regarded as some sort of appeal. It is only in exceptional cases when there is glaring defect in the procedure or manifest error on point of law and consequently there has been flagrant miscarriage of

justice that the revisional court steps in to interfere, *Rameshwar v. Ramibai*, (1987) Cri. L.J. (M.P.).

There is no provision for filing an application for granting interim maintenance during the pendency of the main application under section 125 of the Code. The application for interim maintenance is, by itself, a separate matter and it has to be disposed of separately, much earlier than the final order in the main case. By an order of interim maintenance, the rights of the parties are affected and decided finally in respect of that subject matter and, by no stretch of imagination, such an order can be called an "interlocutory" order. Therefore, revision against an order granting interim maintenance is maintainable. *Sumar Chand v. Sandhuran Rani*, (1987) Cri. L.J. 1396 (P & H),

6.3 *Living of adultery*

The words "if she is living in adultery" undoubtedly connote a course of adulterous conduct, more or less continuous. An occasional lapse would not be sufficient reason for refusing maintenance. The Magistrate has to probe and find out whether, at or about the time of the application, there has been adulterous conduct on the part of the wife. Further, there must be clear proof of the adultery. A suspicion nurtured by the husband will not disentitle the wife to receive maintenance. Though direct evidence of the adultery can seldom be given, yet, at the same time, there must be some evidence, to prove the allegations of adultery and mere bazaar gossip would not prove adultery. Since sub-section (4) is in the nature of an exception to the main section, and it is for the husband, claiming exception thereunder to show that the wife is living in adultery. *Rachita Rout v. Basanta Kumar Rout*. (1987) Cri. L. J. 655 (Orissa) (G. B. Patnaik, J).

6.4 *Legal assistance*

It is the constitutional obligation of the State to provide legal assistance to the poor. It is the constitutional right of the poor to demand,

legal assistance from the State. They are not there to beg for free legal aid. One is only to look at article 39A and article 14 of the Constitution, the spirit of the Constitution, to realise that the time has come when the poor must be provided with appropriate legal assistance by the State. If, in such cases, the poor divorced, the neglected children and parents, do not get free legal assistance from the State to vindicate their rights, then sleeping over the matter would be constitutional "inaction".

An Advocate was appointed Amicus Curiae for the wife who was getting a paltry sum of Rs. 175/- p. m. as maintenance to sustain herself and her child, and hence was unable to contest the proceeding. *Mokshed Ali v. Safura Khatoon*. (1987) Cri. L.J. 1652 (Gauhati) (K. Lahiri, J).

6.5 Burden of proof and quantum of proof.

Although the burden of establishing a case under section 125 is on the party who claims maintenance, the party is not required to prove its case beyond reasonable doubt. A proceeding under section 125 is not the prosecution of a criminal charge, nor is the respondent in such a proceeding an accused. The aggrieved party can establish its case on preponderance of probability. When the wife claims a fixed amount of maintenance and the husband does not contest that the claimed amount is beyond his capacity or means, the court must assume that it tantamounts to admission of the financial capability of the husband to pay the amount and the claim of the wife for the fixed and named sum as the allowance must be accepted, on the principle of "no contest" and the court is bound to award maintenance at the monthly rate claimed. *Krishna Bahadur Pradhan v. Tikamaya Newar*, (1987) Cri. L. J. 1278 (Gauhati)

6.6 Pleadings

An application by the wife for grant of maintenance is not to be strictly construed as a pleading in a civil litigation. The omission to specifically plead in the application that the

husband has sufficient means to provide maintenance or that he has contracted a second marriage, is not fatal. Proof by evidence of the essential requirements for claiming maintenance, would suffice. It is actually for the husband (and not for the wife) to furnish reliable proof of his income, as the wife is not expected to know his exact income.

Where, on an application made by the wife under section 125, she is granted monthly maintenance allowance, the general rule is to order payment of maintenance from the date of the order; and deviation from the rule, by making the allowance payable from the date of the application without recording reasons for doing so, introduces arbitrariness in the order, rendering it invalid. *Rameshwar v. Ramibai*, (1987) Cri-L.J. 1952 (M.P.) (Indore Bench).

Failure to mention in the petition that petitioner is unable to maintain herself is not fatal. *Raibari*, (1983) Cr.L.J. 125 (Or.) *Chaman*, (1983) Cr.L.J. 1570 (P & H).

6.7. *Restoration of proceedings, dismissed for default*

The High Court of Delhi in *Suhird Kumar v. Neeta*, 1988 16 Reports (Del.) 323 (D. P. Wadhwa J.) has held that for sufficient cause the Magistrate can restore a petition under section 125 which had been dismissed for default. As held by the Supreme Court in *Jagir Kaur v. Jaswant Singh*, A.I.R. 1963 S.C. 125, these proceedings are in the nature of civil proceedings, the remedy is a summary one and the person seeking that remedy is ordinarily a helpless person. They are intended to ameliorate the condition of neglected wives and discorded divorcees and the spirit of article 15 (3) of the Constitution must belight the meaning of the section. *Bai Tohira v. Ali Hussain Fissalli*, A.I.R. 1979 S.C. 362.

