

## **Right to Maintenance**

**Introduction-** Before property appreciating the principal of law of maintenance of a wife ,It would indeed be necessary to understand the concept of marriage under Hindu law& the attending rights & duties of the husband and wife, because these principles flow from the sanctity attached to a marriage under Hindu law.

**The concept of marriage-** Under the shastric Hindu law is a sacrament, a religious ceremony which result in a sacred and a holy union of a man and wife, by which the wife is completely transplanted in the household of her husband, becoming a part and parcel of the body of her husband. On the one husband hand, it signifies the spiritual union of man and women as husband and wife and on the other hand, it conceives of the basic principles of mutuality bringing two parties to gather which the forces social milieu, developing since the age-old times of civilization. The aim and objective of this institution is to achieve, by co-habitation of man and women, the supreme Values of dharma, Arth, Kam and purusharth. These are the material determinants of the concept of marriage obliges both husband and wife to live together under the same roof Marriage Thus means mutuality and respects reciprocity.

From the concept of marriage, the institution of the family and home emerges. These Institutions are based on the principle of procreation and protection. It proves the efficacy of marriage

husband is obliged to furnish the roof and further protection which the wife is enjoined to remain under the roof and nurse the growth of the family. Negative injunctions are also ingrained in this relationship. The Hindu wife was enjoined to share the life and love, joys and sorrows of her husband, to render selfless service and profound dedication. Husband, corresponding duties of the husband also accrued, the moment the wife entered his home {I.E.} To protect the wife, to give her a home, to provide her with comforts and necessities of life with him his mea, to treat her kindly and not Cruelly and in humanly and to discharge the duties growing out of marital relation. Whatever be the reason, the female were given no less place in the society and their right of maintenance was preserved and protected zealously. The male folks of the Hindu society were reminded that where females are honoured, there the dieties are pleased but where they are UN honoured, there all religious acts become fruitless. That's why the legislature has given the legal recognition to the right of maintenance by enacting the Maintenance act.

### **CONCEPT OF MAINTENANCE**

Maintenance was regarded as a duty, a duty of a Hindu, Which he owed to his dependent relations and by which both, the person and property were bound. There was a distinction between legal and moral obligation to pay maintenance. When it was legal, it was binding even if the person did not have any property, but when it was moral and optional; it was matter of conscience and was

unenforceable in the law of courts. However, on the death of a Hindu who had the moral obligation to pay maintenance, the said moral obligation used to become transformed, in majority

Of cases, into a legal obligation. It could then be enforced against the property left by the deceased. Hindu the principle underlying such rule was that the heir of the deceased takes the estate not for his own benefit, but also for the spiritual benefit of the person whose property he inherited.

A male Hindu was under the obligation to maintain his aged parents, unmarried daughters, legitimate sons and a wife who was chaste, whether he possessed any property or not. Although a Hindu had no married daughter, whether widow or otherwise was destitute {E.G} was unable to maintain herself from the sources of her husband or after the death of her father, such moral right of the marriage destitute daughter used to convert in to a legal right which could be enforced against the property whether separate or joint, left by her father. The widowed daughter-in-law had the moral right to be maintained by her father-in-law, the moral right used to ripen in to a legal right and was enforceable against the property left by her father-in-law. The property of a Hindu in the hands of his heirs was also liable for the maintenance of his pre-deceased son's daughter until their marriage and also for providing reasonable marriage expenses.

A Hindu, however, was under no legal obligation to maintain his sister and step-mother. If, however, the Hindu male had inherited the property from his father of a Such Hindu male was under the legal obligation to maintain him. The widow was entitled to maintenance

In the same degree of comfort and luxury as she had in her husband's lifetime even an Avaruddha stri {E.G} a woman who was kept by a man as to maintenance from the separate property of her paramour if she was not entitle to maintenance, but if she had stayed with her paramour till his death and the connection had become permanent then even the estate of that Hindu in the hands of his heirs was liable. However the concubine, lose her right of Maintenance on her becoming unchaste. A member of the family who was disqualified to have a share in the joint family property because of his blindness, deafness, dumbness etc, which were considered as disqualifications under the Hindu law of inheritance, was entitled to maintenance. The wife and children of such disqualified heir were also entitled to Maintenance. The right of maintenance was not ascertained, liquidated or specified then it was not heritable and transferable.

Thus Joint family property was also liable for the maintenance of every coparcener and his dependants. The right of maintenance was a person and non-transferable. The right to future maintenance was Subject to debts which were payable out of the property against which the right of maintenance was being enforced. There was no

hard and fast rule to determine the amount of maintenance to be awarded to a person entitled to it, but it depended upon all the facts of the situation. The only procedure open to recover maintenance was to institute a suit. The amount of maintenance could be altered depending upon the change of circumstances. Refusal to maintain was considered to be an offence under Hindu law.

**OBJECT AND SCOPE:**-The provisions of Maintenance act are intended to fulfill a social purpose. These provision are contained in criminal procedure code,1973 under section 125 to 128 and under the Hindu Adoption and Maintenance act,1956.The object of all these provision is to compel a man to perform the moral obligations, which he owes to the society in respect of his wife, children and parents .By provisions a simple and speedy but limited relief, These provision seek to ensure that the neglected wife and children are not left beggared and destitute on the scrapheap of society and there by driven to a life of vagrancy, immorality and crime for their subsistence. The inability of the wife, child and father or mother to maintain themselves could lead to Social problems and therefore, it became the concern of the state not to allow such inability to grow in to social problems of great magnitude unless the consequences of such inability were checked by providing appropriate measure, large scale vagrancy could be the probable off-shoot there from. Therefore, the parliament in its desire to find a solution to this problem evolved a procedure which has found expression in chapter 9 of criminal procedure code.1973.This enactment is fully consistent with ARTICLE 15{3} of the constitution of India which

state that the prohibition contained in the constitution of India 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 state, inter-alia that the state shall, in particular, direct its policies towards securing that the citizens, men and women equally, have the right to an adequate means of 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.

Chapter 9 of the code is not based any assumption that it is the legal right of a wife, a child or the parents to claim maintenance. The purpose of enacting it, is not to recognize o create a right. It proceeds on the assumption of the existence of relationship. The maintenance act is designed to protect the destitute women Who are victims of neglect during marriage and after divorce. it is rooted in state's responsibility for the welfare of the selection of womenhood. The existence of a private prior agreement by the husband to pay certain sum as monthly maintenance to his wife doesn't mean that the husband is absolved from the liability to maintain his wife.

Thought the wife may choose to rely on the agreement and claim maintenance in a civil suit but her statutory right under section 125 of the code is not taken away by such an agreement. However where the husband pleads full and final settlement of thee claim of maintenance of the wife, he has to prove it by proper evidence if the

husband proves an agreement under which the wife received the particular amount as full and final settlement of her future maintenance, She will not be entitled to claim maintenance under it. it is contended by the husband that he has paid a lump sum amount towards the claim of future maintenance, it is the bounden duty of the court to examine whether the amount so paid has any relation connection with the necessities of life to be provided for, in the future. Where the amount paid is illusory, it may be considered in the reduction of maintenance rate but cannot be successfully pleaded by the husband. Where under a clause in the agreement, the wife becomes disentitled to claim maintenance from the Husband; such an agreement would be against the public policy. No party can be permitted to contract out of such an obligation. Such an agreement will not be legal. No doubt this section is intended to help the needy wife, children and the parents, but it does not mean that the statutory procedure can be ignored. Therefore, if a husband is ready to maintain his wife properly in his house, but the wife refuses to live with him without any reason, she will not be entitled to maintenance. It does not confer an absolute right on a wife to get an order of maintenance against the husband nor does it impose an absolute liability on the husband to support her in all circumstances.

The right to maintenance is circumscribed by certain factors {E.G.}{a} the relationship of husband and wife should be proved,{b} she must be unable to maintain herself,{c} the husband

must be having sufficient means and {d} it should be proved that the husband has neglected or has refused to maintain wife.

Even a wife who has been divorced is entitled to claim maintenance from her husband provided that she has not re-married. Whether such a wife has been divorced by her husband or she has obtained divorced or the marriage was divorced by mutual consent, she would still be entitled to claim maintenance under the maintenance act. However by the enactment of the Muslim women act, 1986 these provisions have been made inapplicable to the Muslim woman and her former husband can choose to be governed by the provision of this chapter of the code. A child up till the age of eighteen years, legitimate or illegitimate whether married or not, would be entitled to claim maintenance from his or her father. The father of a minor female child can be ordered to pay maintenance to such a child UN till she attains her majority, if the magistrate is satisfied that the husband of such a minor female child is not possessed of sufficient means. Even a child who's has attained the age of majority has been enabled to claim maintenance if by reason of any physical or mental abnormality or injury is unable to maintain itself. Such a child may be legitimate or illegitimate.

A son may be married, but a daughter who's has attained the age of majority but is married is not covered by this act .A father or a mother have been conferred the statutory right to claim maintenance from his or her son or daughter. The provisions of this act are not in the nature of penal provision but are only intended



for the enforcement of a duty, default, which may lead to vagrancy. This act is really intended for ensuring some supply of food, clothing& shelter to the deserted wives, neglected children& parents.

### **Right to Maintenance under the criminal Procedure code, 1973**

Section 125 to 128 of the code make provisions for maintenance of wife's, children and parents. It is natural and fundamental duty of every person to maintain his wife and children so long as they are not able to maintain themselves. So also it is the sacred duty of a person to maintain his parents also if the code gives effect to the natural duty of a man.

Sec:-125 order for Maintenance of wives, child and parents:-

{1} If any person having sufficient means neglects or refuses to maintain:-

{A} His wife, unable to maintain herself

{B} His legitimate or illegitimate minor child, whether married or  
Not unable to maintain itself.

{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 it self

{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, as such 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 UN till 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.

provided further that the magistrate may, during the pendency of the proceedings regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife, or such child, father or mother, and the expenses of such proceeding which the magistrate considers reasonable, and to pay the same to such person as the magistrate may from time to time direct,

Provided also that an application for the monthly allowance for the interim maintenance & expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of the notice of the application to such person.

Explanation: - for the purpose of this chapter

{A} 'minor' means a person who, under the provision of the India majority act, 1875, is deemed not to have attained his majority,

{B} 'wife' includes a woman who's has been divorced by, or has obtained a divorce from, her husband and has not re-married.

{2} Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses proceeding, as the case may be

{3} If any person so order fails without sufficient cause to comply with the order, any such magistrate may, for every breach of the order, issued 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 months allowance for the maintenance or the interim maintenance and expenses of proceedings, as the case may be remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one month or un till 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 with him a period of one year from the on which it became due provided further that if such person offer to maintain his wife on condition of her living with him, she refuses to live with him, such, magistrate may consider any grounds of refusal stated by her, and may make an

order under this ground section not with-standing 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 for the maintenance or the interim maintenance and expenses of proceeding, as the case may be from her husband under this section, if she is living in adultery, or if, without any sufficient reason, she refuses by mutual consent to live with her husband, or if they are living separately

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

Any person:-Any person includes a male as well a female. It includes a Hindu not divided from as his father. It means an individual, may be that he is a member of joint family. Under this section proceedings cannot be initiated against the whole of the family, where husband is a member of the joint Hindu family. Though the magistrate may consider what is the property of family in considering what sum should be awarded to the wife for maintenance, the order should only be passed against the husband and not against the joint family.

{2} an order under this section is enforceable against a person even if he resides outside the jurisdiction of the court. The word 'any person' includes father or son or husband but does not include a daughter or mother or wife. However a married daughter is included in 'any person'

**Sufficient means:**-'sufficient means' does not mean only visible means such as real property or a particular Employment .it is not confined to the actual pecuniary resources of a person. It refers to the earning capacity of man. if a man is healthy and able-bodied he is presumed to be possessed with means to support his wife and children even if he is unemployed. The words' sufficient means' should not be confined to the actual pecuniary resources but should have reference to the earning capacity.

