

LAW COMMISSION OF INDIA

ONE HUNDRED THIRTY-SECOND

REPORT

CN

NEED FOR AMENDMENT OF THE PROVISIONS OF
CHAPTER IX OF THE CODE OF CRIMINAL PROCEDURE, 1973
IN ORDER TO AMELIORATE THE HARSHSHIP AND MITIGATE
THE DISTRESS OF NEGLECTED WOMEN, CHILDREN AND PARENTS

1989

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M.P.THAKKAR
Chairman

DO No.6(3)(7)/88-LC (IS)

LAW COMMISSION
GOVERNMENT OF INDIA
SHASTRI BHAVAN
NEW DELHI-110001.

To

Shri B.Shankaranand,
Minister for Law and Justice,
Government of India,
Shastri Bhavan,
New Delhi.

April 19, 1989

Dear Minister,

The Commission is forwarding herewith its
One Hundred Thirty-Second Report entitled:

"Need for amendment of the provisions of
Chapter IX of the Code of Criminal Procedure,
1973 in order to ameliorate the hardship and
mitigate the distress of neglected women,
children and parents."

The subject of the report reflects the genuine
and deep concern of the community for the welfare
and protection of the legitimate economic rights of
the neglected wife, children and parents to claim
maintenance under Chapter IX of the Code of Criminal
Procedure. The Commission has undertaken this
exercise suo motu on realising that certain
provisions designed to relieve the distress of the
suffering wife, the helpless children and the aged
parents unable to maintain themselves, have become
outdated in some respects and are in need of being
attuned to the changed times. And on realizing that
some of the provisions have created unforeseen and
unintended roadblocks in the way of the persons in
need of maintenance allowance.

The approach of the Commission has been to diagonalize the ailment and prescribe suitable remedy. The Commission has, therefore, examined the anatomy of the concerned provisions and identified the deficiencies and inadequacies which have been revealed in the course of the working of the provisions. Having identified the problems, the Commission has proceeded to recommend appropriate solutions with a view that the relevant provisions attain their desired goal. It has been the endeavour of the Commission to remove the bottlenecks, evolve an expeditious procedure, and to make the scheme of the provisions more aesthetic in the sense of being more just.

To express the hope voiced whilst concluding the report, the Commission is confident that the suffering and distress of the neglected women, children, and parents, will be ameliorated in great measure and they will have a sigh of relief if and when these recommendations are accepted and acted upon.

With regards,

Yours faithfully,

(M.P.THAKKAR)

ENCL: 132nd Report

CHAPTER I

INTRODUCTION

1.1. The profile. The focus of this report is on identification and solution of the problems faced in recovering an appropriate monthly allowance for maintenance by the wronged wife (from the husband), the neglected children (from their father), and the helpless parents (from their children) under section 125¹ of the Code of Criminal Procedure, 1973.

1.2. How and why of the exercise. The concern of the community to ensure that a provision is made (in the present case, to operate as an economic umbrella for the women, children and parents) does not stop short at making of it. It extends to monitoring the working of the legislation with an eye on making it more effective and efficacious. The lesson learnt from the experience of the working has to be meaningfully utilised in order to:

- (1) plug the loopholes or lacunae,
- (2) remove the gaps,
- (3) make good the deficiencies,
- (4) harmonise the anomalies, and
- (5) overcome the ambiguities.

That is why the exercise is undertaken by the Commission suo motu as a part of its vital function of reviewing and revising the Central Acts of significance with the end in view to update the same to the needs and compulsions of the changing society and changing times. Also with the aim of streamlining the same to serve the object better and more satisfactorily in the light of the experience gained in the actual working of the machinery evolved to solve the problems tackled by the legislature.

1.3. Facets of the problem. The main areas in which the working of the provision has revealed the need for re-conditioning are:-

- (1) The determination of the right to maintenance and the quantum of the monthly allowance;
- (2) The procedural delay in securing a verdict;
- (3) The hardship experienced in recovering the sum awarded by the court; and
- (4) The existence of certain provisions which result in serious hardship and grave injustice.