The view taken by some other High Courts is that the court has no power to order restoration. *Bhagwan Singh v. Gurnam Kaur*, (1965) 68 P. L. R. 127. *Hakimi Jan Bibi v. Mouze Ali*, (1905) 2 Cr.L.J. Rep. 213 (Cal.).

Meaning of "residence" (Sub-section 1)

"Reside" does not mean domicile in the technical sense. It means something more than flying visit or a casual stay. There should be an intention to stay for a period, the length of which depends upon the circumstances of each case. A person "resides" in a place, if he makes it his abode permanently or even temporarily. It depends on the facts of each case. The same meaning should be given to the words "resides" and "last resided". *Jagir Kaur*, A.I.R. 1963 S.C. 1521 (case law reviewed).

"Reside" implies more than "stay". It implies some intention to remain at a place, and not merely an intention to pay a casual visit. *V. Balakrishna Naidu*, A.I.R. 1942 Mad. 66 or a flying visit. *Dadan*, (1957) BLJR 19.

In a Madras case, the petitioner returned from Ceylon Government, went to his old post in Mysore and rented a house in Bangalore. Although he and his wife had not been getting on well for many years, the wife consented to come and live with him in Bangalore. She had been there for about two months, when both the husband and the wife went to Ceylon for a short visit. On their return from this short visit, they halted at Trichinopoly where both the brother of the husband and the wife's father lived, and went to stay in the house of the husband's brother. During the four days that they remained there, the husband ill-treated his wife and drove her out of the house and returned to his duties in Mysore State. As a result of what happened in Trichinopoly, the wife brought an application for maintenance. It was held that the husband had made Bangalore his home before he visited Trichinopoly and intended to continue to reside there. The visit to Trichinopoly was clearly a casual one, in order that the parties might see their relatives on their way from Ceylon to Bangalore. The residence of the husband at the time when he ill-treated his wife was therefore Bangalore and not Trichinopoly; and that

was where the husband "last resided" with his wife at the time when the application for maintenance was filed. The Magistrate at Trichinopoly therefore had no jurisdiction to entertain the petition. *V. Balakrishna Naidu v. B. Sakuntala Bai*, A.I.R. 1942 Mad. 666 (Horwill, J.).

Where the husband and wife left their permanent residence and stayed for two months at Agra, that temporary stay gives jurisdiction to the Magistrate, *Sher Singh*, I L R 49 All 479 *Janki*, A I R 1932 Nag. 85. *Sardari* A I R 1951 Punj. 84. *Jolly* 21 CWN 782.

It should be considered whether the period of stay was merely for a visit or for residence, although temporary. *Dadan*, (1957) B.L.J.R. 19. "To reside" means to live or to have a dwelling place or an abode. The fact that a person a father lives at a certain place and he goes there sometimes, does not give jurisdiction. *Rafagatulla*, AIR 1947 All. 4. So, visiting the wife casually at a place would not give the court there jurisdiction. *Satwant*, (1956) ALJ 134. But if a man resides for some time with his wife in the house of his parents-in-law, that is sufficient "residence". *Gangabai*, AIR 1938 Sind 223; *Sama Jetha*, AIR 1930 Bom. 438.

A husband was a resident of District. The father of his wife resided in Y district. The husband paid some visits to her in her parent's house and those were the last occasions when the husband and the wife lived together, after which the wife made an application for the grant of maintenance in a court in the Y district. It was held that it must be taken that the husband last resided with his wife in her parent's house and therefore the court in the Y district had jurisdiction to entertain the petition. *Allah Ditta v. Sakina Bibi*, AIR 1928 Lahore 853 (Jai Lal J.).

A fractious woman should not be enabled to harass her husband by making an application as at any place very far from the place where the husband resides after their

separation, and having regard to these rival claims of the two spouses the legislature limited the jurisdiction under section 488 to the district where the husband resides, that is to say, the jurisdiction was given to any magistrate in the district so long as the husband was resident in the district over which the magistrate held jurisdiction. Magistrate's jurisdiction is defined by section 12 of the Code. The jurisdiction under section 12 (1) is conferred upon a Magistrate districtwise and it is with reference to that jurisdiction that the provisions of the other sections of the Code will have to be construed, particularly section 488 (8). *Shantibai v. Vishnupal*, AIR 1965 Bom 107 (Kotwal J). The judgement was from asseced urder the 1898 Code the based of jurisdiction has not been evidenced.

In interpreting the word "district", regard must be had to the expression "any district where he resides". "District" means any court in the district in which husband resides and is not limited to that court within whose jurisdiction the husband resides. *Shantabai*, AIR 1965 Bom 107. An application may be filed against a person in any district where (i) the person is or (ii) he or his wife resides, or (iii) he last resided with his wife or the mother of the illegitimate child "stay".

Section 126

126. *Procedure* (1) Proceedings under section 125 may be taken against any person in any district—

- (a) where he is, or
- (b) where he or his wife resides, or
- (c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is 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-cases :

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, 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.

(3) The Court in dealing with applications under section 125 shall have power to make such orders as to costs as may be just.