**Rai Bari behead v. Mangaraj Behera** In this case court held that the maintenance has to be determiner in the light of the standard of living of the person concerned, the earning of the husband, his other financial commitments etc. In solvency of the husband was not conclusive to determine the maintenance instead his capacity to work and earn is material. Omission in behalf of the wife to plead that the husband has' sufficient means' does not taken away her right to get maintenance.

**Smt. Sudha alies Ranjana R. Patil v. raj Kumar Deoganda patil**  
Took a difference view and observed as under; section 15 of CPC nowhere lays down that only an able bodies husband will be bound

to maintenance his wife. Section 125 speaks of the inability of the wife to maintain herself and does not speak about the physical capacity the wife to maintain herself or his wife or children. Even though respondent is blind his entering in to marriage with the petitioner is itself indication that he has undertaken to maintain the petitioner wife. It is the first responsibility of Hindu husband to maintain his wife and nothing to do with his capacity. Physical disability and there for even though it is proved that the husband has no apparent source of income, he can be made liable to pay maintenance to his wife who is unable to maintain herself and to whom the husband has refused or neglected to maintain.

**T.P. Ashraf v. Fousia M {2007}** Husband contended that wife was in employment and can maintain herself. It was not proved by evidence brought on record. Husband earning R.S/-9000/- P.M and married again court granted maintenance of R.S/- 2000/- P.M to wife.

Neglects or refuses to maintain-Refuse means a failure to maintain or denial of the obligation to maintain after demand neglect on the other hand means a default or omission to maintain in the absence of by words or by conduct. But once it is proved that a person has neglected to maintain his wife or children, the magistrate has power to make order under this section. Neglect or refusal is something more than mere failure or omission. But when there is a duty to maintain, such as, in the case of a child, mere failure or omission may be amount to neglect or refusal. An offer to maintain in future

will not debar the magistrate from awarding maintenance. Maintenance means appropriate food, clothing and lodging. If the husband offers to maintain his wife, if she lives with him, the circumstances under which she refuses to go with him and discharge her marital obligation will be looked into. To proceed in a claim for maintenance proof of a wife to live with her husband however genuine does not per se entitled her to live separately and claim maintenance from her husband.

Offer of a Muslim husband, who has taken a second wife, to maintain the first wife on condition that she lives with him cannot be considered to be a bonafide offer and he will therefore, be considered to have neglected or refused to maintain his wife. Where there is a private agreement between the husband and wife to pay the maintenance, any failure to pay the maintenance will amount to refusal or neglect to maintain the wife.

**Sita Devi v. Hari Narain** It was held that if there is no evidence as to the neglect or refusal an order for maintenance passed by the magistrate is bad-in-law. Failure to maintain property can also amount to negligence.

### **Who can Claim Maintenance?**

{1} Wife

{2} Child

{3} Father or Mother

{1}Wife-The term 'wife' appearing in section 125{1} means only a status wedded wife. Acceptance of a woman as wife, declaration of her status directly or indirectly and acceptance of status by a woman are enough to bring her with him the fold of the term 'wife'. A marriage between a Hindu and Christian is not invalid with him the meaning of section 125 Application for maintenance under the section 125 is not maintainable, if the applicant fails to prove that she is a legally wedded wife of the opposite party. Second wife of a Hindu married after the commencement of Hindu marriage act, 1955 during the life time of the first wife is not entitled to maintenance. The term 'wife' also included a divorced wife and includes divorced by mutual consent. Since a right of the wife to maintenance is a statutory right an agreement contrary to it cannot be given effect to as it would be against public policy.

Similarly the principle of Muslim law that a divorced wife is entitled to maintenance only during the period of iddat is not relevant when considering the provision of sec 125 enacted by the parliament for all UN provided wives, irrespective of their religion or caste.

**Deb Narayan halder v. Anushrea halder** the respondent in her application for maintenance gave reasons for her ill treatment by the appellant, namely his greed for dowry that she was not good looking. The trial court has found that no dowry was ever demanded either before or after the marriage. Even the mother of the respondent had to admit that the appellant had never demanded any dowry or gift of course she said that all this was in



his mind. So far the second reason is concerned in the course of her deposition the respondent has not said a word about it. Therefore both the reasons given in the application for her ill treatment are non-existent.

The trial court found her not entitled for maintenance. But the High Court set aside the findings of the trial magistrate. The Supreme Court held that the order of the high court was not proper.

The court further observed that the parties married in the year 1985 and lived happily for many years till about the year 1996. After 1996 there was some misunderstanding, which ultimately resulted in their separation. Why this happened, it is difficult to fathom, but the evidence on record does not show that the respondent's wife was subject to torture and harassment by the appellant and certainly not for the reasons alleged by her. It was held that the court is not permitted to conjecture and surmise. It must base its findings on the evidence produce before it by the parties. The inquiry by the court is restricted to the evidence on record and the case pleaded by the parties. It is not permissible to the court to conjecture and surmise and make out a third case not pleaded by the parties.

**Amina v. Hassn Kaya** The appellant was married to respondent on 28-12-1972. As per respondent's version a girl child was born to the appellant on 28-04-1973 and respondent divorced the appellant on 2-5-1977. She filed a petition on 14-12-1977 under section 125,

CRPC seeking maintenance for herself and her daughter. The respondent accepted the factum of marriage but pleaded that the fact that appellant was pregnant at the time of marriage was concealed from him by the appellant; the marriage was, therefore invalid and void. He also pleaded that the child as not born to the appellant through the respondent and therefore, the respondent had no obligation to pay any maintenance qua the child. It was held that a five month old pregnancy is such an advanced stage that it cannot be concealed as the pregnancy start shaving by that time. In any case it cannot be concealed from husband. There for, It cannot be accepted that the respondent husband did not know at the time of the marriage that the appellant wife was pregnant. This fact being Know to the husband marriage cannot be said to be illegal or void. The respondent did not raise any objection at the time of marriage. He *was* present at the time of delivery of the child and gave his own name as the father of the child for official record. Even thereafter for nearly four years he goes along with the marriage and bring up the child while treating appellant as his wife. The divorce was given after four and half years. It was Further observed that any person who learns that his newly married wife is, already pregnant for five months and who

**Mohd. Ahmed khan v. Shah Bano Begum & others** The appellant, a Muslim, was married in 1932 and in 1975 he drove her out of the matrimonial home. The respondent filed a petition under section 125 CRPC in April 1978 against the appellant claiming maintenance at the rate of Rs. 500 per month. The appellant

divorced the respondent by an irrevocable talaq in November 1978. His defense to the respondent's petition was that she had ceased to be his wife by reason of the divorce granted by him, that he was therefore under no obligation to provide maintenance for her, that he had already paid maintenance to her at the rate of Rs. 200 per month for about two years and that, he had deposited a sum of Rs.3000 in the court by way of dower during the period of idiot. The question was whether the respondent was entitled to maintenance. In application for revision filed by the respondent High Court enhanced the amount of rs.25 as maintenance fixed by the magistrate to Rs. 179.20 Per month. In appeal a two judge Bench of the Supreme Court referred the month to the present Bench. Dismissing the husband's appeal with costs and adding that it would be open to the respondent to make an application under section 127{1} of the code for increasing the allowance of maintenance granted to her on proof of a change in the circumstances as envisaged by that section, supreme court held that section 125 was application to all irrespective of their religion clause {B} of section 125{1} contains no words of limitation so as to justify exclusion of Muslim women. There had been a lot of hue and cry by Muslim fundamentalists after this revolutionary judgment of the apex Court which was truly intended to protect the interest of Muslim women from oppression. Consequently the central government was compelled to bring a legislation nullifying the judgment of the Supreme Court. Therefore Parliament passed a Muslim women's {protection of rights on divorce} act, 1986

providing for other remedies to Muslim women. This new Act allows a Muslims woman to avail the remedy available under section 125 cry pc only if the husband consents to it.

### **Dania Latifi & another v. Union of India**

The petitioner challenged the constitutional validity of the Muslim women {Protection of Right on Divorce} Act, 1986, under which section 125 of the criminal procedure code, providing for maintenance to wives, including divorce women, by their formal husband, was made in applicable to divorced Muslim women. The petitioners primarily submitted that {1} section 125 CRPC, was enacted as a matter of public policy, in order to provide a quick summary remedy to persons unable to maintain themselves, that the provision reflected the moral stance of the law and ought not to have been entangled with religion and religion based personal laws {2} Section 125 CRPC also further the concept of social justice embodied in Article 21 of the constitution of India hence excluding divorced Muslim women from its protection is a discrimination against them {3} The inevitable effect of the Act is to nullify the law declared by the Supreme Court in *Shah Bano case* {1985}2 scc 556 }, which is most improper, {4} the Act is un-Islamic and also has the potential to suffocate Muslim women and to undermine the basic secular character of the constitution, {5} The Act is Violative of Article 14 and 21. On behalf of the union of India, it was submitted that the need for giving effect to a community's personal law was a legitimate basis for discrimination. If the legislature can apply a

particular provision as a matter of policy, it can also withdraw such application and substitute another in this place. The policy of section 125 crpc is not to create a right of maintenance beyond the purview of personal law. The Act has been enacted to overcome the ratio of the *Shah Bano* decision.

On behalf of the all Indian Muslim person law board it was submitted that the object of the was to undo the effect of *Shah Bano case*, in that the case the Supreme court had attempted the hazardous task of interpreting an unfamiliar language connected to religious tenets, Which was not a safe court to pursue, that the term 'mate' had been wrongly interpreted in shah bano case. The purpose of the act was to avoid vagrancy, but at the sometime it aimed to prevent the husband from being penalized, that the terms maintenance and provision as used in section 3{1} {a} had the same meaning, that provisions of section 4 of the act were adequate for taking care of any possibility of vagrancy, that according to the Muslim social ethos a divorced Muslim woman was not at all dependent on heer former husband because society provided a wider safely net. The Islamic shariat board presented more detailed submission regarding the term 'mate' and as to why the views of certain Muslim authors, proposing that Muslim law obliges a man to pay maintenance to his former wife beyond the iddat period, ought not to be accepted. The Supreme Court decided to consider only the question of the constitution validity of the Act and upholding the same. While upholding the validity of the act and

upholding the same. While upholding the validity of the Act, We may sum up our conclusions.

{1} A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending Beyond the iddat period must be made by the husband with him the iddat period in terms of Section 3{1} [a] of the Act

{2} liability of a Muslim husband to his divorced wife arising under Section 3{1}{a} of the Act to pay maintenance is not confined to the iddat period.

{3} A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the magistrate may direct the state wakf board established under the Act to pay such maintenance.

{4} the provisions of the Act do not offend articles 14, 15 and 21 of the constitution of India.

{B} Child: - The word child is not defined the code. It means a person who has not reached full age i.e.: 18 years as prescribed by the Indian majority Act,1875, and who is incompetent is enter in to any contract or to enforce any claim under the law. Under clause {c} of sub-section {1} a child need no be a minor but it must be, by reason of physical or mental abnormality or injury unable to maintain itself. So for as this clause is concerned the Limitation is contained in the expression unable to maintain itself .The basis of an application for maintain of a child is the paternity of the child. The fact of legitimate or illegitimacy of a child is an irrelevant consideration in awarding maintenance. Even an illegitimate minor child is entitled to maintenance.

**K.K.Nath V. Kanchan Bala Nath** It was held that though the Mother is not the wife of the father, the child of such father, who is in custody of his mother, is entitled to maintenance.

**Moti Ram V. IST ADDS. District, Bareilly** A petition was filed by wife calming maintenance for herself and minor daughter. The daughter was not impleaded as applicant and marriage was earlier declared void. Application on behalf of daughter was held maintainable.

A woman may be of a dad character, yet she may be entitled to an order for maintenance for illegitimate child if she proves that the person against whom a claim is made is the father of the child. A father is bound to maintain his child even though it is living with

mothers who refuse to come to her husband under a decree for restitution of conjugal right. The basis of an application for maintenance in the case of a wife is subsistence of a legal or valid marriage and in case of a child the paternity of a child, whether the paternity is legitimate or illegitimate. An unchaste wife is entitled to maintenance for her husband's child.