1.4. The Commission had issued a questionnaire concerning the principal issues to which a large

number of responses were received. It will be appropriate to proceed to examine the issues concerning re-conditioning of the concerned provisions after dealing with the questionnaire and the responses evoked by the same.

CHAPTER II

QUESTIONNAIRE ISSUED BY THE COMMISSION AND THE RESPONSES EVOKED BY THE QUESTIONNAIRE

On the basis of the preliminary study of the problems arising in the context of section 125 of the Criminal Procedure Code, a questionnaire was issued by the Commission. It was sent to a number of organisations and it was also given press publicity. The responses evoked by the questionnaire have been analysed and the position emerging from the analysis of the responses is being set out in the context of each question.

QUESTION NO. 1

1. (a) Sec.125 of the Code prescribes a ceiling of Rs.500/- in awarding monthly allowance for the neglected wife, child, father or mother. Has the sum of Rs.500/- not become unrealistic having regard to the steep rise in the cost of living and the consequential inflation since the ceiling was devised?
- (b) Should the ceiling of Rs.500/- not be revised upwards from Rs.500/- to Rs.1000/- or Rs.1500/-?

Or

Would it be preferable to do away with riders like the ceiling on the quantum of monthly allowance etc. and to provide instead thereof that the court may direct payment of such monthly allowance as the court may consider just, fair, and appropriate taking into account the need based requirements of the neglected wife, child or parents including the need for meeting future emergency needs of such person on the

one hand and the property income and other resources of the person liable to pay such allowance on the other. In doing so the court may treat the realisations of the sale or encumbrances effected by the person liable to pay the allowance within two years immediately preceding the application for maintenance and during the pendency of the proceedings thereafter as his existing assets.

Response. A vast majority expressed the opinion that the ceiling should be abolished and the quantum of maintenance should be left for the court to be determined in the light of facts and circumstances of the case.

QUESTION NO 2.

2. The recovery of the monthly amount awarded by the Court presents numerous difficulties and poses several problems. The awardee would have to approach the court every time the person liable to pay the allowance neglects to make the payment. The awardee would have to engage a lawyer and to incur expenditure in connection with the payment of professional fees and other incidental expenses once again and frequently from time to time if payment is withheld often. In order to recover the amount in arrears, the awardee may well have to spend a few months' allowance. Under the circumstances, would it not be desirable to empower the court in its discretion to direct the person liable to pay the allowance to deposit monthly allowance for six months or so in advance in fit cases?

Response. By and large the opinion was expressed that the person liable to pay maintenance should be directed to deposit maintenance amount for six months in advance.

(Note: Some suggested that the concerned person

should be directed to make an advance deposit for a period of one year whereas some suggested that the period should be restricted to three months or that such order should be passed only in case of defaulters).

QUESTION NO. 3

3. Section 125 contemplates award of monthly allowance to a person on condition that he or she is unable to maintain himself or herself. The expression 'unable to maintain' has not been defined. Would it not be desirable to add an explanation to the effect that the expression 'maintain' covers in its amplitude not only the expenditure needed for food, shelter, clothing etc. but also the sum needed for being set apart in order to meet future emergencies arising on account of sickness, unemployment or some other misfortune?

Response: A vast majority of the respondents have supported the proposal that it should be clarified by way of an Explanation in the statute that the maintenance would cover in its amplitude not only the expenditure needed for food, clothing and shelter but also the sum needed for being set apart in order to meet future emergencies.

QUESTION NO. 4

4. Whether it needs to be clarified by way of adding an explanation that whilst determining the amount of monthly allowance not only the present income of the person liable to pay the allowance but also all his other resources such as the property possessed by him and his interest, if any, in joint family properties should be taken into account? And also that the gifts made by him in the twelve months immediately preceding the institution of the application claiming

the maintenance and during the pendency of the proceedings arising therefrom and the sale proceeds or realisations from the alienations made during this period should be taken into account?

Response: A vast majority of the respondents have expressed the opinion that all the resources of the person liable for payment of maintenance should be taken into account.

QUESTION NO. 5

5. Would it not be just, fair and appropriate that the monthly allowance ordered to be payable is declared to be a charge on the properties of the person liable to make payment and recoverable also from the persons inheriting the properties by testamentary or non-testamentary succession to the extent of the value of such inherited properties?