Working for gain

Proceedings can be taken against a person at a place where he works for gain, though he may not reside there, *Rupchand*, AIR 1942 Sind 32; *Panchugopal* 1955, 59 CWN 767.

The expression "where he resides or is or where he last resided with his wife" in section 488 (8) [now section 126 (1)] is sufficiently wide to confer jurisdiction upon a Presidency Magistrate in a case in which the opposite party works for gain within the jurisdiction of his court, although he may not have a permanent residence within such jurisdiction. *Indubala Devi v. Satchil Prasad*, AIR 1939 Cal. 333 (Edgley, J.).

Temporary Residence

Sub-section (8) of section 488 Cr. P. C. does not necessarily refer to a permanent residence. It refers also to temporary residence. The word "residence" implies something more than a brief visit, but not such a continuity as to amount to "domicile". Each case has to be dealt with on its merits. In those cases where the parties have no home of any sort and have been moving about place to place, each place where they

do live would be their home for the time being. And the court within whose jurisdiction, they resided last, can entertain an application under section 488. A woman should not be deprived of assistance from a court easily accessible to her. *Sampooranam v. N. Sundaram*, AIR 1953 Mad. 78 (Ramswami, J.).

Where a person has a fixed place of residence, an occasional visit to another place does not give jurisdiction to the court at that place. *Khajrunnessa*, ILR 53 Bom. 781; *Ramdei*, AIR 1926 Oudh 268; *Shambai*, AIR 1941 Nag. 175; *Ramkumar* 22 Cr. L. J. 710.

In the case of persons who have a fixed residence, a visit to another place for however long a period, so long as it is casual, will not confer jurisdiction. A person who works and has a prominent home in one place cannot by his visits to another place the during period of casual leave, confer jurisdiction on the courts of latter place. Where, however, the parties have no home of any sort and are moving about from place to place, each place, where they so live, would be their home for the time being. The sole test on the question of residence is whether a party has *animus manendi*, or an intention to stay for an indefinite period, at one place; and if he has such an intention, then alone can he be said to "reside" there. *Charan Das v. Swasti Bai*, AIR 1940 Lah. 449 (Young C. J. & Ram Lall J.).

The word 'resided' in section 488 (8) implies something more than a more brief or flying visit and would include temporary as well as permanent residence. The court should always 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. The Magistrate is justified in ordering that he would decide the question of jurisdiction after the evidence has been let in and considered. If, after considering the evidence adduced, the Magistrate comes to the conclusion

determining what the term "reside" means is the intention or the *animus manendi* of the person residing in a particular place, and the cognate expression includes both temporary and permanent residence. But the expression "resides" used in section 126 (1) (b) of the new Code will not include a casual or flying visit or a brief stay. On other hand, it implies more than that the expression "resides" occurring in section 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 a temporary residence also.

There was nothing to show that the wife was residing within the territorial jurisdiction of the court in which the petition for maintenance was filed by her. There was only a bold and vague statement made by her about her residence in the territorial jurisdiction of the court, it was held, that the wife was not residing within the territorial jurisdiction of the court in which the petition was filed and that court has no jurisdiction to entertain the petition. *K. Mohan v. Balakanta Lakshmi* (1983) Cr. L. J. 1316 (Mad) (Ratnavel Pandian, J.).

Residence of child

Jurisdiction for the purposes of section 125 is determined by the residence of the parties. It is immaterial if the child is outside the jurisdiction of the court, or even out of India. *Rowland*, 62 CWN 221 : AIR 1959 Cal. 703.

Proceedings in wrong court

An order passed for maintenance would not be bad, merely because proceedings were taken in a wrong court. Section 531 (now section 462 Cr. P. C. 1973) applies. *Rajkumari* AIR 1977 SC 1101; *Sitaram*, AIR 1929 Cal 336; *Mq Paik*, 40 Cr. L. J. 702; *Balwant*, 38 P.L.R. 9 63; *Panchugopal*, 59 C.W.N. 767; *Ambalal*, AIR 1963 Guj, 91. Section 531 (now section 462 Cr. P. C. 1973) relates to a defect of jurisdiction. Where a

Magistrate has the "power" to try a particular application under section 488, and the controversy relates solely to his territorial jurisdiction, there should, ordinarily, be no reason why section 531 should not be applicable to the order made by him.

There is no reason why, in such a case, section 531 should not be applicable merely because of the Magistrate, while considering the evidence relating to jurisdiction, unwittingly makes reference to section 531 in passing and not for the purpose of assuming jurisdiction under it. *Raj Kumar Vijh v. Dev Raj Vijh*, AIR 1977 SC 101 (P.N. Bhagwati, A.C. Gupta & P. N. Singhai, J.).