**Villabhaneni yedukondalu V. Vellabhaneni Nageswaramma** Held that when a child is born during the continuance of valid marriage the conclusive presumption is that the child so born is the legitimate child of a man and his wife, unless it has been shown, that the parties has no access between them, for proving non-access a higher standard of proof is required.

The children of Muslim parents are entitled to claim maintenance under sec.125 CR.P.C for the period till they attain majority or are able to maintain themselves, whichever is earlier and in case of female, till they get married this right is absolute notwithstanding the fact that the minor children are living with divorced wife. Further the right is not restricted, affected or controlled by divorcee's right to claim maintenance for maintain the infant children in her custody for a period of two years from the date of the birth of the child concerned under section 3{1}{b} of the Muslim women Act,1986.

{C} Father or Mother:-The provision relating to maintenance of father or mother who may not be able to maintain is new. The



expression his father or mother occurring in section 125, cr.p.c, nowhere specially included the stop-father or step-mother. Mother in its ordinary sense means, the lady who has given birth to the person, from whom, the maintenance is asked for under section 125, CR.P.C. This provision is a special with him its purview. It is not a general provision, though which maintenance could be asked by any person and for that purpose, the other laws, governing the parties could be made use of the step-mother, under certain circumstances, could ask for maintenance from her step-son under the provisions of personal law of the parties

**Vijaya Manehar Arabat V. Kashirao Rajaram sawai** The Supreme Court held that it is true that clause {d} of section 125{1} has used the expression his father or mother but the use of the word his does not exclude the parents claiming maintenance from the daughter. But before ordering maintenance in favour of a father or a mother against their married daughter, the court must be satisfied that the daughter has sufficient means of her own independent by of the means of income of her husband and the father or the mother, as the case may be, is unable to maintain himself or herself. The question whether a step-mother can claim maintenance from her step-son has been answered differently by different high Court. The orissa and Allahbad High Court are of the view that a step-mother will be included But the Madhya Pradesh and Andhra Pradesh High Court having expressed a contrary opinion. Mother also included adoptive mother.

**Pandurang V. Baburao** In this case held that the father is entitled to claim Maintenance from his children. If he is unable to maintain himself. This statutory obligation of a child to maintain his father can-not be defeated by heading that the father had failed to fulfil his parental obligation towards the children during their minority, parents may make application for maintenance against any one of the sons and it is not necessary that he should make all his sons party to his application.

Mother staying with one of her sons can maintain an application for maintenance against the other son, who is found to be in affluent circumstances and who is in possession of joint family properties.

{5} Unable to maintain itself:-“Unable to maintain” means unable to earn one’s livelihood. Under to maintain” applied to child only. Under the new code, it applies to wife also. Under this code provision has been made for maintenance of father or mother provided that he or she is unable to maintain himself or herself. Primary obligation for maintenance of the mother is own her husband. Therefore, she must be claim from her husband if he is able to maintain to her. But there is nothing in the Act that entitles a mother to claim from her children if her own husband to able to provide maintenance for her. If he refuses to neglect to maintain her she, as a mother, may claim for her children. What necessary is that she must be unable to maintain herself?In judging the question whether wife is unable to maintain herself, the question whether she is an able bodied person having ability to earn is not

relevant. The expression "unable to maintain herself" can mean that the wife has no other means or source to maintain herself. A wife M.A.B.ED. But unemployed is unable to maintain to herself and entitled to maintenance allowance.

**Aziz Ahmed V. shahejahan** Although the wife failed to aver in the petition for maintenance that she was unable to maintain herself, the statement in the petition that she was sent to her parents place and her father was maintaining her by necessary implication amounted to an assertion that she had no independent means of living but was mean maintained by father. Further, from the evidence, the magistrate found that the wife was unable to maintain herself and the finding was upheld in revision, the maintenance order could not be quashed on ground of defect in pleadings.

**Rewati Bai V. Jogeshwar** It was held that inability of the wife to maintain herself is a condition precedent to granting maintenance. The deserted wife aged about 50 years working as a labour for her survival was held entitled to maintenance in this case. The Bombay High Court has not taken into consideration potential capacity of wife to earn, but the Karnataka and Kerala High court have taken a contrary view. Mere failure to state in the application by the wife that she is unable to maintain herself does not take away her right to receive maintenance under section 125.

**Muraleedharam v. Vijayalakshmi {2007}** It was held that expression 'able to maintain' must receive a dynamic and realistic

interpretation. Mere fact that she has qualification is not sufficient ipso facto to conclude that she is in a position to maintain herself.

{6} Monthly rate: - The earlier provision that only a sum of money not exceeding rs-500 should be order to be paid has now been omitted by an amendment the maximum limit of rs-500 has been removed and

Now the amount of allowance for the maintenance or the interim maintenance shall be in the discretion of the magistrate. Of course no other payment in other shape such as tuition fees or medical expenses can be ordered to be paid in addition to the allowance for the maintenance or interim maintenance. The magistrate can also not order the husband to provide other additional facilities like house accommodation etc Every wife and every child and father and mother can be awarded such amount of allowance of maintenance or interim maintenance allowance or the interim maintenance can be varied if a change in the circumstances is brought to the notice of the court.

While determining the amount of maintenance or interim maintenance the court will take in to consideration the existing situation, such as that one of the child, was a student of same course involving heavy expenditure, at the time of passing order Where the trail court and court of appeal have given concurrent finding about amount of maintenance, its correctness cannot ordinarily be questioned in revision petitioner in the High

Court.1[40] However the rate cannot be fixed on an abstract and hypothetical thing like capacity to earn money. While awarding the amount of maintenance allowance or interim maintenance the court shall fix it taking all the items of maintenance together and separate amount may be ordered for each of the claimant.

**Sudeep Chaudhary V. Radha Chaudhary** it was held that the amount awarded under section 125, CR.P.C, for maintenance was adjustable against the alimony amount awarded in the matrimonial proceeding under section 24 of the Hindu Marriage Act, 1955 and not to be given over and above the same.

{7} Maintenance claim valid Marriage essential

Under section 125 no maintenance can be granted to a woman unless she proves herself to be his legal wife according to his personal law. Valid marriage between the applicant and the opposite party when the applicant is a lady must be proved. No concubine can claim it and alleged second wife married after 18-5-1955 during the subsistence of the first valid marriage, the parties being Hindus cannot claim maintenance. If the wife fails to prove her marriage with the opposite party but she is having her spouse living with her she cannot claim maintenance for the opposite party. The women must be a wife including the divorced wife who has not married at the time of filing petition for maintenance. It is for the

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3 Jagir KaurV/s Jaswant singh, Air 1963 S.C 1524

applicant to adduce evidence to establish the relationship upon which the claim to maintenance is based.

**Zulekha Khatoon v The state** When the status of wife is disputed by the husband on flimsy grounds, the magistrates will not lose his jurisdiction and he has to find out whether the ground raised by the husband is a serious one and a bonafide one. He has to satisfy himself whether *prima facie* the parties are married and to afford them the immediate and speedy relief provided under section 125, CR.P.C, without prejudice to the contention of the parties to establish their real matrimonial links before the civil court. Where the court refused to grant maintenance to wife on ground that signature on *Nakahnama* provided by wife was not properly proved, such refusal was held not proper.

The marriage relationship under custom in the community of Gonds is not as sacrament as it is considered under shastric Hindu Law. In shastric Hindu Law there is no provision of divorce except in shudras by custom. These Gonds are governed by their personal custom which vary on different aspects. Divorces are rather common and second marriage of the wife in one of the indicators of end of marriage with previous husband. It is also common that a person keeps more than one wife among these Gonds. So the second marriage in the life time of first wife will not be called a void marriage. It will still be a marriage.

**Shabnam Ara Bibi V. Malik Babar Ali** It was held that divorced Muslim women cannot resort to a proceeding under sec.125 of cr.pc and cannot maintain the same unless she has taken the remedial steps and passed out the legal hurdles as provided under Section 3 and 5 of the Act {Muslim woman protection of rights and divorce Act, 1986} 'Divorced woman means divorce according to Muslim law. There for the question of marriage/divorce is a question of fact.

**Amit Kumar sharma V. 6<sup>th</sup> A.Dj bejnor** Held that Section 125 of the code of criminal procedure is available to the parents against a neglecting child. Thus a mother can enforce her right of maintenance through section 125, CR.P.C. She is also entitled for maintenance through section 20 of Hindu adoptions and maintenance Act, Which also provides a right to the parent to recover maintenance from neglecting children.

**Amit Aggarwal v. State of U.P. {2007}** It was held that maintenance to wife proceeds on basis of de facto marriage & not on marriage de jure. Thus validity of marriage will not be a grand for refusal of maintenance, if other requirements of maintenance under section 125, crpc are fulfilled.

{8} Proviso {2} to Section 125 {1}:- In view of this proviso

When an application for monthly allowance is made, then during the pendency of the proceeding for monthly maintenance allowance the court has been empowered to order payment of interim monthly allowance and may also order payment of expenses of such

proceeding. The amount shall be with him the discretion of the court. Usually claim for maintenance allowance take a long time for final disposal and during this period the claimant suffers lot of difficulties. Therefore, the legislature has thought it necessary to make provision for interim allowance of maintenance during the pendency of the proceeding.<sup>2</sup>[50]

{9} proviso {3} to Section 125{1}:- This proviso has also added by the amendment in 2001. According to third proviso whenever an application for the monthly allowance for interim maintenance or expenses for proceeding under the second proviso is made, It shall be disposed of within sixty days from the date of service of the notice of the application to such person. These provisions will save the claimants of maintenance from undue harassment due to prolonged proceeding it is hoped that the proceeding will not be now unduly prolonged causing harassment to claimant and even though they still continue and take time in final disposal, the interim order will help them and save from misery.<sup>3</sup>[51]

{10} sub-Section {2}:- Sub-section {2} of this section provides that the monthly allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so order from the date of application for maintenance or

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4 S.N misra's work on cr.pc, 13<sup>th</sup> edition 2006, page 125.

3[51] S.N misra's work on cr.pc, 13<sup>th</sup> edition 2006, page 125.



interim maintenance and expenses of mentioned in the order, it will be payable from the date of order.<sup>4</sup>[52]

**Krishna Jain V. Dharma raj Jain**<sup>5</sup>[53] The Madhya Pradesh High Court has held that the court has power to order payment of maintenance either from the date of application or from the date of order but in either case it must record its reasons. But non-recording of reasons where maintenance was awarded from the date of the order. There is no such general rule that maintenance should be awarded from the date of order.

{11} Sub Section {2}:-Sub-Section {3} provides remedies for the enforcement of the order for payment of maintenance allowance or the interim maintenance and expenses of proceeding, as the case may be. Two remedies are provided.

{1} issue of a warrant for levying the amount due, and

{2} Sentence the husband {or the father} for whole or part of each month's allowance or the interim maintenance and expenses of proceeding, as the case may be, to imprisonment.<sup>6</sup>[54]

The magistrate may for every breach of the order issue a warrant for levying the amount due, in the manner provided for levying fines. In

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<sup>4</sup>[52] Con mani V/s Esther pachikara,1981.cr.1.j.{Noc}76{Ker}

<sup>5</sup>[53] 1992 cr.1.j 1028 {M.P}

<sup>6</sup>[54] S.N misra's work on cr.pc, 13<sup>th</sup> edition 2006, page 126.

the manner provided means procedure laid down for warrants for levy fines in chapters relating to execution. Before proceeding under sub-section {3} the magistrate must be satisfied that:-

{1} the person proceeded against was ordered to pay the maintenance or the interim maintenance and expenses of proceeding, as the case may be,

{2} He failed to comply with the order, and

{3} His failure was without sufficient cause.