Response A large number of the respondents have expressed the opinion that a provision for creating a charge on the property or the estate of the person liable to make payment should be incorporated in the Chapter pertaining to maintenance.

QUESTION NO. 6

6. Would it not be just, fair and appropriate to provide that the amount of arrears of allowance will stand satisfied only by actual payment to the entitled person or upon the court being satisfied that the order has been complied with by a voluntary compromise or arrangement in writing confirmed by the entitled person in Court?

Response: A majority of the respondents have expressed the opinion in favour of the proposal.

CHAPTER III

IDENTIFICATION OF DEFICIENCIES AND ANOMALIES IN CHAPTER IX OF CODE OF CRIMINAL PROCEDURE AS PRESENTLY MOULDED AND CONSIDERATION OF MEASURES FOR REDRESSING THE SAME

3.1. A number of problems have arisen in relation to section 125 of the Criminal Procedure Code, 1973, as revealed in the course of the working of the said provision. These deserve to be highlighted and the measures for redressal deserve to be considered in order to eliminate the factors giving rise to hardship and injustice in the course of the operation of the provision.

3.2. Section 125, in so far as material for the purposes of the present discussion, may be quoted:-

"125(1) If any person having sufficient means neglects or refuses to maintain-

- (a) his wife, unable to maintain herself; or
- (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself; or
- (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself; or
- (d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may, from time to time, direct:

Provided.....

Explanation.....

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

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

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

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

(3) In order to enable a wife to claim maintenance, the wife is required to establish that she is unable to maintain herself, as enjoined by clause (a) of section 125(1).

3.4. Ceiling. The Commission has examined, in the first instance, the problem arising in the context of the ceiling engrafted in the provision which disables a magistrate from awarding an allowance for maintenance at a rate exceeding Rs.500 per month. It appears to the Commission that the fixation of the ceiling at the figure of Rs.500 made in 1955, which had been retained in 1973, could hardly be said to be relevant any more after a passage of more than 30 years. The consumer price index in 1955 was 105.² The consumer price index in 1988 was 972.³ Thus, the cost of living index has risen nine times since the ceiling of Rs.500 was devised. Taking into account this factor, the ceiling would have to be raised from Rs.500 to Rs.4,500. This aspect has therefore, been closely examined by the Commission. In the first place, should there be a ceiling when the law does not provide for a floor? It would appear to be somewhat unreasonable to do so. It has not been possible to ascertain what weighed with the Legislature in engrafting a ceiling in the provision. A research made in the context of the Objects and Reasons of the Bill introduced in Parliament and in the parliamentary debates does not reveal the rationale of this provision. It would, however, appear that possibly the Legislature was desirous of

engrafting a ceiling in view of the fact that what was being provided was a summary remedy by recourse to a court constituted under the Code of Criminal Procedure. The recourse to civil court for claiming maintenance in a regular civil proceeding being available to a litigant, possibly it was considered expedient to engraft a ceiling. With the passage of time and change in the circumstances, the situation has undergone a sea change. Recourse to a civil court has become virtually out of reach of a wife, child or parent seeking maintenance. Because, the workload in the civil courts has increased to such a great extent that a claim for maintenance would remain unresolved for years in the trial court itself. It would take more than a decade to get the matter finally resolved through the hierarchy of the appellate courts in view of the position of arrears in the civil courts. Under the circumstances, now a person claiming maintenance under section 125, Cr.P.C. scarcely approaches the civil court in order to establish such right in that forum. Besides, the litigation in the civil courts has become so costly that a person in need of maintenance can scarcely afford it. The court fees, the advocate's fees, the incidental expenses and the expenses required to be incurred in