Section 126 (2) : party not present

Section 126, Cr. P. C. is silent as to the order that can be passed when the applicant is absent. There is no indication as to either dismissing the application for default or the consideration of the matter on merits *ex parte*. These sections have the trappings of civil proceedings and the projection of right to recover maintenance, apparently of a civil nature are transplanted in Cr. P. C. for providing speedy and imminent relief and immediate sustenance of life to the handicapped segment of the society. Suitable provisions have been made in O. 9, C. P. C. for setting aside the *ex parte* orders if sufficient cause is shown. In case of maintenance petitions, the trial court does not generally have material, except perhaps the bold application of the applicant. In such circumstances, it is not feasible to invest the trial court with power to dispose of on the merits. There being not even the implied power to dismiss for default, it could be concluded that there is a lacuna regarding this aspect. *Abdul Wahed v. Hafeeza Begum*, (1987) Cri. L. J. 726 (A.P)

Preliminary inquiry

Section 125 (2) is mandatory. There can be no preliminary inquiry before summoning the other party. *Nandlal* AIR

1960 SC 882. The word "all" emphasises that fact, that no evidence shall be taken in the absence of the father or the husband, as the case may be, or their pleader. *Nandlal*, AIR 1960 SC 882. No order should be passed under the section, without notice to the opposite party. *Barot*, AIR 1952 Kutch 85 As to service by registered post. See service.

The petition has to be decided in accordance with the procedure laid down in Chapter 9, which is self-contained and hence, the strict rules of pleadings applicable in civil suits can not be applied. Accordingly, the wife's petition cannot be dismissed for not averring that she is unable to maintain herself. *Malan*, (1981) Cr. L.J. 184 (Kant).

Service of notice

Service of notice has to be effected as contemplated under section 68 read with sections 69 and 70 of the Code, before making an *ex parte* order against the husband. Mere publication of the notice in the Government Gazette cannot serve the purpose of notice as understood under section 68 read with section 69, unless provision to that effect has been made by the State Government. For, under the provisions of the said sections, not only the summons must issue, but it must also be served, (in the absence of any express direction by the State Government), by a police officer or by an officer of the court issuing it or by any other public servant. In the absence of service of summons, the *ex parte* order made under section 488 is liable to be set aside. *Pahilajrai, v. Jethi Bai*, A. I. R. 1959 Pat. 433 (Imam, J.). Service through process-server of the civil court is not valid. *Revoppa v. Gurusanthawwa*, A.I.R. 1960 Mys. 198. As to service by registered post. see *Gurnam*, AIR, 1950 Punj. 20.

The summons in the proceedings under section 488 Cr. P. C. should be signed by the Presiding Officer and the same

should be served by a police officer.

In an application under section 488 Cr. P. C. filed in a Munsiff Court who reported that the respondent refused to accept the notice it was held (i) that the notice issued was not valid and (ii) that the errors and irregularities in the process were not curable under section 537, Cr. P. C. 1898 *Revappa v. Gurusanthawwa*, AIR 1960 Mys. 198 (K. S. Hegde, J.).

Nature of proceedings

Order of dismissal (of application for maintenance) for default of appearance, before the evidence is recorded is administrative in nature and there is no bar to the Magistrate restoring it. *Prema*, (1980) Cr. L.J. 80 Delhi. But otherwise, the proceedings are judicial. *Nanda* 21 CWN 344.

Record of evidence

Magistrate must make a memorandum of the substance of the evidence given. The case cannot be decided on affidavits *Naranappa*, A.I.R. 1963 Mys. 174. Evidence is to be recorded under section 274 of the Code of 1898. *Kalidas*, (1893) I.L.R. 20 Cal. 351.

Where there is no application for dispensing with personal attendance nor any order to that effect, an order passed on evidence not taken in the presence of the opposite party must be set aside. *Rupchand* A I R 1942 Sind 32. *Indubala* A I R 1939 Cal. 33. *Harmuzshah* 2 Bom L R 700 *Venkatrao*, A I R 1954 Hyd. 178. *Anil*, AIR 1959 Trip. 26.

Record of evidence in the absence of husband, but in the presence of his counsel, is not fatal, where there is no prejudice. *Joginder*, A I R 1960 Punj 249; (1960) Cr. L. J. 640: *Arunkumar*, (1980) Cr. L. J. 601 (Bom). Section 313 of the Code, (accused not to be give evidence) does not apply to a

person proceeded against under Section 125. *Vithaldas*, AIR 1928 Bom 347; *Mehr*, AIR 1929 Lah 32; *Sew Kumar*, AIR 1959 Cal 454. So, a person against whom proceedings are instituted under section 125 may himself give evidence. *Hironanda*, 9 C.W.N. 983; *Nur Md.*, (1879) I.L.R. 16 Cal 781; *Bachal*, 25 Cr L. J. 1091; *Karnail*, A I R 1955 Punj 26. It may be noted also that under the present law in India the accused in a criminal prosecution is a competent witness though not compellable.

Meaning of ex parte

There is no definition of *ex parte*, but the word is to be understood in the same sense as is used in Orders 9 and 17, C. P. Code. *Mq Ba*, A I R 1939 Rang 151. Subjective satisfaction, of the magistrate is required, before passing an *ex parte* order. When there is no such satisfaction, there is no question of limitation. *Bhinrao*, AIR 1963 Mys 239; (1963) 2 Cr L. J. 293; *Khembai*, (1981) Cr L. J. 690 (Kant). The magistrate need not record reasons for his satisfaction, if it is writ large on the record and reflected in the final order. *Arunkumar* (1980) Cr L.J 601 (Bom) - *CONTRA* : *Anilranjan*, A I R 1959 Tri 26; (1959) Cr L.J 776.