Before action may be taken under this sub-section, the husband will be entitled to show 'sufficient reason' for his failure to comply with the order 7[55]

**Pt. Shyamacharam v. MST. Angari Devi. 8[56]** It was held that the words sufficient cause are wide enough and mean that the explanation furnished for non-compliance must be satisfactory. The fact that the husband has become insolvent and that his property has vested in the receiver is not a sufficient cause because the property vesting in the receiver does not include property which is exempted from attachment and sale under section 60 of the civil procedure code.

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7[55] State of Mysore V/s sivashanker murigappa air 1960 Mys 173.

8[56] AIR 1938 all 253.

{11}{a}:- Imprisonment extending to one month

**Kuldip kaur V. surinder Singh 9[57]** The Supreme Court held that a person who without reasonable cause refuses to comply with the order of the court to maintain his neglected wife or child would not be absolved of his liability merely because he prefers to go to jail. Sentencing a person to jail is a mode of enforcement and not a mode of satisfaction. The liability could be satisfied only by making actual payment of arrears of maintenance. Sending of husband to jail is only a mode of recovery and not a substitute of recovery.

Where the husband proves that he has no means to pay the maintenance the imprisonment would be unwarranted 10[58]. In case of default in paying the maintenance the court could not pass an order of arrest without first resorting to coercive measures provided under Section 421 of the code, like attachment of property.11[59] For recovery of arrears of maintenance, warrant may be issued for attachment of future salary. Such warrant remains dormant until such time the salary becomes due at end of the month.12[60]

{12} Proviso: - proviso {1} to sub-section {3} expressly provides that no warrant shall be issued for the recovery of any amount due

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9[57] 1989 cr.l.j 794 {sc}

10[58] Dyaneshwar Badurao Govel V/s sou Kamal Govel, 1992 cr.l.j 235 {Bom}

11[59] om prakash V/S vidaya Devi, 1992 cr.l.j 658 {p&h}

12[60] Surekha Mrudengia V/s Ramahari Mrudangia,1990 cr.l.j 639 {Orissa}

under section 125 unless an application is made to the court with him a Period of one year from the date on which it became due<sup>13</sup>[61]

{12}{2}:-offers to maintain his wife: - Husband may offer to maintain his wife. He cannot be compelled to maintain her as his wife. The sub-section does not contemplate a conditional offer an offer to maintain must be a bonafide offer and not made with the object of escaping obligation.<sup>14</sup>[63] This proviso has been added in the interest of the wife and not the husband. It is based on the recognition of the principal that a woman is entitled to live with that amount of decency and dignity which prevails in her class and if the treatment of her husband does not permit her to live with dignity that may amount to neglect under section 125. Therefore an offer by the husband to maintain his wife should not be too readily accepted by the court to mean that as soon as he make such an offer, he ceases to neglect or refuse to maintain there is conflict of opinion as to whether keeping of mistress or taking a second wife by itself is sufficient, for passing an order or refusal to maintain, is still to be proved before any such order is passed <sup>15</sup>[64]

In some cases it has been held that merely taking a second wife or keeping a mistress is not sufficient to successfully claim

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<sup>13</sup>[61] Govind sahai V/S Prem devi 1988 cr.lj 638 {Raj}

<sup>14</sup>[63] caovind Ram Narain Das V/s Ratan bai nathuram Air 1955 sau 105.

<sup>15</sup>[64] S.N misra's work on cr.pc, 19<sup>th</sup> Edition, page.127.

maintenance although it may be a just ground for wife's refusal to live with her husband.<sup>16[65]</sup> A contrary because a person has taken a second in some other cases wherein it has been held that merely because a person has taken a second wife he will be liable to pay maintenance irrespective of any consideration of neglect or refusal to maintain <sup>17[66]</sup> unless wife's refusal to live with her husband is founded on sufficient reasons she will not be entitled to maintenance

**Mithlesh Kumari V. Bindhawasami 18[67]** It was held that wife has no absolute right of maintenance, where husband offers to maintain his wife on condition of her living with him but she can claim maintenance if there is just ground for her refusal to live with the husband.

**Ansuya bai V. Nawaslal 19[68]** It was laid down that under explanation to section 125{3} a right has been conferred on wife to live separately and claim maintenance from her husband if he marries another woman or takes a mistress. In this connection no distinction has been made between a legally married second wife and a mistress. Any offer to take the first wife back can not considered to be a bonafide offer unless the husband offers to set

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<sup>16[65]</sup> Ramji Mahiya V/s muni devi malviga 1959 all 767

<sup>17[66]</sup> Biro V/s Bihari lal Air 1968 j&k 47

<sup>18[67]</sup> 1990 cr.lj 830{all}

<sup>19[68]</sup> 1991 cr.lj 2959{mp}

up a separate residence for her. Even written consent of the first wife for the second marriage of husband would not disentitle her from claiming maintenance.

{13} Sub-section{4} of Section 125:- wife will not be entitled to allowance for the maintenance and expenses of proceeding, as the case may be in the following three circumstances and any order already made in that behalf may on proof of either of them be cancelled by the magistrate

{A} if she is living in adultery

{B} If without any sufficient reason, she refuses to live with her husband,

{C} if she is living separately by mutual consent.

{A} Living in adultery:-The obligation of a husband to maintain his wife arises out of an anxiety to protect deserted or abandoned wives from the bitter necessity of earning living by trading on their sex.

Therefore a woman living in adultery should not be entitled to any such protection. Adultery is breach of the matrimonial tie. Living in adultery does not mean a single act of adultery. It refers to a course of conduct which implies more lapses than one from virtue. It is not necessary that wife must be living in the house of adultery 20[69]. Living in adultery denotes a continuous course of conduct and not

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20[69] Criminal procedure code, s.n misra, 13<sup>th</sup> edition, page.128.

an isolated act of immorality 21[70].she must be living in a state of quasi-permanent union with the man with whom she is committing adultery 22[71]

[B} Sufficient reason for refusal to live with husband:-The reason shown for refusal to live with husband must be reason able and must have relation to the safety and health of the wife. This subsection does not contemplate reasons which are purely based on economic or financial grounds23[72]

**Sirajmohmed khan v. hafizunnisa yasinkhan24[73]** It was held that 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 mean.

**Ashok kumar singh V. 6<sup>th</sup> addl session judge, Varanasi 25[74]**  
Also impotency was held to be ground for wife to live separately and

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21[70] Rachita rout v/s basant kumar rout,1987 cr lj 655 {orisa}s

22[71] n.rama rao mane V/s radha rukmini bai 1973 crlj 547 {mys}s

23[72] Jaganrath v/s sarjoo 1970 kash ij 1633

24[73] 1981 cr lj 1430 [2c}

25[74] 1996 crlj 392 {sc]

26[75]the order granting Rs 500/- per month as maintenance to wife was also held to be proper as husband being an army officer had sufficient means to maintain his wife it amounts to cruelty entitling the wife to live separately.

Where a husband keeps a concubine, wife will be justified in refusing to live with husband and claim maintenance.27[76]

{C} Living separately by mutual consent:-wife's right to maintenance by husband springs from the husband's enjoyment of the society and services of his wife and not merely from an empty or ornamental status as wife concerned by law there if wife and husband are living separately by mutual consent, wife would not be entitled to maintenance except to the extent to the husband himself agree to pay mutual consent implies a desire to live apart living apart must be the outcome of independent desire of both the parties28[77]

### **M.Ramakrisna raddy v. T. jayemona29[78]**

Husband and wife executed divorce agreement on ground of incompatibility of marriage and remote chances of living together. In pursuance of his agreement wife was living separately. In case of a

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27[76] Chand begum V/s hyder beig 1972 crlj 1970.

28[77] S.nmisra's work on cr.p.c, 13<sup>th</sup> edition, page 129.

29[78] 1992cr.lj 1868{AP}



claim for maintenance it was held that it is not an agreement for living of a claim for maintenance it was held that it is not an agreement for living separately by mutual consent, therefore wife was entitled for maintenance.

**Bagwan dutt v. kamalaDevi 30[79]** It was held that in determining the amount of maintenance the magistrate is competent to take into consideration the separate income and means of the wife. The absence of express provision making the inability of a wife to maintain herself a condition precedent to the maintain ability of her petition does not imply that while determining her claim of maintenance, the magistrate is debarred from taking into consideration of the wife's own separate income or means to support.

{14} Section 125{5};-sub-section 125 makes provision regarding cancellation of the order of maintenance etc. passed in favor of wife under section 125 on certain grounds. While sub-section {4} disentitles a wife from succeeding to get an order of maintenance, sub-section {5} provides that

{1} the wife is living in adultery

{2} without sufficient reason she refuses to live with her husband.

{3} the wife and husband are living separately by mutual consent.<sup>31</sup>[80]

On the above three grounds the court can refuse to grant maintenance under section 125{4} and under section 125{5} the order of maintenance can be cancelled on the same ground. The meaning and scope of these grounds have already been explained in relation to sub-section {4} and they will carry the same meaning for the purpose of sub-section {5} also<sup>32</sup>[81]

**Smt Rani Singh@munni v. Sh Ram Ratan Prasad verma<sup>33</sup>[82]**

The court held that when petitioner wife could not cross-examine the witnesses produced by opposite part for sufficient reason, rejection of maintenance petition on this ground held not sustainable.

{15} Maintenance allowance under Muslim woman, 1986;-A divorced Muslim woman can-not claim maintenance under section 125,crpc after passing of the act 25 of 1986 unless the option is exercised by both the parties under section 5 of the Muslim woman {protection of right on divorce} act{25of 1986} . The family court cannot entertain application filed under section 125, crpc when no option has been exercised.<sup>34</sup>[83]

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<sup>31</sup>[80] Criminal procedure code, s.n misra,13<sup>th</sup> edition,page 130

<sup>32</sup>[81] Criminal procedure code, s.n misra,13<sup>th</sup> edition,page 130

<sup>33</sup>[82] 2000{1} East crc 385 {pat}

<sup>34</sup>[83] patnam vahedullah khan v.p ashia khatoon.2000 cr.lj 2124{A,p}

**S.k omar Ali V. Aspia bibi<sup>35</sup>[84]** It was held that when magistrate granted maintenance allowance to wife under section 125, CRPC and it become final subsequent application by husband under section 125, crpc for alteration of same on divorce in view of advent of 1986 act not maintenance as barred principle of *re-judicate*.

{16} Grant of maintenance –Decretion of court:-It is purely the discretion of the court to grant maintenance from a particular date, the facts and circumstances of each individual case are to be taken into consideration, which passing such an order. In this context section 354{6} crpc is quite relevant under this section every final order 36[85]made under section 125, crpc shall contain the point or points for the determination of decision there on and the reason for the decision in the light of the above section, the court is required to support its decision on every point for determination with reason.<sup>37</sup>[86] Maintenance amount for minor child becomes due from date of order of trial court.<sup>38</sup>[87] Close relations in such cases are quite natural and best witness<sup>39</sup>[88]. When husband had got landed and house properties reduction of amount of compensation by session court from rs.150 to rs.100 p.m not justified in such hard days

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<sup>35</sup>[84] 1998 cr.lj 752 {cal}

<sup>37</sup>[86] Patnam vahedullah khan j.p Ashia khatoon,2000 cr.lj 2124 {Ap}

<sup>38</sup>[87] rajendra V/s monor revathi 1997{1} crimes 486{mad}

<sup>39</sup>[88] Suhana s.Nagori V/s sikandarkhan bilal khan 1997{1} crimes 467 {guj}

**Rankanishi Behara V. Jayanti sahuo40[89]** It was held that the order of family court granting maintenance to wife is justified, when the husband could not present any justifiable reason of his refusal to payment of maintenance for such a long period, order does not need any interference.

**Bal Krishna v. the member secretary, lok Adalat, Jamkhandi & Anr {2007}41[90]** The matter was referred to lok Adalat and the lok Adalat awarded maintenance in absence of the petitioner/ husband and his counsel by relying upon case papers. It is not proper because Adalat is not a court to write Judgement. The purpose of referring matter to Adalat is to negotiate matter with parties and to settle case amicably by consent of both parties and an award cannot be passed by Adalat.

