

# A Call for Action

## Law Commission's Report on Maintenance

### Humane Recommendations Ignored



*Section 125 of the Code of Criminal Procedure (CrPC) is perhaps the one legal provision to which distressed wives most frequently have recourse and also the one provision which causes the most hardship to a wife seeking redress. Much before questions of divorce or custody can be settled, an ill-treated wife finds herself in need of money to sustain herself and her children. Under the civil law (the Hindu Maintenance Act) she would be entitled to get a better share of her husband's income than under section 125, CrPC, which can get her a maximum of Rs 500 per month. But given the crowded condition of the courts, the civil case would probably take a decade to settle. So, most women prefer to file a petition under section 125 which, being a criminal law, is supposed to be more expeditious. However, the maximum amount available under section 125 is pitifully absurd, and further, husbands generally default in payment after a month or two, making it necessary for wives to rush to court repeatedly and finally to give up the battle as an exercise in futility.*

*This extremely crucial provision has remained unamended for nearly four decades except for one amendment in 1973 which further biased it against petitioners. The provision, as it stands now, contains loopholes which deter many women from leaving violent marriages since they have no means to support themselves.*

*The Law Commission in 1989 prepared a report on this provision, based on extensive research, including questionnaires sent out to a number of organisations and individuals. The Commission report provides an excellent analysis of the workings of section 125 and makes a number of important recommendations. These recommendations are summarised succinctly in Chapter 5 of the Law Commission Report. It is unfortunate that the legislature has seen fit to ignore these recommendations for almost four years. Section 125, CrPC, should be immediately amended along the lines suggested by the Law Commission.*

—Ed.

**T**HE FOCUS of this report is on identification and solution highlighted and the measures for redressal deserve to be of the problems faced in recovering an appropriate monthly allowance for maintenance by the wronged wife (from the husband), the neglected children (from their father) and the helpless parents (from their children) under section 125 of the CrPC, 1973....

A number of problems have arisen in relation to section

125 of the CrPC, 1973, as revealed in the course of the working of the said provision. These deserve to be hardship and injustice in the course of the operation of the provision....

Section 125, in so far as material for the purposes of the present discussion, may be quoted:— “125(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:

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

The present deliberations centre around three aspects which emerge from the provision as it is presently moulded:—

(1) A magistrate cannot award maintenance at a monthly rate exceeding Rs 500 in the whole even when satisfied that the claim for maintenance at a higher rate is justified;

(2) A discretion is conferred on the concerned magistrate to order payment of the maintenance allowance either from the date of the order or from the date of the application for maintenance; and

(3) In order to enable a wife to claim maintenance, the wife is required to establish that she is unable to maintain herself.

### **Abolish the Ceiling**

It appears to the Commission that the fixation of the ceiling at the figure of Rs 500 made in 1955, which had been retained in 1973, could hardly be said to be relevant any more after a passage of more than 30 years....

Secondly, the very fact that there is a ceiling operates on the mind of the magistrate in determining the quantum of monthly allowance required to be awarded for maintenance. It is a psychological deterrent. Since the maximum is Rs 500, the magistrate tends to determine the maintenance allowance at 50 percent to 75 percent of the maximum even if there is justification for awarding a larger sum in order to enable the claimant to meet the economic needs. And, finally, having regard to the rise in the cost of living index, the ceiling has become altogether irrelevant with a 900 percent rise in the index in the interregnum. The need of the claimant cannot even be satisfied in a small measure by an award of even the maximum sum of Rs 500 today... It cannot be overlooked that if a ceiling is retained,

it would require to be revised from time to time taking into account the inflation and rise in cost of living. It would be extremely difficult to amend the provision periodically, time and again, for it would result in investment of legislative time unnecessarily. The present experience reinforces this apprehension in as much as the ceiling of Rs 500 has remained unrevised for 30 years without anyone (including women's activist groups) even becoming aware of the resultant anomaly and injustice....