connection with appeals make it economically impermissible to approach the civil court. Most of the claimants for maintenance rest content with the order of the criminal court exercising jurisdiction under section 125 Cr.P.C. and do not make recourse to civil proceedings. Under the circumstances, the demand of the times and the demand of the situation is that the remedy under section 125, Cr.P.C. should be made as comprehensive as possible. Thus, the conceivable rationale for incorporating a ceiling has disappeared. Secondly, the very fact that there is a ceiling operates on the mind of the magistrate in determining the quantum of monthly allowance required to be awarded for maintenance. It is a psychological deterrent. Since the maximum is Rs.500, the magistrate tends to determine the maintenance allowance at 50% to 75% of the maximum even if there is justification for awarding a larger sum in order to enable the claimant to meet the economic needs. And, finally, having regard to the rise in the cost of living index, the ceiling has become altogether irrelevant with a 900% rise in the index in the interregnum. The need of the claimant cannot even be satisfied in a small measure by an award of even the maximum sum of Rs.500 today. The cost of housing accommodation has made it impossible to

get accommodation without being required to pay exorbitant rent. And with the cost of articles of food and clothing having risen so much that the claimant cannot satisfy even the basic needs without having to spend a much larger amount for bare existence. It has also to be recognised that the incomes of the workers and the salaried classes as also of the other sections of the society have gone up on account of inflation and rise in cost of living. The resources of the persons liable to pay have been augmented and their economic condition has vastly improved. This factor has also to be taken into account in considering the desirability or otherwise of retaining the provision as to ceiling. It cannot be overlooked that if a ceiling is retained, it would require to be revised from time to time taking into account the inflation and rise in cost of living. It would be extremely difficult to amend the provision periodically, time and again, for it would result in investment of legislative time unnecessarily. The present experience reinforces this apprehension in as much as the ceiling of Rs.500 has remained unrevised for 30 years without anyone (including women's activist groups) even becoming aware of the resultant anomaly and injustice. When the Commission

embarked on the examination of the issue, two options presented themselves before the Commission, namely, (1) to raise the ceiling taking into account the inflation and the rise in cost of living, and (2) to do away with the ceiling altogether, leaving it to the court to determine the quantum of monthly allowance required to be awarded from case to case depending upon the facts and circumstances of each case. Having accorded anxious consideration to the relevant factors, the Commission is firmly of the opinion that the appropriate course would be to do away with the ceiling altogether by eliminating the reference to the ceiling (as at present of Rs.500) engrafted in the said provision. Consequently, the reference to the ceiling of Rs.500 made in the first proviso to sub-section (1) of section 127 will also have to be deleted.

3.5. The date from which the order for payment of monthly allowance by way of maintenance should be made effective. Sub-section (2) of section 125, as at present fashioned, provides that the monthly allowance shall be payable from the date of the order, or from the date of the application for maintenance, if so ordered, by the magistrate. The provision is capable of being construed as implying that ordinarily the maintenance amount is

payable from the date of the passing of the order disposing of the proceeding by the magistrate unless the magistrate incorporates an express direction to the contrary and provides for payment of monthly allowance from the date of the institution of the petition for maintenance. In case the order is silent as to the date from which the order for maintenance is to become effective, the order would become operative only from the date of the final order disposing of the proceeding. There is no conceivable principle in denying the allowance for maintenance for the interregnum during which the proceeding remained pending in the court if the right to claim maintenance is ultimately upheld at the conclusion of the proceedings. The provision appears to be unwittingly loaded against the claimant for monthly allowance for, the claimant being interested in an expeditious disposal of the matter, the delay in disposal of the proceeding can scarcely be laid at the door of the claimant. In fact, indirectly it encourages the person liable to pay the allowance to prolong the litigation and thereby compound the injustice resulting to the claimant. The person liable to pay the maintenance allowance would have a vested interest in the prolongation of the proceeding. For, the longer the delay, the longer he can

retain the amount with himself and keep the wife or the claimant away from his or her claim. Such a person would also have the sadistic satisfaction of causing harassment to the claimant with impunity. Besides, once a claimant has established that the person liable to pay maintenance allowance has refused or neglected to discharge his obligation, it would be adding insult to injury to deprive the claimant of the rightful claim by denying maintenance with effect from the date of instituting the petition. The right to claim maintenance existed on the date on which the petition was instituted. It did not come into existence years later, on the date on which the magistrate could dispose of the proceeding. It is a matter of common knowledge that the workload in courts has increased tremendously. The courts are not able to dispose of even vital, urgent and sensitive matters within a reasonable time. This reality has to be faced. It often takes 3 to 4 years to dispose of a proceeding in the court of the first instance.⁴ The claimant is in no way responsible for the delay in the disposal of the matter. It is not the fault of the claimant that the courts are overworked and their dockets are overcrowded. If at all, possibly it is the fault of the system.