The *ex parte* order may be cancelled, if the person affected applies within three months and shows sufficient cause for non-appearance. *Mg Tan*, 24 Cri. L. J. 928; A. I. R. 1923 Rang. 155, page 175A. Three months are to start from the date of the order and not from the date of knowledge of the order. *Govindan*, A.I.R. 1950 Mad. 153; *Hari Singh*, (1962) 2 Cri. L.J. 581; *Hyder*, A.I.R. 1968 Mys. 98; *Parson*, A.I R. 1971 P & H 77. But according to the other view, three months are to count from the date of knowledge of the order. *Zohra*, A. I. R. 1966 A. P. 50; *Meenakshi*, A. I. R. 1970 Mad. 242; *Md. Akbar, Ali*. (1977) Cri. L. J. 1654 (Cal.) (cases reviewed).

Non-access and evidence of paternity

Husband or wife can be examined to prove non-access and consequent illegitimacy of the child. *Howe*, I. L. R. 38

Mad. 466: *Rozario*, I. L. R. 18 Bom. 468: *Shyam*, 50 C. W. N. 916. Birth register record furnished by the mother is not evidence of paternity. *Mahadeva*, A.I.R. 1962 Mad. 141.

Paternity : Inquiry

Sections 200-203 of the Code of Criminal Procedure 1973 do not apply to an application under section 125. The chapter is self contained one and the section does not contemplate a preliminary enquiry as to the paternity of the child before issuing notice to the respondent. A preliminary enquiry by examining the applicant without sending notice to the opposite party and following the procedure in section 126 (2) is not legal. The section confers power on the magistrate to decide, though in a summary manner, the paternity of child. In a case where the magistrate dismissed the application "presumably oppressed by the high status of the respondent", the Supreme Court, while setting aside the magistrate's order, observed: "In the courts of law, there cannot be a double standard one for the highly placed and another for the rest". *Nandlal*, A. I. R. 1960 S. C. 882.

Section 126 (3) : Costs

Costs may be awarded to the successful party in order to compensate for the expenses incurred. The High Court may award costs in revision. *Yesubai*, 34 Cr.L.J. 140; *Keni*, I.L.R. 49 Mad. 891; *Mg Tin*, A.I.R. 1941 Rang. 135. Costs can be recovered by distress warrant under section 421. *Mg Tun*, A.I.R. 1941 Rang. 247.

127. 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 make such alteration in allowance as he thinks fit.

Provided that if he increases the allowance, the monthly rate of five hundred rupees in the whole be not exceeded.

(2) 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.

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that—

(a) the woman has, after the date of such divorce, re-married, cancel such order as from the date of her re-marriage.

(b) the woman has been divorced by her husband and that she has received whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order—

(i) in the case where such sum was paid before such order, from the date on which such order was made.

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a

monthly allowance has been ordered to be paid under section 125, the Civil Court shall take into account the sum which has been paid to, or recovered by, such person as monthly allowance in pursuance of the said order.

Scope and application of section 127

Section 127 empowers the magistrate to alter or modify the order of maintenance on account of (i) a change in the circumstances of the party paying or receiving the maintenance or (ii) any decision of a competent civil court. The party entitled to alteration of the order can always move the magistrate when there is a change of circumstances. *Shanno Devi*, 53 Cr.L.J. 473; *Lilawanti*, 37 Cr.L.J. 68. Section 127 should be read as a proviso to section 125. *Thayumanthar*, A.I.R. 1958 Mys. 190; (1958) Cr.L.J. 1522.

Section 127 is applicable only for the purpose of cancellation of an order passed under section 125 of the Code. Therefore, it is clear that section 127 (3) (b) or (c) cannot be brought in at the time when the application under section 125 is to be heard and decided. The requirement of section 125 is that there should be sufficient means with the husband who neglects or refuses to maintain the wife. On these points, if there is sufficient evidence on record, the magistrate would be justified in passing an order for maintenance under section 125. *Leelaben Amratpuri Goswami v. Goswami Babupuri Dhanpuri* (1987) Cr.L.J. 1637 (Guj.)

Change of circumstances

The expression "change of circumstances" means not only change in the pecuniary circumstances, *Nihan*, 15 Cr.L.J. 554; *Rukmini*, 19 A.W.N. 32, but also other change in circumstances of the party paying or receiving the maintenance. *Shah*, I.L.R. 19 All. 50. The circumstances affected may be personal, e.g. the death of a child or the birth of another or that the child has grown older; *Ramayee*, I.L.R. 14 Mad. 398; *Upendra*,

I.L.R. 12 Cal. 535; *Mg Shwe*, A.I.R. 1939 Rang. 95: 40 Cr.L.J. 440; *Chander*, A.I.R. 1968 Delhi 174; or divorce. *Abdul Rahman*, I.L.R. 5 Cal. 558; *Ahmed Kasim*, I.L.R. 59 Cal. 833; *Din Md.*, I.L.R. 5 All. 226; *Abdur Ali*, I. L. R. 7 Bom. 180; *Md. Rahimullah*, A. I. R. 1947 Mad. 461; *Janni*, A. I. R. 1955 A.P. 1. The change may be in economic circumstances. Rise in the cost of living is a change. *Janakibai*, A. I. R. 1956 Bom. 432. The change must be in the existence of circumstances and not in the proof of circumstances that already existed at the time of the last order. *Govindan*, I.L.R. (1950) Mad. 153.