Having accorded anxious consideration to the relevant factors, the Commission is firmly of the opinion that the appropriate course would be to do away with the ceiling altogether by eliminating the reference to the ceiling (as at present of Rs 500) engrafted in the said provision....

### **Starting Date for Payments**

There is no conceivable principle in denying the allowance for maintenance for the interregnum during which the proceeding remained pending in the court if the right to claim maintenance is ultimately upheld at the conclusion of the proceedings. The provision appears to be unwittingly loaded against the claimant....

Indirectly, it encourages the person liable to pay the allowance to prolong the litigation and thereby compound the injustice resulting to the claimant. The person liable to pay the maintenance allowance would have a vested interest in the prolongation of the proceeding. For, the longer the delay, the longer he can retain the amount with himself and keep the wife or the claimant away from his or her claim. Such a person would also have the sadistic satisfaction of causing harassment to the claimant with impunity....

The right to claim maintenance existed on the date on which the petition was instituted. It did not come into existence years later, on the date on which the magistrate could dispose of the proceeding. It is a matter of common knowledge that the workload in courts has increased tremendously. The courts are not able to dispose of even vital, urgent and sensitive matters within a reasonable time. This reality has to be faced. It often takes three to four years to dispose of a proceeding in the court of the first instance. The claimant is in no way responsible for the delay in the disposal of the matter....

There is, therefore, no escape from the conclusion that sub-section (2) of section 125 requires to be amended so as to provide that the amount of maintenance shall be payable from the date of the making of the application by the claimant....

### **Calculation of Amount Required**

The only condition which is required to be satisfied in order to claim maintenance under section 125(l)(a) is that the wife has no income or no adequate income of her own

from which she can maintain herself on the date of the institution of the petition. Whether or not she had the potential to secure an employment and/or to earn any income by exerting herself is a matter within the realm of conjecture. It is common knowledge that there is widespread unemployment and even if the wife makes effort to secure employment, she may not be able to secure a suitable employment. At times she may not feel safe in securing employment even if it is available....

The Commission is of the opinion that an Explanation should be added to section 125(1), that the phrase "unable to maintain herself" concerns itself with the actual separate income, if any, of the wife and not with the possibility or potentiality of the wife being able to earn for herself by securing employment....

Section 125 as at present merely provides for awarding maintenance to the person entitled thereto but it does not spell out or even indicate the relevant criteria for determining the quantum of maintenance which can be awarded to the successful claimant. This has resulted in the determination being made by and large on subjective approach of the concerned magistrate....

An analysis of the judgements of the different High Courts... for the years 1981, 1982, 1984, 1985, 1986 and 1987 reveals that very meagre amounts were being awarded to the wife and the child....

It is, therefore, essential to provide by a suitable amendment that in determining the quantum of maintenance, not only the current income of the person liable to pay the allowance but also all his other resources and assets as existing on the date of the institution of the petition for maintenance, may be taken into account with the end in view to award a sum considered just and fair....

It requires to be clarified that the need of the awardee not only for food, clothing, shelter, medicines, educational expenses, etc, but also the need to provide for unforeseen emergencies and expenses has to be taken into account....

### **Preventing Harassment**

Subsections (4) and (5) of section 125(1),... provide: (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.... The limitation imposed by the aforesaid provisions on her right to receive and to continue to receive maintenance, particularly in the context of the rider that she should not be

entitled to such allowance, "living in adultery" works in an oppressive manner in so far as the wife is concerned.

Questions loaded with insinuations and embarrassing questions regarding the associations and movements of the wife may be posed.... Such course may be adopted with a view to intimidate the wife and make her abandon the proceedings or submit to an unjust settlement. The wife would find herself under great pressure in view of her anxiety to save herself from such predicament and resultant embarrassment in open court out of fear of social stigma. The Commission, therefore, is of the view that the aforesaid two subsections of section 125 deserve to be amended by deleting the phrase "if she is living in adultery" occurring in the aforesaid two sub-sections....