{17} Appeal:- No appeal under clause 15 of the letters patent from on order of judge of a high court in revision against an order of a magistrate appeal lies to supreme court under article 134{1}{C} or article 136 of the constitution.42[91]

{18} Revision

{A} Revision lies

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40[89] 1999 cr.lj 2127{ori}

41[90] {2007} crlj {Noc} 41 {ker}

42[91] Deochand V/s State of mah, Air 1974 sc 1488.

{1} where the magistrate awards maintenance to the woman without coming to a definite finding that she is the wife

{2} if the magistrate has erred in law

{3} has failed to exercise his discretion judicially.

{4} if the magistrate has granted maintenance after a civil court of competent jurisdiction has held that the petitioner is not entitled maintenance

{5} if the magistrate makes the order granting maintenance in the absence of any pleading that the petitioner is unable to maintain herself or him self

{6} when the magistrate has erroneously held that the wife being at fault the children in her custody should suffer

{7} against an order granting interim maintenance

{8} if the maintenance is granted without taking into consideration the separate income or means of the petitioner

{9} once the husband starts paying the interim maintenance and continuously pays for a certain period, subsequently demands its revision, is not justifiable, he should have challenged it prior to giving consent and making payment

[B} no revision lies

{1} where substantial justice has been done

{2} unless the order regarding quantum of maintenance is manifestly perverse or grossly inadequate

{3} merely because the revision court would have come to another conclusion on the evidence

{4} finding about cruelty, status and capability of husband to maintain wife and inability of wife to maintain herself are finding of facts and cannot be interfered with,

{5} on the ground that the sessions judge dismissed the revision as not pressed

{6} merely because the proceedings were held in a wrong place in the absence any failure of justice

{7} against the judgment which is not happily worded though not perverse

{8} A revisional court does not have any general power to reassess evidences and substitute them with own findings, interference in magistrate's order without valid reason is illegal and liable to be set aside 43[92]

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43[92] N.D basu's work on cr.p.c {1}, 9<sup>th</sup> edition, page.560.

{19} Complaint under sec 494 ipc not bar for maintenance:-prior dismissal of complaint under section 494, ipc not to estop the wife from maintenance petition<sup>44</sup>[93]

{20} constitutional sweep in maintenance

The provisions of sec 125 {1} {b} explanation is a measure of social justice and specially enacted to protect woman and children and falls within the constitutional sweep of articles 15{3} reinforced by article 39.<sup>45</sup>[94]

{B} Section 126-procedure

{1} proceeding 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 to such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is

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<sup>44</sup>[93] Samir mendal V/s state of bihar 2000 {1} east crc 567{pat}

<sup>45</sup>[94] Rohtas Singh v/s Ramandri 2000 {3} scj 432 {sc}

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 summon 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 willfully avoiding service, or willfully 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 term as to payment of costs to the opposite party as the magistrate may think just and proper.

**Bai Krishna v. the member secretary, lok Adalat, jamkhandi & Anr46[95]** A matter was referred to lokadalat and the lokadalat awarded maintenance in absence of the petitioner/ husband and his counsel by relying upon case papers. It is not proper because adalat is not a court to write judgment. The purpose of referring matter to adalat is to negotiate matter with parties and to settle case amicably by consent of both parties and an award can-not be passed by adalat.

{3} the court in dealing with applications under sec 125 shall have power to make such order as to costs as may be just47[96].

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46[95] {2007} crlj {noc}41 {ker}

47[96] Dr.N.V paranjape work on cr.p.c, 1<sup>st</sup> edition 2005, page 117



**Arums kumar v. Chandan Bai<sup>48</sup>[97]** It was held that where the husband is willfully avoiding the service of summons or neglecting to attend the court, the magistrate may decide the case ex parte after recording all the available evidence against the husband and reasons for proceeding ex parte in this case.

**Bhupender Singh v. Narinder kaur<sup>49</sup>[98]** It was held that sending notice by registered post or its publication in the daily newspaper will not be deemed to be a proper service for the purposes of this section.

**Aruna basu v. Dorethea mitra<sup>50</sup>[99]** The Supreme Court held that a decree for maintenance or alimony does not abate or get extinguished with the death of husband.

{C} Section 127-alteration in allowance

**Sub-section {1}:-**of section 127 provides that where an order for maintenance has been passed under section 125, the amount stated therein can be increased or decreased by change of circumstances of the person receiving or the person paying the amount. However private agreement between the parties does give jurisdiction to the court under section 127 to enhance the amount of maintenance.

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<sup>48</sup>[97] 1980, cr lj 601 {Bom}

<sup>49</sup>[98] 1990 crlj 2265 {Del}

<sup>50</sup>[99] {1983}3 SCC 522.

**Sub-section {2}:-**of section 127 provides that 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.

**Sub-section {3}:-**envisages three circumstances where the magistrate can cancel the order of maintenance issued in favour of a divorced wife, namely

{1} if she has remarried,

{2} if she has received the whole sum payable to her under any customary or personal law and

{3} if she has voluntarily surrendered the right which she had got by an order of the magistrate.<sup>51</sup>[100]

**Sub-section {4}:-**provides that at the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a monthly allowance for the maintenance and interim maintenance as the case may be to be paid under section 125, the civil court shall take in to account the sum which has been paid to, or recovered by, such person as monthly allowance for the maintenance and interim

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<sup>51</sup>[100] D.r.n.v. paranjape's work on cr.p.c, 1<sup>st</sup> edition 2005, page 120.

maintenance or any of them as the case may be, in pursuance of the said order<sup>52</sup>[101]

**Bai tahira v. Ali hussain fissali**<sup>53</sup>[102] The Supreme Court has observed that if the quantum of meher which a Muslim wife receives from her husband on divorce is sufficient enough to provide her subsistence for living, the magistrate may cancel the order of maintenance made by him under section 125 but if the amount of meher is nominal and not sufficient enough for the subsistence of the wife, the order of maintenance made under section 125 may not be cancelled.

**Ahmad khan v. Shah Bano Begum** <sup>54</sup>[103] The Supreme Court has ruled that the amount of meher paid to the divorced Muslim wife by her husband need not to be taken into consideration while passing order under section 125 of the code. But consequent to the enactment of the Muslim woman {protection of right on divorce} Act, 1986, now before proceeding under section 125 in a Muslim woman's maintenance case, the magistrate will first hear the husband and wife both, under section 3{2} of the 1986 act and it is only when they jointly or separately declare that they would prefer to be governed by the provision of sections 125-128 of the criminal

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<sup>52</sup>[101] D.r.n.v. paranjape's work on cr.p.c, 1<sup>st</sup> edition 2005, page 120.

<sup>53</sup>[102] 1979 crlj 151 {s.c}

<sup>54</sup>[103] 1985 crlj 151 {s.c}

procedure code, the magistrate would start proceedings under section 125.

{D} Section 128- enforcement of order of maintenance

A copy of the order of<sup>55</sup>[104] [maintenance or interim maintenance and expenses of proceeding, as the case may be] shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to<sup>56</sup>[105][ whom the allowance for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be] is to be paid, and such order may be enforced by any magistrate in any place where the person against whom it is made may be, on such magistrate being satisfied as to the identity of the parties and the non-payment of the<sup>57</sup>[106] [allowance, or as the case may be, expenses, due]

The provisions of this section are supplementary to these of section 125{3} and they empower the magistrate who passes the order of maintenance to enforce it in any place where the respondent is found or residing after satisfying himself about the identity of that person and fact of non-payment of the maintenance<sup>58</sup>[107]

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<sup>55</sup>[104] Subs for the word “maintenance” by the cr.p.c {Amendment} Act no.50 of 2001.

<sup>56</sup>[105] Subs for the word” whom the allowance” by ibid

<sup>57</sup>[106] Subs for the word”allowance due” by ibid

<sup>58</sup>[107] DR.n.v.paranjape’s cr.p.c, 1<sup>st</sup> edition; 2005, page.121.

**Abdul Hanif v. Bano Khatoon**<sup>59</sup>[108] It was held that where family court is established, jurisdiction for implementation of order passed under section 125 can be exercised by such court alone maintenance has no jurisdiction to entertain application under section 128.

**Aluri Sambaiah v. Shaikha Zahirabi**<sup>60</sup>[109] No petition can be filed under section 128 for the enforcement of the order before the expiry of the time allowed by the magistrate who has passed the order for payment of maintenance.

### **Maintenance under the Hindu Marriage Act, 1955**

Section 24 of Hindu marriage act deals with maintenance *pendente lite* during the proceedings between a husband and wife, while section 25 deals with permanent maintenance to be fixed at the time of passing any decree or subsequent thereto. But in case of maintenance *pendente lite*, the same cannot be refused on the ground of allegations in the pleadings of the parties. Thus refusal of maintenance *pendente lite* on the ground of alleged infidelity of wife would not be proper. Maintenance under this section is also not to be affected on the ground that there was a compromising decree charging the husband's property for life-long maintenance of the deserted wife. Maintenance under the present section is a

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<sup>59</sup>[108] {1994}31 All cre 648 {All}

<sup>60</sup>[109] {1978} crlj 211 {Ap}

confirmed right of a wife, which she can claim as a wife although without fulfilling marital right.<sup>61</sup>[110]

Maintenance pendent elite and expenses of proceedings {sec.124):- where in any proceeding under this act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceedings, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceedings, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.<sup>62</sup>[111]

{1} any spouse:-under this section, either spouse can apply for the maintenance. Section 39 of the Paris marriage and divorce act, 1936, section 36 of the Indian divorce act and section 36 of the special marriage act 1954 provide for an order of interim maintenance in favour of the wife only. So is the law in England. The Hindu marriage act has taken an advanced step and allows even the husband to make an application for alimony or expenses of proceedings from the wife, if his income is not sufficient for his support. No doubt even the husband can claim maintenance under this section but in reality only the wife applies for the maintenance

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<sup>61</sup>[110] R.K Aggarwala's work on Hindu law, 21 ED, page.128.

<sup>62</sup>[111] s.n. aggarwal's work on the law on maintenance, 1<sup>st</sup> ed{1988}, page 257

under this section but in reality only the wife applies for the maintenance pendent elite and expenses of the proceedings under this section.

{2} Husband and wife:-The word's wife and husband used in section 24 are only descriptive of the parties and not indicative of their legal status once a marriage is solemnized in accordance with the provisions of the act, parties must be regarded as husband and wife for the purpose of this section, even if the marriage is alleged to be void or a nullity under the other provisions of the act. The expressions 'husband' and 'wife' have also been used in section 25 of this act. Under that section also these expressions have been given a wide meaning. Even a wife whose marriage has been declared to be a nullity or whose marriage has been dissolved by a decree of divorce is awarded permanent maintenance against her husband, considering these expressions to mean not only the wife and husband of a subsisting marriage but also descriptive of the parties of a void or dissolved marriage.

{3} discretion of the court:-it is the discretion of the trial court to pass an order of maintenance pendent elite, provided there is a change in the circumstances. The order to be passed should be supported by reasons. The same is to be based on the material on record which is to be analysed judiciously. The guiding principle would be that if the applicant has no independent means to

maintain her, she is entitled to maintenance and expenses of the proceedings, unless good cause is shown to deprive her of it.<sup>63</sup>[112]

The court should record findings {a} if the applicant has no independent income sufficient for her support and for necessary expenses of the proceedings or if she has the income, the nature or quantum of it, {b} the income of her husband and the quantum there of {c} the nature and extent of her need, both for maintenance and for expenses of the proceedings.

**M. Kanga raj v. jeeva<sup>64</sup>[11**

Matrimonial court under sec.24 has got power to award maintenance and litigation expenses even if main petition is dismissed or disposed of award of sum of R.S 1500 p.m granted by court below each for wife and minor child from date of petition till date of order and litigation expenses of R.S 2000 and medical expenses of R.S 1500 are reasonable in fact and circumstances of case.