Modification

An order under section 125 can be modified under section 127. *Budhni*, I. L. R. 27 All. 11. Order can also be cancelled under section 125 (5). Under section 127, the wife can apply for increase of her or the child's maintenance. The opposite party can also apply for reduction or for cancellation of order on account of a civil court decree, e.g., for restitution for conjugal rights, invalidity of marriage, divorce.

Compromise

An order of maintenance can be cancelled on the application of both parties that they have compromised. If thereafter the wife is ill-treated again, she can file a fresh application for maintenance. *Tetri*, A.I.R. 1950 Cal. 168.

Divorce amongst Muslims

A valid divorce under the Mahomedan law is a change in the circumstances. *Md. Rahimulla*, A.I.R. 1947 Mad. 461 (cases reviewed); *Shk Daud*, A.I.R. 1921 Nag. 7; *Ahmed Kasim*, A.I.R. 1933 Cal. 27. If the question of divorce is now raised as a ground disentitling to maintenance, the court is of course bound to decide the woman's status. *Md. Rahimulla*, A.I.R. 1947 Mad. 461; *Janni*, A.I.R. 1955 A.P. 1; *Md. Ismail*, A.I.R. 1960 Ker. 262. But in view of the inclusive definition of "wife" in section 125 (1), Explanation (b), further facts (besides divorce the fact that took place after the order for maintenance

has been passed), have to be proved in order to disentitle the wife to maintenance, and such facts will be as those mentioned in section 127 (3) on which order for maintenance, as has been passed in favour of a divorced wife, can be cancelled and the allowance can be stopped. For, a wife divorced after an order for maintenance is passed, should not be in a worse or better position in this matter in any respect than a wife, in whose favour an order for maintenance has been passed before divorce.

Death of beneficiary

Where a total sum is fixed for the maintenance of wife and child, then on the death of one, the court can modify the order suitably. *Kalavantibai*, A.I.R. 1953 Bom. 366. For a contrary view, see *Ma Khim*, A.I.R. 1941 Rang. 46. Where a divorced wife marries again, there is no "change in the circumstances" so as to justify cancellation of the order against the first husband to maintain his child. *Budhan*, I.L.R. 27 All. 11. When the husband does not allow the wife to cultivate the land given to her for maintenance under a compromise order, it is a "change in the circumstances", justifying the fixation of a cash maintenance. *Punndeb*, A.I.R. 1950 All. 434. Change of circumstances would include change of circumstances of the husband also. *Meenakshi*, (1980) Cr LJ 1200 (Mad.).

Alteration in the allowance

It was held in Allahabad that "alteration" does not justify total discontinuance. *Din Md.*, I.L.R. 5 All. 226. But it has been held in Madras that reduction of maintenance to nothing would also be an "alteration". *Meenakshi*, A.I.R. 1925 Mad. 491; *Md. Rahimullah*, A.I.R. 1947 Mad. 461. Increase or decrease can be made as often as occasion may require or justify. *Thiagaraja*, (1954) 2 M.L.J. 608. Monthly allowance of Rs. 25 was increased to Rs. 100 on account of rise in the husband's pay. *Wadhvi*, A.I.R. 1961 A.P. 510. Increase or decrease of allowance can be made effective from

the date of order and not retrospectively from the date of application. *Amroon*, A.I.R. 1949 Cal. 584; 52 C.W.N. 465; *Lilawanti*, A.I.R. 1935 Lah. 24 *Contra Hiralal*, A.I.R. 1926 Bom. 419.

Effective date of increase

Increased allowance takes effect from the date of the order and not from the date of the application. *Amroon*, A.I.R. 1949 Cal. 589 *Contra Thayumanuyar*, A.I.R. 1958 Mys. 190; *Parameswara*, A.I.R. 1969 Ker. 108. An annual paddy maintenance passed on compromise being not an order under section 125, there can be no modification under section 127. *Annapura*, A.I.R. 1960 Orissa 94. Decrease cannot be made effective from date of application. *Parameswara*, A.I.R. 1969 Ker. 108.

Notice

The want of a provision for notice does not abrogate the salutary rule of natural justice that a notice should be given to the party affected before ordering alteration in allowance. *Janni*, A.I.R. 1955 A.P. 1; *Zinabhai*, A.I.R. 1937 Bom 454.