### **Ensuring Prompt and Regular Payments**

The suffering of the wife, child or parent needing maintenance is in no way diminished either by awarding an appropriate amount or by awarding the said amount expeditiously if the claimant is unable to recover the amount or has to face almost insurmountable difficulties for recovering the same.... There are a number of deficiencies, anomalies, ambiguities and loopholes, which have been identified in the course of the working of the relevant provisions, which call for attention. The claimant who has successfully secured an order for payment of monthly allowance by way of maintenance faces a host of problems, namely:—

The awardee is required to approach the court to enforce the order for maintenance every month if an intransigent person refuses or neglects to make payment regularly. The awardee has to engage an advocate, approach a court, incur expenses and invest time in starting

a fresh round of litigation for the purpose of recovery of the allowance awarded to him or her, and it is not only once that the awardee has to face such a situation. The same situation has to be faced as often as the person held liable to pay the allowance makes a default... This is one of the most vital issues which demands an appropriate solution....

If, in the situation in which the awardee is placed, he or she is unable to approach the court within one year of the last default, the claim of the awardee becomes unenforceable by virtue of the first proviso to section 125(3) which reads:

‘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.’

The awardee wife can be obliged to face another round of litigation if the husband who has been held liable to pay the allowance makes an application to the court that he is prepared to maintain his wife on condition of her living with him.

Thus, almost insurmountable hurdles are placed in the path of the awardee, which virtually amount to conferring on such person a mere paper right which is, in practice, worth very little....

The magistrate passing the order for monthly allowance should be empowered to direct the person held liable to pay the allowance to deposit in advance six months' allowance at the rate determined by him and keep it deposited till the order of maintenance holds the field unless, for reasons to be recorded in writing, he considers it unjust to do so in the circumstances of the case....

The concerned magistrate must also be empowered to permit the awardee to withdraw the amount due from the deposited amount in case of default on the part of the person held liable. The magistrate must also have the power to direct that the payment should be made either by depositing in a bank account opened in the name of the wife or by depositing the amount from month to month in the court or by remitting it by money order as may be convenient to the awardee after consulting the wishes of the awardee. The magistrate must also be empowered to direct the employer, if any, of the person held responsible to make a deduction of the amount of monthly allowance from the monthly salary of the person held liable to pay it to the awardee in the manner specified by the learned magistrate. It should also be provided that wilful default in making the deduction will constitute contempt of court....

There is no good or substantial reason for precluding the awardee from approaching the court for issuance of a

warrant for recovery merely because the awardee does not approach the court within one year. In fact, it results in grave and serious injustice to the awardee, for the entire claim gets wiped out if the awardee is not in a position to approach the court for physical or economic or other reasons....

So also there is no good reason to once again reopen at the stage of recovery the controversy as to whether or not the wife is entitled to refuse to live with the husband. This question would have been gone into at the stage when the right to maintenance was determined on merits. At the subsequent stage of recovery, no useful purpose would be served by requiring that if the husband makes an offer that he is prepared to maintain her on the condition of her living with him, the entire controversy must be reopened. The existence of this provision serves no better purpose than providing a weapon of harassment to the errant husband in as much as a husband can always make an application just in order to tire out the wronged wife who has won a decision in her favour after a prolonged, costly and unequal battle....

It will be appropriate to provide for an appeal against a final order granting or refusing maintenance passed by a magistrate....

The wife, child or parent who has been awarded maintenance would have no real protection in case the person liable for payment of maintenance prefers an appeal. It is, therefore, necessary to provide that in an appeal by a person held liable to pay maintenance, the appeal will be maintainable only when it is accompanied by an affidavit of the appellant to the effect that he has deposited or paid all such arrears and will deposit future maintenance regularly. It may, however, be provided that the appellate court may, on being satisfied that undue hardship would be caused to the appellant if he is required to pay all the arrears, in its discretion, extend the time for making deposit or exempt the appellant from making deposit of any part of the arrears....