There is no reason why a wife, a child or a parent who is in need of maintenance and is held to be entitled to claim maintenance under the law should be denied such a right for the interregnum during which the application remained pending in the court of the magistrate. There is, therefore, no escape from the conclusion that sub-section (2) of section 125 requires to be amended so as to provide that the amount of maintenance shall be payable from the date of the making of the application by the claimant.

3.6. Need to set right an injustice arising out of strained construction of the expression "unable to maintain herself" in section 125(1)(a) as a result of which maintenance has been denied to the wife on the ground that even though she may not be having any income or earning in presenti, if she is an able-bodied or educated woman, she could earn her own living. The provision relating to maintenance was embodied in section 483 of the Code of Criminal Procedure of 1892. The material part of section 488 was in these terms:-

"483. Order for maintenance of wives and children-

(1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or 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, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

As discussed in Smt. Malan v. Baburao⁵, a comparative study of this provision with the material part of the corresponding provision contained in section 125 of the Code of Criminal Procedure would show that while in s.488 of the old Code the condition "unable to maintain itself" apparently attached only to the child and not to the wife, in s.125 of the new Code, this condition has been expressly made applicable to the case of wife. But, this recasting of the old Code provision does not signify any fundamental change in the law and it has been done merely to clarify and make explicit what was formerly implicit. This phrase was introduced for the first time in the Code of 1973 presumably in the context of the controversy as to whether the separate income of the wife can be taken into account in determining the amount of maintenance payable to her under section 482 of the Code of Criminal Procedure, 1898.⁶ The Delhi High Court and the Punjab High Court⁷ had taken the view that the separate income of the wife could not be taken into account in determining the quantum of maintenance payable to the wife. This controversy was ultimately settled

by the Supreme Court in Bhagwan Dutt's case 8 wherein the decisions of the Delhi and Punjab High Courts were overruled and the view taken by the SA Kerala High Court that the separate income of the wife can be taken into consideration was approved. Since the law had not been settled when the Code of 1973 was enacted by Parliament, the phrase "unable to maintain herself" was introduced in section 125(1)(a) of the Code of Criminal Procedure, 1973. But the introduction of this expression gave rise to a number of unforeseen and unintended hurdles in the way of a woman in distress needing maintenance:

(1) Some courts sustained the hyper-technical plea that in the absence of an averment in the petition claiming maintenance expressly stating that the petitioner-wife was "unable to maintain herself", the petition deserved to be rejected without anything more.

(2) Some courts sustained the plea that if a wife claiming maintenance was healthy and able-bodied or if she was educated, she had the potentiality to maintain herself and that accordingly she was not entitled to maintenance under section 125(1)(a).

So far as the first point is concerned, the view

has been reversed subsequently in most of the High
9 Courts and it does not call for any remedial measure, particularly in the enlightened climate of the eighties when courts have been showing greater awareness of the problems of the women and have been dealing with such problems with sensitivity. So far as the second obstacle is concerned, the problem survives only in the context of two High Courts, namely, Karnataka and Kerala High Courts. The phrase "unable to maintain herself" has been construed by these two High Courts as warranting taking into account the factor as regards her potential or capacity to earn and the factor as to whether she has made efforts to earn for herself. Says the Kerala High
10 Court:

"Again in this case the petitioner for whom maintenance is claimed is aged 22 years. She is a fairly well educated lady, healthy and is not stated to be suffering from any illness. Such a person should be presumed capable of maintaining herself until the contrary is proved. The burden of proving that she is not capable of maintaining herself is on her and if she fails to adduce sufficient proof the Magistrate would be perfectly justified in disallowing her claim for maintenance. If a person is a minor there can be no presumption that he or she is able to maintain himself. On both these grounds the order of the learned First Class Magistrate is correct and calls for no interference. The Revision Petition is dismissed."