Section 127 (2) : civil court

The criminal court must take the decision of the civil court as it stands and consider its necessary effect on the maintenance order, i.e. whether the order should be varied or cancelled. It cannot ignore the civil court decision. *Titus*, A.I.R. 1947 Mad. 425; *Nagappa*, A.I.R. 1968 Mys. 12; *Vanajahshamma*, A.I.R. 1970 Mys. 305; *Bhagwant*, (1981) Cr.L.J. 151 (P & H). If any party has obtained the reversal of the order of maintenance by fraud, the magistrate can restore the order. *Bhagubhai*, A.I.R. 1937 Cal. 334.

Decree for restitution

Normally, a decree for restitution of conjugal rights may be sufficient cause for refusing maintenance. But if, after the decree, other circumstances have arisen which provide

reasonable cause for the wife's not returning to her husband, the wife is entitled to maintenance. *Khan Bahadur*, A.I.R. 1945 Pat. 53; *Taraknath*, 52 C.W.N. 166. The earlier view was that a decree for restitution of conjugal rights supersedes an order for maintenance. *Bulakidas*, I.L.R. 23 Bom. 484; *Bai Parvati*, I.L.R. 44 Bom. 972; *Nur*, I.L.R. 27 All. 483. But according to later view, a decree for restitution does not *ipso facto* cancel a maintenance order, nor is the magistrate bound to cancel the order. He should consider all other circumstances that prevail or have arisen. *Mg Dwn*, 26 Cr.L.J. 1341; *Sher Khan*, 13 Cr.L.J. 748; *Rajpati*, I.L.R. 46 All. 877; *Fakruddin*, A.I.R. 1944 Bom. 11; *Kuntibala*, A.I.R. 1955 Cal. 108. Where a decree for restitution of conjugal rights is obtained by the husband subsequent to the order for maintenance, an application for cancellation of the order is the proper remedy. *Sheelarani*, A.I.R. 1965 Punj. 79; *Jhanwarlal*, A.I.R. 1969 Raj. 29.

Magistrate has a discretion as to whether the order should be cancelled after restitution decree *Ali Md*, A. I. R. 1926 Sind 270. Where it is clear that the object of decree was to get rid of the maintenance order and not to get back the wife to live with him, the discretion should be used against cancellation. *Pawakkay*, 27 Cr. L. J. 30; A. I. R. 1925 Mad. 1218; *Mg Po*, A.I.R. 1939 Rang. 314. The mere fact that the civil court is satisfied that the wife should go and live with the husband does not satisfy the magistrate surrendering his judgment. Before cancelling the order of maintenance, the magistrate is bound to satisfy himself that the applicant is *bona fide* prepared to offer his wife a house which she ought to accept. *Fakruddin*, A. I. R. 1944 Bom. 11; 45 Cr. L. J. 897; *Kuntibala*, 58 C.W.N. 702, dissenting from *Taraknath*, 52 C.W.N 166. If, however, the wife is not prepared to go back to her husband, there should be no maintenance. *Md. Siddiq*, I. L. R. (1950) All. 485.

Paternity decree

A decree of a civil court holding that applicant is not the father of the child, entitles him to get the maintenance order cancelled. *Venkayya*, I. L. R. 46 Mad. 721; *U. Arzeina*, A. I. R. 1940 Rang. 298. Decree in subsequent civil suit in favour of the husband, dissolving the marriage on the ground of desertion, is not a "decision" within sub-section (2), and the husband has to prove the fact of desertion independently. *Ranjit*, (1979) Cr. L L. 1301 (Cal.). On a petition by the wife for maintenance on the ground of desertion by the husband, while her application under section 9, Hindu Marriage Act, 1955 was previously dismissed on the ground that she had deserted her husband, the magistrate cannot come to a contrary finding and grant maintenance. *Teja Singh*, (1981) Cr. L J. 1467 (P & H).

Sub-section (3) of section 127 is a special provision dealing with the matter for cancellation of order for maintenance in the case of divorced woman. *Mariyumma*, A.I.R. 1978 Ker. 231 (FB).

Section 127 (3) (b) and (c) : Divorce

Section 127 (3) (b) reflects separate and legal incidents of the first limb of the explanation to section 125 (1), i.e. a woman who *has been divorced* by her husband. Section 127 (3) (c) reflects incidents of the other limb, i.e. a woman who *has obtained a divorce* from her husband. Clause (b) provides for cancellation of maintenance on payment of dower, if a Muslim woman has been divorced by her husband. Clause (c) provides that where a Muslim woman obtained a divorce from her husband (under the Dissolution of Muslim Marriage Act, 1939 or otherwise according to personal law of some of the Muslims), maintenance cannot be cancelled unless she voluntarily surrenders her right of maintenance. *Zohora*, (1981) Cr.L.J. 754 (SC).

Sub-section (3) (b) : "Whole of the Sum"

The sum refers not only to maintenance, but also to mehar or dower as is payable under the personal law of the Mahomedans on divorce, which must be paid also in full before cancellation is sought. *Alluri Sambalah*, (1978) Cr.L.J. 211 (A.P.); *Rukhsana*, (1977) Cr.L.J. 1041 (Bom.) A reasonable compensation received by a divorced wife under section 8 of the Travancore Ezhava Act on dissolution of marriage at the instance of the husband is an amount contemplated by sub-section (3) (b). *Kamalakshi*, A. I. R. 1979 Ker. 116 (FB). Payment of mehar money as a customary discharge is within the cognisance of this provision. *Bai Tahira*, A.I.R. 1979 S. C. 362.