{4} sufficient:-The word 'sufficient' is of some significance and it cannot that the income of the applicant should normally be sufficient for a person for his or her sustenance as well as to meet the necessary expenses of the proceedings. It does not contemplate that some income of the applicant, howsoever meager it may be, would disentitle the applicant from getting relief under this section.

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<sup>63</sup>[112] s.n. aggarwal's work on the law on maintenance, 1<sup>st</sup> ed{1988}, page 261

<sup>64</sup>[113] Air {2006} Noc 1514{Mad}



The word independent in this context means self-earned income or her exclusive income. If the applicant is maintained by her parents, it does not mean that the applicant is maintained by her parents, it does not mean that the applicant has independent income sufficient for her support.<sup>65</sup>[114]

**Rajambal v. Murugappan<sup>66</sup>[115]** It was held that where the wife has separate means sufficient for her defense and subsistence, she should not be entitled to alimony, nor costs during the proceedings and if the husband has neither property nor earning capacity, the court would not award any interim alimony.

{5} having regard to: - The expression having regard to in section 24 has no more definite and technical meaning than that of the ordinary usage. This expression conveys a mandate and makes it clear that the court shall have regard to the income of the parties in ordering payments of maintenance pendent elite by one spouse to the other. The matter which must be considered by the court is the income actually earned by the parties and not what a party could have earned by putting in more labour, capital or by more application of industry.<sup>67</sup>[116]

{5} having regard to:-The expression having regard to in section 24 has no more definite and technical meaning than that of the

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<sup>65</sup>[114] s.n. aggarwal's work on the law on maintenance, 1<sup>st</sup> ed{1988}, page 262

<sup>66</sup>[115] 1986 {1} HLR 202 Madras

<sup>67</sup>[116] S.N aggarwal's work on the law on maintenance, 1<sup>st</sup> ed{1988}, page 263

ordinary usage. This expression conveys a mandate and makes it clear that the court shall have regard to the income of the parties in ordering payments of maintenance pendent elite by one spouse to the other. The matter which must be considered by the court is the income actually earned by the parties and not what a party could have earned by putting in more labour, capital or by more application of industry.<sup>68</sup>[117]

**Sulochnabai v. Tikaran**<sup>69</sup>[118] Where both the parties are found to be placed in similar situations in the matter of their financial position {I, E} both being labouress, the petition of the wife for interim maintenance can be dismissed.

Normally the petitioner under this section is the wife and the respondent is the husband. Hence the subsequent paragraphs relate to the income of the parties in this sequence<sup>70</sup>[119]

{A} Income of the wife:-The wife claiming maintenance has to satisfy the court that she has no independent income sufficient for her support, The use of word income indicates that owning of some property, movable or immovable by the petitioner is not sufficient to disentitle her to maintenance or expenses. The mere fact that the wife is educated and capable of earning cannot disentitle her to maintenance. Income is not equivalent to her potential earning

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<sup>68</sup>[117] s.n. aggarwal's work on the law on maintenance, 1<sup>st</sup> ed{1988}, page 262

<sup>69</sup>[118] 1986[1] HLR 383 M.p

<sup>70</sup>[119] S.N aggarwal's work on the law on maintenance, 1<sup>st</sup> ed{1988}, page 263

capacity.<sup>71</sup>[120] The income of the brother of the petitioner wife cannot afford a ground for refusing maintenance to her<sup>72</sup>[121].

**Pushkar Navnitlal Shah v. Rakhi Pushkar shah**<sup>73</sup>[122] Wife claim maintenance pendent elite. But the husband takes the plea that in view of sec 6 and 29A Maharashtra Amendment to Hindu succession Act, wife has acquired equal right in movable and immovable properties of father and was not entitled to claim maintenance. Court refused to express its opinion. Moreover those provisions are not applicable inter vivos and come into play only at the stage of opening of a succession. No coparcener can predicate his share in the joint family property till actual partition takes place.

{B} Income of the husband:-In such litigations, the disclosure of real income of husband is more in need but more it becomes shrouded in mystery and ultimately the court is led to base its judgement on its own calculations after ensuring to be as nearer to the real digit of income of the husband as in the facts and circumstances of each case it could be. The husband commands perfect knowledge about his income while the knowledge of the wife about his income is normally imperfect. However the husband defending the claim cannot be expected to be thorough revealing about his income,

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<sup>71</sup>[120] Radhika bai v/s Sadhu ram awtar rai AIR 1970 M.P 14

<sup>72</sup>[121] S.N aggarwal's work on the law on maintenance, 1<sup>st</sup> ed{1988}, page 263

<sup>73</sup>[122] AIR{2007}Guj 5

rather the husband normally tries to hide his real income wherever it is possible and to minimize it with an intention to lessen his liability of parting with the money which he is required to pay as maintenance.

**Uma Maheshwari v. K.Babu<sup>74</sup>[123]** It was held by the court that husband was drawing a salary of R.S 2000 P.M. He was not doing any permanent job getting a sum of R.S 10000 as alleged by the wife. Court also taken into consideration ailment suffered by father of husband and expenses incurred thereon. So the court ordered for granting maintenance of R.S-600/- p.m.

**Jaspal Kaur v. Manjit singh saluja<sup>75</sup>[124]** An application for maintenance was filed by the wife. According to the applicant, husband was professor in Govt College and was drawing salary of R.S-25,000/-p.m.This was disputed by him matter was pending in family court and without going into controversy, high court as an interim measure, directed him to pay R.S-5000/-P.M as maintenance.

{6} If to be considered

**{A} Conduct of the parties:-**The conduct of party claiming maintenance is not to be considered while disposing of the application under section 24. if the conduct of a spouse claiming

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<sup>74</sup>[123] AIR {2006} Mad 373

<sup>75</sup>[124] AIR {2006} Noc 1075 {M.P.}

maintenance under this section was to be considered in such proceedings, the legislature would have provided to that effect as it has done in section 25. The conduct of the spouse claiming maintenance is entirely irrelevant for want of a specific provision to that effect<sup>76</sup>[125].

**Solochana v. Tikaram**<sup>77</sup>[126] It was held that if the wife has brought cohabitation to an end by such misconduct for which the husband is not to be blamed and for which judicial verdict is already recorded in separate proceedings the court may well refuse to grant alimony and expenses for litigation.

**{B} Denial of jurisdiction:** - The duty of the affluent spouse to maintain the indigent spouse is unaffected even when the jurisdiction of the court is disputed. An objection as to jurisdiction can not be a defence to the claim for expenses. The jurisdiction to pass an order under sec 24 arises, as soon as any proceedings are instituted under the act in the court and lasts so long as the proceedings are pending.

**Surinder Kumar v. kamlesh**<sup>78</sup>[127] It was held that even if the husband contends that he is a foreign national and is residing outside the country and disputes the jurisdiction of the court in the main petition filed by the wife; still the application for maintenance

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<sup>76</sup>[125] S.N aggarwal's work on the law on maintenance, 1<sup>st</sup> ed{1988}, page 265

<sup>77</sup>[126] 1986 {1} HIR 583 M.P

<sup>78</sup>[127] AIR 1974 ALL.110.

under this section can-not be defeated. The question of jurisdiction will come up for determination in the main petition.

**{C} Denial of marriage:-**The mere fact that the respondent denies the factum of marriage is no bar to the power of the court to make and order of maintenance under this section. Of course, a good prima facie about the marriage would have to be made out by the petitioner before any such order would be made by the court in case of any such contention. The grant of interim maintenance cannot be postponed until the passing of the final decree only on the ground that in the petition, the validity of the marriage itself is in dispute.<sup>79</sup>[128]

{7} Maintenance of the child:-The earlier view of law was that section 24 did not authorise the grant of pendent elite maintenance to the child who is living with the wife claiming maintenance. But the recent trend is otherwise thought the language of the section 24 in it self does not permit maintenance for the children, under which either of the two spouses can make a claim, yet the minor child living with mother {I.E} Petitioner wife increases her needs there for, the court's have taken the view that the needs of the children of the wedlock living under the care and protection of the should also be considered, while disposing of the petition under section 24. Any maintenance that may be awarded to the wife would be meaningless if the same is not intended for the maintenance of children also if

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<sup>79</sup>[128] Gopal v/s Dhapubai 1986 {2} HLR 253 M.P

the child is school going, his school expenses, on clothing and medicines are also to be considered.

**Mukesh Mittal v. Seema Mittal**<sup>80</sup>[129] Wife and her minor daughter suffered from HIV positive. There was no finding as to how HIV positive status was acquired by them wife asserted that cause of HIV positive is to be blood transfusion during her pregnancy. It was held that it cannot be a ground to refuse maintenance to them. However, the nature of order passed under section 24 is entirely different than the nature of the order to be passed under section 26 of the act. The order under section 24 is not appealable while the order under section 26 is appealable under section 28 of the Act but it does not mean that the needs of the child living with the mother cannot be considered as the needs of the mother.<sup>81</sup>[130]

{8} Amount of maintenance:-The legislature has declared its policy under section 24, the policy being that the quantum to be fixed is what is reasonable under the circumstances, the application under section 24 has to be considered in the background for which this section has been enacted. This section does not postulate any limit in the grant of interim maintenance or expenses for litigation, so also there is no universal rule to limit the grant of maintenance or expenses for litigation. The principle that should be followed by a court while granting maintenance pendent lite would be, that the

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<sup>80</sup>[129] AIR {2006} DEL 145

<sup>81</sup>[130] S.N Aggarwal's work on the law on maintenance, 1<sup>st</sup> ed {1988}, page 268

amount should be sufficient for the purpose of maintenance, taking in to consideration social position of the parties' standard of living spouse and the present day cost of living. While fixing the maintenance allowance, It should not be taken as an award or an alms but it should be seen that in these stages of high inflation when the money has completely lost its purchasing value as compared to the fifties the court should always consider the real aspect of maintenance and meeting the litigation expenses which should really fulfil the real demand of the party concerned 82[131]

**Swapan Kumar Ganguly v. Smritikana Ganguly**83[132] Petitioner is working in subsidiary intelligence bureau getting salary of R.S 7391/- p.m. in the interest of justice, petitioner directed to pay R.S 3000/-P.M to respondent. It was held that said order would not, however, preclude respondent from challenging salary certificate in trial court.

{A} Attending circumstances to be considered:-This section empowers the court to award such sum as it may seem to the court to be reasonable. The reasonable amount would differ from case to case. The court will take all the circumstances of the case into account and arrive at a proper solution having particular regard to the factors which are mentioned in the section. For fixing the quantum it is only the income of the respondent that should be

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82[131] S.N aggarwal's work on the law on maintenance, 1<sup>st</sup> ed{1988}, page 269

83[132] AIR {2006} NOc 822 {cal}



taken into account. The ability of the parties to work and earn their income and chances to improve financial condition, their status and position in life, the means and income of the parties, the nature of litigation, allied circumstances and equities of the parties will have to be considered while determining the quantum of maintenance.

**Gopal singh v. District judge, Bhilwara**<sup>84[133]</sup> It was held that grant of maintenance after due consideration of fact that wife has been receiving maintenance under section 125, crpc also not improper.

{B} When the husband conceals his income:-When the husband instead of revealing his income and property conceals his income and hold back the necessary and relevant record for frustration the claim of the wife and anxiously suppresses his income to reduce its visibility to the minimum possible extent, the wife should be awarded a handsome amount per month as interim maintenance under section 24<sup>85[134]</sup>.

**Swaran lata v. Sukhwinder kumar**<sup>86[135]</sup> Where the husband intentionally pleads low income while the circumstance speaks otherwise, the income of the husband should accordingly be held what is proved by the circumstances and the wife can get interim maintenance accordingly.