### **Legal Representation**

The hardship to the claimant is compounded when the said person has to again approach an advocate and to initiate proceedings for recovery from time to time. Under the circumstances, the claimant is virtually deprived of maintenance allowance for considerable length of time in order to meet the legal expenses. It is no doubt true that with the legal aid schemes sponsored by the State, the hardship is somewhat mitigated. But then, when the Legal Aid Committee makes available the services of some advocate on the panel, the said advocate may not be able to devote sufficient time and attention by reason of the fact that the advocate concerned would be having his or

her private practice and would be required to attend to the causes of such clients in different courts. The remuneration paid by the Legal Aid Committee may also not be to the satisfaction of the concerned advocate. Under the circumstances, the cause of the claimant would be served much better and effectively if the services of a Maintenance Counsellor attached to the court exercising jurisdiction under section 125, CrPC, are made available to the claimant free of cost as a measure of

social welfare and legal aid obligation of the State. An Additional or Assistant Public Prosecutor appointed under section 24/25 of the CrPC may be designated as a Maintenance Counsellor for this purpose with an obligation to devote himself or herself exclusively to matters of claimants under section 125, with liberty to attend to other matters only when the maintenance work has been attended to. It would be desirable, so far as possible, to appoint women advocates to discharge these functions....

Of course, the services of such a Maintenance Counsellor would be optional in the sense that the claimant would have a right to engage a counsel of choice at the claimant's own expense, if so desired.

### Preventing Evasion

An order passed in favour of a claimant for maintenance can easily be defeated by transferring the properties possessed by the liable person with the end in view to deprive the awardee of the benefit of the order secured by the awardee on investing considerable time, money and effort and procuring the same....

It is necessary to make a provision to the effect that the monthly allowance ordered to be payable shall be a charge on the properties of the liable person and shall be recoverable from the transferee as also from the person inheriting the properties by testamentary and non-testamentary succession. And also that the right, title and interest of any person acquiring a property from the liable person during the interregnum between the date of the institution of the petition claiming maintenance in the court of the magistrate till the final order shall be subject to the right of the awardee to seek satisfaction of the order for maintenance against such property....

Not infrequently when the proceeding for enforcing the order is initiated, the awardee is faced with the plea that the claim has been satisfied by a compromise or arrangement arrived at between the parties after the passing



of the order. It provides scope for another round of litigation and harassment to the awardee. Under the circumstances, it is necessary to provide that an order for maintenance will not be treated as having been discharged or satisfied unless an application is made to the court of the magistrate which passed the original order, signed by both the parties, recording any arrangement or compromise which might have been arrived at between them. Such an arrangement or

compromise must be in writing and must be confirmed to have been arrived at voluntarily and for good consideration by the awardee, satisfying the magistrate by appearing personally in the court that the arrangement has been voluntarily arrived at with full understanding. And, for reasons to be recorded in writing, the same shall be recorded by the concerned magistrate only upon being satisfied that the arrangement is genuine, voluntary, for good consideration and just and fair....

### Expedited Procedures

Proceedings initiated under section 125, CrPC, in order to claim maintenance are meant to be summary proceedings designed in order to afford swift and quick relief to the claimants entitled to maintenance. In actual practice, it is common experience that such proceedings are not being disposed of for a number of years....

The need for devising a summary procedure, which would enable the concerned magistrate to dispose of the matter speedily is, therefore, self-evident....

The problem can by and large be tackled at three levels:

(1) prescribing a time limit for filing a written statement or statement of objections coupled with conferment of the power on the magistrate to pass an order as prayed on failure of the respondent to file the statement with the prescribed time limit; (2) deciding the matter on affidavits with opportunity to the other side to cross-examine the witnesses of the deponents; and (3) requiring the magistrate as far as practicable to dispose of the matter within six months after hearing it from day to day.... □

### Write For Manushi

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