Divorcees

The only just construction of the section is that Parliament intended that the divorcees should not derive a double benefit. The purpose of the payment "under any customary or personal law" must be to obviate destitution of the divorced woman and to provide her with the wherewithal to maintain herself. The payment of an illusory amount by way of customary or personal law requirement will be considered in reduction of the maintenance rate, but cannot annihilate that rate unless there is a reasonable substitute. The whole scheme of section 127 (3) (b) is manifestly to recognise the substitute maintenance arrangement by lump sum payment charged by the custom of the community, or the personal law of the parties. There must be a rational relation between the sum so paid and its potential as provision for maintenance. Therefore, no husband can claim under section 127 (3) (b) absolution from his obligation under section 125 towards a divorced wife, except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance. The court will have to see further whether the payment of the sum of amount is a

fairly capitalised substitute or in other words whether adequate provisions have been made for the maintenance of the divorce under section 125, otherwise it will be considered only in reduction of maintenance rate. *Bai Tahira*, (1979) Cr. L. J. 151 (SC).

The payment of an amount, customary (e. g. mehar under Mahomedan law) or other sum, must be a reasonable and not an illusory amount. It must provide more or less the present worth of the monthly maintenance allowance and will release the quondam husband from the continuing liability, only if the sum paid is realistically sufficient to maintain ex-wife and salvage her from destitution. *Fuzhunbi*, A. I. R. 1980 S.C. 1730; (1980) Cri. L.J. 1249 (S.C.) paragraphs 18, 19, overruling *Rukhsana*, (1977) Cri. L.J. 1041 (Bom.) and *Kamalakshi*, A.I.R. 1979 Ker. 116 (FB).

In order to exercise the power conferred by subsection (3) (b), it has to be found as a fact that the wife has done a voluntary act of receiving the whole sum contemplated to be payable by clause (b). If the wife is unwilling, the provisions are not applicable. *Fuzhunbi*, A.I.R. 1980 S.C. 1730; (1980) Cri.L.J. 1249, approving *Hajuben Suleman*, 18 Guj. L.R. 133.

Mehar

Mehar (as understood in Muslim law) cannot, under any circumstance, be considered as consideration for divorce or a payment made in lieu of loss of connubial relationship. The language of sub-section (3) (b) appears to suggest that payment of the sum and the divorce should be essentially parts of the same transaction, so as to make one the consideration for the other. In *Zohara*, (1981) Cr.L.J. 754 (S.C.), while interpreting sub-section (3) (b), it has been stated that under Muslim law, the husband could still get the maintenance cancelled after divorcing his wife according to personal law, if he paid the entire dower specified at the time of marriage. So whether dower or mehar falls within the meaning of any

court it can be enforced under section 125 (3) and remains in force until there has been one of the following events :—

- (i) cancellation under section 125 (5) ;
- (ii) modification under section 127; or
- (iii) cessation of conjugal relationship plus some other factor, showing "change of circumstances" within section 127.

order are (i) the identity of the parties and (ii) the non-payment of the maintenance. So long as cancellation is not obtained the order is enforceable. *Pearey*, AIR 1935 All 977. The fact that there has been any agreement between the parties after the order, cannot be considered by the magistrate *Prabhu*, ILR 25 All 165; *Fazal Din*, AIR 1932 Lahore 115; see however *Rangamma*, I L R 10 Mad 13 where the plea was a release and also *Suitan*, AIR 1937 Pesh 45. Application for recovery of maintenance may be made (i) either to the magistrate who passed the original order (ii) his successor or (iii) to a magistrate having jurisdiction over the place where the person resides, *Ma Thaw*, 15 Cr. L. J. 701; *U Hpay*, 37 Cr. L. J. 91; *Mq Tun*, AIR 1941 Raw 247. A maintenance order of a Lahore Court obtained before partition can be enforced in any court in India within whose jurisdiction the husband resides. *Kishorilal*, AIR 1953 S C 441; (1953) Cr. L. J. 1929 (SC). The magistrate who made the original order can issue a warrant for the collection of arrears of maintenance. *Gnanambalammal*, ILR 52 Mad 77 29 Cr L.J. 932. This section contains no provision for costs, as in section 126 (3) *Ma E*, AIR 1939 Rang 67.

Enforcement of Maintenance Order

"Any magistrate" need not to be a magistrate of the categories (that is judicial magistrate of the first class or metropolitan magistrate in metropolitan area) mentioned in section 125 (1) *Mq Tun*, AIR 1941 Ram 217. Hence a second class judicial magistrate can enforce, the order of maintenance. But a second class judicial magistrate cannot pass an order of imprisonment for breach of an order. The power to enforce an order of maintenance does not necessarily include the power to award imprisonment. *Kuppini*, AIR 1935 Mad. 572: 36 Cr. L. J. 830.

Once a maintenance order is passed by a competent