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<sup>84[133]</sup> AIR {2006} Raj 240

<sup>85[134]</sup> Renu jain v/s Mahabir prased jain AIR 1987 Delhi 43

<sup>86[135]</sup> 1986 {1} HLR 363 P&H

This section does not say that the applicant should be given maintenance in lump sum.<sup>87</sup>[136]

{9} Maintenance can-not be denied: - Maintenance can-not be denied in following circumstances

{a} When written statement is not filed:-An order imposing a condition that the application for alimony will not be considered unless the applicant files a written statement or reply in the main petition is unwarranted. The wife is not bound to file the written statement before moving the court for the grant of maintenance pendent elite and expenses of the proceedings<sup>88</sup>[137].If the husband is the respondent in the main petition, he cannot prolong the decision of the application under this section merely by seeking adjournments for filing reply in the main petition.

{b} When delayed petition by the wife:-Even if the petition is filed by the wife after long delay, the application for maintenance cannot be dismissed on the ground of undue delay under section 23 because this section does not control section 24 of the Act.<sup>89</sup>[138]

{c} When main petition is decided earlier:-A reading of this section does not show that when the main petition is disposed of, the jurisdiction of the court to award maintenance pendent elite by an

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<sup>87</sup>[136] S.N aggarwal's work on the law on maintenance, 1<sup>st</sup> ed{1988}, page 273

<sup>88</sup>[137] Jagdish v/s Dhapubai 1985 {1} HLR 119 Delhi.

<sup>89</sup>[138] Gopal v/s Dhapubai 1986 {2} HLR 253 M.P

order to be passed thereafter is taken away, nor it can be viewed that since the main proceeding stand terminated there is no occasion to grant interim Maintenance or expenses of the litigation. The right to those items, if established cannot be defeated by allowing time to elapse in the disposal of the application while the main proceedings are pushed to an end.

**Sohan lal v. Kamlesh<sup>90</sup>[139]** It was held that if against an order if the trial court fixing the maintenance in a petition under section 24, the wife files a revision petition and during the pendency of the revision, main petition is disposed of by the trial court, the revision petition cannot be dismissed on the application, filed under this section is decided afterwards, Maintenance can be granted only till the decision of the main petition.

{10} Section 24 also applicable to:-

**{A} Appeal proceedings**

**{B} Proceedings under order 9 rule 13 clc**

**{C} Proceedings under section 25, Hindu Marriage Act.**

**{D} Execution Proceedings**

{A} Appeal proceedings:-The term 'proceedings' and 'court' occurring in section 24 have not been defined anywhere in the Act. These terms would, having regard to the object of the enactment and the

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<sup>90</sup>[139] AIR 1984 P&H 332

setting in which they are employed, also take in respectively the 'appeal' and the 'appellate court' An application for interim maintenance can be filed in the appellate court also and this section permits the appellate court to award maintenance to a wife or husband during the pendency of the appeal from an order passed in the proceedings under the Act<sup>91</sup>[140].While fixing the quantum of maintenance and awarding litigation expenses, the appellate court would consider the inflationary trend taking place and the rising prices from the date when such an order was passed by the trial court.<sup>92</sup>[141]

**Mohinder kaur v. Surinder Kumar**<sup>93</sup>[142] Even if the husband does not turn up inspite of service of notice in the application under this section, the wife can be allowed maintenance pendente lite and litigation expenses by the appellate court during the pendency of the appeal.

{b} proceedings under order 9 rule 13 CPC:-When an ex parte decree is passed by the matrimonial court, it would be open to the aggrieved spouse to apply under order 9 rule 13 cpc for setting aside the ex parte decree. Order 9 rule 13 cpc lays down a sound principle of effective right of being heard and provides an immediate remedy in the trial court itself to put the defendant in a position in

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<sup>91</sup>[140] S.N aggarwal's work on the law on maintenance, 1<sup>st</sup> ed{1988}, page 274

<sup>92</sup>[141] Thankamma v/s Kuttan 1985 {1} HLR 67 Kerela.

<sup>93</sup>[142] 19858 {1} HLR 584 P&H

which position he or she would have been, if no ex parte decree was passed against him or her. This avoids multiplicity of proceedings and expenses.<sup>94</sup>[143]

**Madan Lal v. Neena**<sup>95</sup>[144] **Hon'ble Justice S.S.Sodhi** {Punjab and Haryana High Court} discussed the applicability of section 24 to the proceeding under order 9 rule 13 cpc initiated by the wife for setting aside the ex parte decree of divorce passed against her. It was observed that an application under order 9 rule 13 cpc would be deemed to be proceedings under the act and would attract the provisions of section 24. Such an application cannot be treated as an application under the code, as it would be a fallacy to treat it like this section 21 of the act does not bar the applicability of section 24 to the application under order 9 rule 13 cpc. Moreover the object and rationale of section 24 of the act is to obviate against financial handicap of a party to litigation.

{c} Proceedings under section 25, Hindu Marriage Act:-proceeding under section 25 of the act for permanent alimony are in the nature of continuance of proceedings, initiated by the spouse and shall be deemed to be proceedings under the act for the purpose of section 24. Therefore, interim maintenance under this section can be granted during the pendency of proceedings under section 25 which

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<sup>94</sup>[143] S.N aggarwal's work on the law on maintenance, 1<sup>st</sup> ed{1988}, page 275

<sup>95</sup>[144] 1986{2} plr 601.

are instituted after the decree for substantive relief under the Hindu Marriage Act is passed.<sup>96</sup>[145]

{d} Execution Proceedings:-The proceedings will not cease to be proceedings for the purpose of section 24 of the ACT, if the proceedings are for the relief's which can be granted under the Hindu Marriage ACT<sup>97</sup>[146] This matter has also been extended by judicial decisions even during the execution of the decree under the Hindu Marriage ACT.<sup>98</sup>[147]

{11} Maintenance for which date

**{A} In original proceedings**

**{B} in appeal proceedings**

**{C} when no date is specified**

**{D} when the proceedings are stayed<sup>99</sup>[148]**

{A} In original proceedings:-This section does not lay down any specific provision regarding the date from which the maintenance is to be awarded. The section however, does prescribe the outer limits by the use of the words 'during the proceedings' which mean from the date of initiation of the proceedings till the proceedings reach

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<sup>96</sup>[145] Yogeshwar Prasad v/s jyoti rani AIR 1981 Delhi 99.

<sup>97</sup>[146] Sou. Nirmala v/s Gangadhar 1985 {1} HLR 391 Bombay

<sup>98</sup>[147] Amrit Singh v/s Lakwinder Kaur 1985{1} HLR712P&H

<sup>99</sup>[148] S.N aggarwal's work on the law on maintenance, 1<sup>st</sup> ed{1988}, page 279

the end. This principle of law was applied by the Supreme Court<sup>100</sup>[149] and the words of the section were interpreted with reference to the heading of section. The impact of the words pendent elite is well known which also mean during the pendency of the litigation <sup>101</sup>[150]. In other words, it refers to the period between the date of initiation of the main proceedings and the date of the conclusion.<sup>102</sup>[151]

**Nalini v. Velu**<sup>103</sup>[152] The Andhra Pradesh High Court expressed the view that it should be awarded from the date of the application, while the High Court of Calcutta, Delhi, Karnataka, Punjab and Haryana and Kerala have taken the view that interim maintenance be made effective from the date of service of summons of the main petition.

**Tripta Chhabra v. Ajit kumar chhabra**<sup>104</sup>[153] It was held that where the court chooses to fix the interim maintenance from the date of the making the order, it has to assign reasonable grounds. The court can-not choose this date arbitrarily.

{B} in appeal proceedings:-The order of maintenance passed by the trial court shall subsist during the pendency of the main

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<sup>100</sup>[149] Bhinka v/s Charan singh AIR 1959 SC 960

<sup>101</sup>[150] S.N aggarwal's work on the law on maintenance, 1<sup>st</sup> ed{1988}, page 279

<sup>102</sup>[151] Jwala Prasad v/s Meea Devi AIR 1987 ALL 130

<sup>103</sup>[152] AIR 1984 Kerela 214

<sup>104</sup>[153] 1986 Rajambal v/s Murugappa 1986 {1} HLR 202 Madras.

proceedings in the trial court. Once the main petition is decided by the trial court, the order of maintenance passed by it shall come to an end. It cannot ensure after the proceedings have ended.<sup>105[154]</sup> If the appeal is filed against the decree of the matrimonial court, a fresh application under this section for maintenance has to be filed in the appellate court and a fresh order is to be passed which may come into force with effect from the commencement of the appeal and may ensure till it is decided.

{C} When no date is specified: - in the absence of a specific date in the order of maintenance passed under this section, the amount of maintenance becomes payable from the date of the order. No subsequent order should be passed without hearing the parties and without giving just and valid grounds from making the maintenance payable from any other date or the date of the application, particularly in those cases where the husband is not instrumental in causing the delay in the disposal of the application under this section <sup>106[155]</sup>

{D} when the proceedings are stayed:- If the proceedings in the main case are stayed either by the higher court or by the trial court then the applicant will be entitled to maintenance till the date of stay of

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<sup>105[154]</sup> Rajambai v/s Murugappa 1986 {1} HLR 202 Madras.

<sup>106[155]</sup> Liladhar v/s Jamuna bai 1986{2} HLR 284 M.P



proceedings but not after that as proceedings cease to be pending after the stay order is passed<sup>107</sup>[156]

{12} payment not to be with held by the court: - Normally the court should not with hold the payment of maintenance allowance pendent elite and expenses of litigation to the wife. These payments rather should be got made promptly. Even if the wife prolongs the case, it is no ground for withholding these payments to her.<sup>108</sup>[157]

{13} Jurisdiction: - For an application under section 24, the jurisdiction lies with the court in which the main proceedings are pending.<sup>109</sup>[158]

{14} Order not appealable:-No appeal lies against an order for maintenance and expenses of the proceedings passed under this section in view of the amended section 28 of this ACT. Prior to the amendment in the Hindu Marriage act in 1976, such an order was appealable.<sup>110</sup>[159]

After amendment, section 28 has been divided into four sub-sections. Sub-sections{1} provides for appeals against decrees, Where as sub-section {2} gives a right of appeal of order made by

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<sup>107</sup>[156] Jai Rani v/s Om prakash saini AIR 1984 Delhi 301.

<sup>108</sup>[157] Naginder kaur v/s Bawant singh 1986 {1} HLR 527 p&m

<sup>109</sup>[158] Jagdish v/s Bhanumati AIR 1983 BOM. 297.

<sup>110</sup>[159] S.N aggarwal's work on the law on maintenance, 1st Ed {1988}, page 289.

the court in any proceedings under section 25 and 26 of the said ACT. Sub-section {3} provides that there would be no appeal under the said ACT on the subject of costs. The parliament did not make any provision for temporary alimony.

Under section 28, order under section 24 is not appealable. The legislative intent appears to be and it is more manifest that the order right or wrong shall be final.<sup>111</sup>[160]

However, revision petition can be filed <sup>112</sup>[161]

### **{B} Section 25- Permanent alimony and maintenance**

**{1}**Any court exercising jurisdiction under this ACT may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance, and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case it may seem to the court to be just and any such payment may be recurred, if necessary, by a charge on the immovable property of the respondent.

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<sup>111</sup>[160] S.N aggarwal's work on the law on maintenance, 1st Ed {1988}, page 290.

<sup>112</sup>[161] S.N aggarwal's work on the law on maintenance, 1st Ed {1988}, page 290.

{2} If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section {1}, it may at the instance of the either party, vary, modify or rescind any such order in such manner as the court may deem just.

{3} if the court is satisfied that the party in whose favor an order has been made under this section has remarried, or if such party is the wife that she has no remarried chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party, vary, modify or rescind any such order in such manner as the court may deem just.<sup>113</sup>[162]

{1} Amendment of 1976:-This section has been amended by section 17 of the marriage laws {Amendment} ACT, 1976. In sub-section {1}, the words "While the applicant remains unmarried" have been omitted, while the words " and other circumstances of the case" have been added immediately after the words "conduct of the parties" in sub-section{3}, the words "it may at the instance of the other party vary, modify or rescind any such order in such order in such manner as the court may deem just" have been substituted for the words "it shall rescind the order". By this amendment, the portion of sub-section {1} which was causing a lot of confusing has been taken away. It has also enabled the court to take into account

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<sup>113</sup>[162] S.N aggarwal's work on the law on maintenance, 1st Ed {1988}, page 293.

other circumstances of the case, besides the conduct of the parties while passing an order under this sub-section.<sup>114</sup>[163]

{2} any spouse: - This section recognizes the right of the wife and of the husband at equal level in the matter of maintenance when a decree is passed granting relief in any matrimonial cause. This section makes a departure from the analogous rule relation to payment of permanent alimony and maintenance enacted in the English matrimonial causes ACT, 1950 and the special marriage ACT, 1954 The present rule though it introduces an unusual and somewhat grotesque feature in this branch of law, has the merit of enabling the court to grant effective relief in deserving cases, for instance that of a destitute husband against whom proceedings under the ACT are adopted by the wife and the decree is passed on the grounds of his being afflicted with leprosy or where for instance, a wife who is possessed of substantial property has unreasonably deserted the husband who has no independent income. Under this section any of the spouses can claim maintenance but invariably it is the wife who is economically weak and she needs the benevolence of the provisions of this section.<sup>115</sup>[164]

{3} any court exercising jurisdiction:-The opening part of section 25, Hindu Marriage ACT provides that the proceedings may be taken before any court exercising jurisdiction under the ACT. The view of

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<sup>114</sup>[163] S.N aggarwal's work on the law on maintenance, 1<sup>st</sup> ed{1988}, page 294

<sup>115</sup>[164] S.N aggarwal's work on the law on maintenance, 1st Ed {1988}, page 294.

Punjab and Haryana High court is that jurisdiction under the ACT is exercise in view of section 19 of the ACT on matters arising under the ACT. It is not necessary that petition under section 25 is maintainable only in the court which passed the decree.116[165]

**Amrik singh v. Lakhwinder kaur**117[166] It was held that where the decree for judicial separation is passed by one court at the instance of a spouse and the decree for the divorce is passed by a different court at the instance of the other spouse, in such a situation, the application for the maintenance under this section can be entertained by any of the two courts because both of the courts exercised the jurisdiction at the time of passing the decree. The jurisdiction of the court which passed the decree for judicial separation can-not be challenged merely because a decree of divorce was passed subsequently by the other court.

{4} any decree: - An application for maintenance under this section can be filed on the passing on the “any decree’ The expression “any decree” is not limited it any decree under particular section of the ACT. It seems, therefore, that any decree of substantive relief under the Hindu marriage ACT is covered by this expression by which the relationship of the husband and wife between the parties is not

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116[165] Darshan kaur v/s Malook singh AIR 1983 P&h 28

117[166] 1985{1} HLR 712 P&h

affected a decree which declares the marriage void or snaps the marriage tie is also covered by the scope of this section.<sup>118</sup>[167]

**Dyal singh v. Bhajan kaur**<sup>119</sup>[168] It was held that in void marriage generally a woman is duped into contracting and is made to go through a mock marriage and to lose her maidenhood under the belief brought out by false pretences that she was going to be a lawfully wedded wife, when in reality the husband was already having a wife living and when that marriage was subsisting. Therefore, the intention of the law makers could be to entitle such a woman to claim maintenance under this section.

**Kuldeep chand v. geeta**<sup>120</sup>[169] It was held that even a decree by which the marriage between the parties is dissolved would be covered by the term "any decree" Which the meaning of this section. It could not have been parties who have suffered the misfortune to have their marriage dissolved. Such parties cannot be made to suffer further misery of starvation without the ground of alimony.

{5} Decree on the ground of unchastely:-The view of law is not consistent and is rather divergent with regard to the grant of maintenance under this section when the decree of judicial separation under section 10 when a decree of divorce under section 13{1} {I} is passed against the wife on the ground that she has, after

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<sup>118</sup>[167] S.N aggarwal's work on the law on maintenance,<sup>1</sup><sup>st</sup> ed{1988}, page 278

<sup>119</sup>[168] air 1973 p&h 44.

<sup>120</sup>[169] AIR 1977 Delhi 124.

the solemnization of the marriage, had voluntary sexual intercourse with any person other than her husband<sup>121</sup>[170]

**Sachendra Nath v. Banmala**<sup>122</sup>[171] The court was of the view that in the exercise of the discretion expressly vested in court of law under section 25{1} of the Hindu Marriage ACT, a judge should, unless there be very special grounds. Leave a wife divorced on the ground of proved unchastity, or adultery to the resources of her immorality and deny her the lawful means mean of support by passing a decree for maintenance in her favour.

{6} No time limit:-Under this section the court may at the time of passing any decree or at any time subsequent thereto make an order of maintenance. It means that the section is silent on the time limit for the filing of the application under this section after the passing of the decree. Under section 37 of the Indian divorce ACT, 1869 and section 19, 20, and 22 of the English matrimonial cause act, 1950, the court can pass an order for maintenance on any decree for divorce or nullity of marriage or judicial separation which would seem to indicate that the order for maintenance must be passed at the time of such decree or seem thereafter.<sup>123</sup>[172]

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<sup>121</sup>[170] S.N aggarwal's work on the law on maintenance, 1st Ed {1988}, page 298.

<sup>122</sup>[171] AIR 1960 cal 575.

<sup>123</sup>[172] S.N aggarwal's work on the law on maintenance, 1st Ed {1988}, page 301.

There is no bar of limitation in the matter of presentation of such application nor would delay in presenting the application be any bar to the claim for maintenance.<sup>124</sup>[173]

{7} Wife or husband: - The words 'wife' and husband in their literal sense, would refer only to the parties of a subsisting marriage. A woman who has obtained a decree for dissolution of her marriage cannot strictly be described as a wife. Similarly a husband who has obtained a decree for divorce cannot be described as a husband. A Hindu male and female who have entered into a marriage which is voidable and which has been annulled by a decree of nullity under section 12 of the Act also cannot be described as husband and wife.<sup>125</sup>[174]

**Sisir kumar Kundu v. Sabita Rani Mandal**<sup>126</sup>[175] It was held that the expressions 'wife' and 'husband' have not been chosen to signify an existing relationship at the point of the time when an application under this section is made. These words have been used as convenient terms to refer to the parties who have gone through a ceremony of marriage whether or not that marriage is valid or subsisting, just as the word 'marriage' has been used in the act to include a purported marriage which is valid ab initio.

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<sup>124</sup>[173] S.N aggarwal's work on the law on maintenance, 1st Ed {1988}, page 302.

<sup>125</sup>[174] S.N aggarwal's work on the law on maintenance, 1st Ed {1988}, page 302.

<sup>126</sup>[175] AIR 1972 cal.4.



{8} Amount of maintenance:-This section lays down that for assessing the quantum of permanent maintenance under this section, regard shall be had to.

{A} The income and other property of the applicant

{B} The conduct of the parties.

{C} The respondent's own income and other property, if any, and

{D} other circumstances of the case which may seem to the court to be just.

{A} Income and other property of the applicant:-The income of the applicant and the existence of other property in her hands though not yielding income would be a relevant circumstance in determining the quantum of maintenance. However, mere capacity to earn or that the applicant is a person of sound health and can make a living is no ground to deny the maintenance to her but if she is earning a living, it has to be taken into account while assessing her maintenance. it is only the independent income of the wife which matters and not any help from others including the father or the brother because such help in its very nature is not a permanent source of income of the wife.127[176]

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127[176] S.N aggarwal's work on the law on maintenance, 1st Ed {1988}, page 303.

**Dushiant Sabarwal v. Santesh Gulati**<sup>128</sup>[177] Where the wife is in service and is getting salary, that amount has to be considered while assessing the permanent alimony.

{B} Conduct of parties:-The conduct of the parties is not a relevant factor under section 24 of the act but it is a primary consideration to which the court is directed to address itself for assessing the permanent alimony to be awarded under this section. If the conduct of the applicant is found as not proper, the court may either refuse to grant maintenance or may grant a lesser amount than it would have otherwise granted <sup>129</sup>[178]

**Yogeshwar Prasad v. Jyoti Rani**<sup>130</sup>[179] It was held that if the conduct of the respondent is found to be improper, the court may make him or her to pay more than the court would normally award.

{c} Respondent's own income and other property:-The court has also to take into account the respondent's own income and other property of the respondent, if any, While estimating the amount of permanent maintenance. The court would not focus its attention only on the income of the respondent in the year preceding the making of an order but would normally have regard to the earning in previous year and probable earnings in the future. A mode often

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<sup>128</sup>[177] 1985 {1} HLR 131 P&H

<sup>129</sup>[178] S.N aggarwal's work on the law on maintenance, 1st Ed {1988}, page 303.

<sup>130</sup>[179] AIR 1981 Delhi 99.

adopted is to take into account the average earnings during the previous years.

{D} other circumstances: - The income of the respondent or his property by itself cannot be made the basis of an order for permanent maintenance under this section. The factors such as the status and station in life of the parties, during of the marriage, support and education of children, the ability of the spouses to earn and their future prospects as also their age, health, liabilities of the respondent and reasonable wants of the applicant.<sup>131</sup>[180]

{D} When husband dies:-after the fixation of maintenance and permanent alimony in favour of the wife under this section, the order of maintenance is not extinguished with the death of the husband and his estate in the hands of the heirs can be proceeded against the satisfaction of the order so long as she is alive and leads a life which would not otherwise disentitle her to the maintenance.

**S.D.patil v. D.T.patil**<sup>132</sup>[181] It was held that normally the wife of a void marriage can be granted maintenance under this section when the decree of nullity is passed under the act. But the wife of such a void marriage can also be awarded maintenance in other civil proceedings by applying the principles of this section, even after the death of the husband, although the proceedings for

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<sup>131</sup>[180] S.N aggarwal's work on the law on maintenance, 1st Ed {1988}, page 305.

<sup>132</sup>[181] 1987 {1} HLR460 Bom.

annulment of marriage under the act have not taken place in his lifetime.

{10} alteration in the maintenance allowance:-Sub-section {2} confers ample power on the court to vary, modify or rescind, at the instance of either party, any such order in such manner as the court may deem just, if it is satisfied that a change has taken place in the circumstances of either party at any time, after the first or the last order was made. It would seem that the court may revise its order from time to time but there must be some material change in the circumstances of the parties and court would not modify an order simply because there has been some slight changes in their circumstances. Any substantial change in the income and property of the applicant would proportionately change in the income and property of the respondent would justify the increase in the quantum of maintenance, previously awarded. The court may even rescind cancellation 133[182].

{11} when the order ceases to operate:-The permanent maintenance granted under this section shall cease operating when order of interim maintenance comes into force as both these orders cannot operate simultaneously. For examples, if the husband files appeal against the decree of substantive relief and the wife is allowed interim maintenance under section 24 in the appeal proceedings, the order of permanent maintenance secured by her after the

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133[182] S.N aggarwal's work on the law on maintenance, 1st Ed {1988}, page 308.

decision of the trial court in the substantive proceedings, shall cease operating.

{12} order appealable: - order under section 25 is not a decree. It remains as an order and is appealable under section 28 of the act.134[183]

{c} **Section 26- Custody of children:-**Section 26 enables the court to pass such interim order from time to time and make such provision in a decree as it may deem just and proper with respect to the custody, maintenance and education of minor children. This section pays down two kinds procedure for the relief provided by it, namely an application which the proceedings are pending and a petition after the decree is passed the proceeding contemplated by this section are the proceedings for restitution of conjugal right, judicial reparation, nullity or divorce.

**Sudarshan kumar khurana v. Deepak 135[184]** Even where a wife has no independent income of her own, sufficient to support her and is entitled to maintenance pendent elite under section 24, the court has discretionary power to grant maintenance for children also.

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134[183] S.N aggarwal's work on the law on maintenance, 1st Ed {1988}, page 310.

135[184] AIR 1981 p&h 305.

**Luxman singh v. Asha Devi 136[185]** it was held that where the wife files an application under section 25 for permanent alimony, maintenance of children can also be allowed. (**1986{1}HLR 343 Rajasthan**)

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