11 The Karnataka High Court has endorsed this view and observed:-

'Now it is to be seen whether a presumption as laid down by the Lahore High Court in Mahomed Var's case (1941-42 Cri LJ 439) and the Kerala High Court in Saraswathi's [(1961) 2 Cri LJ 640] that a normal hale and healthy person, may be fairly educated also, is presumed to be able to maintain oneself, does arise in this context. I am constrained to hold with great respect that the presumption can only be to the extent of concluding that a normal healthy person may be fairly educated, is capable of earning. It cannot extend to conclude that such earning would be sufficient to maintain such a person.'

The fact that she has refused to earn for herself may be taken into consideration while considering the quantum of maintenance that the husband is liable to contribute towards maintenance, as is the view expressed by the Supreme Court.'

The women in these two States would have to suffer because their rights would be governed by the law as interpreted by their respective High Courts. There is little doubt that if the matter reaches the Supreme Court, the view is likely to be reversed. But whether or not such a matter would eventually reach the Supreme Court and if it so reaches, whether it would come up for hearing at an early date is a matter on which it would be futile to speculate. It is also quite possible that these very High Courts might overrule the view by constituting a larger Bench. But then till this happens, the lower courts would be bound by the law laid down by the High Court and the women in these two States would have to suffer unnecessarily. Such a situation needs to be

remedied with a sense of urgency. That is why the Commission has been constrained to deal with this aspect which is peculiar to the States Kerala and Karnataka. The Bombay High Court in Vimal's case ¹² has taken a contrary view on the reasoning unfolded hereinafter:

The expression "unable to maintain" is used in all these sub-clauses. Sub-section (1)(a) deals with the case of wife. Sub-section (1)(b) is concerned with providing maintenance allowance to legitimate or illegitimate minor child whereas sub-section (1)(c) deals with the question of major child who is, by reason of any physical or mental abnormality or injury is unable to maintain itself. Sub-section (1)(d) deals with the father or mother who is unable to maintain himself or herself. In sub-section (c) of Section 125(1) there is intrinsic aid or evidence available for construing the expression "unable to maintain". If by this expression the legislature intended that every able-bodied person who is otherwise able to earn, is not entitled to claim maintenance allowance under section 125, then in sub-section (c) it was not necessary for the legislature to say in express terms that the child who has attained majority will be entitled to get maintenance only if by reason of any physical or mental abnormality or injury such a child is unable to maintain itself. This provision throws light on the intention of legislature. If the provision of sub-section (1)(a) is read in this context then in my opinion, it is quite clear that while construing the expression "unable to maintain" the concept of able bodied person's ability to earn cannot be imported. The expression "unable to maintain herself" connotes the situation wherein it is not possible for the wife to maintain herself from any other source, meaning thereby wherein it is demonstrated that but for the maintenance allowance claimed from her husband, she has no other source or means of maintenance.

It is well-known that merely because a person is able bodied and does not suffer from any physical or mental disability, he is not always able to earn. Ability to earn

many times depends upon several other factors, such as, education, experience, finances, family tradition etc. In the competitive employment market mere physical ability is not the only qualification required for getting a job. In a country where economic independence of the wife is still a rarity, such a situation would never have been intended by the legislature. As observed by the Supreme Court in Bai Tahira's case, (1979 Cri. LJ 151), Article 15 (3) has compelling compassionate relevance in the context of Section 125 and benefit of doubt, if any, in statutory interpretation belongs to ill-used wife. Protection against moral and material abandonment manifest in Article 39 is part of social and economic justice specified in Article 38, fulfilment of which is fundamental to the governance of Country. (Article 37).

In Nanak Chand v. Chandra Kishore, AIR 1970 SC 446: (1970 Cri LJ 522), the Supreme Court had an occasion to consider the scope of word 'child' as used in Section 483 of old Criminal Procedure Code. It was held by the Supreme Court in the said decision that the said word does not mean minor son or daughter but the real intention is contained in the expression 'unable to maintain itself'. Then in para 9 of the said judgment a reference was made to the lot of helpless children who though major are unable to support themselves because of their imbecility or deformity or other handicaps. Then in para 13 of the said decision, namely Nanak Chand's case the Supreme Court observed as under:-

"Coming to the third point raised by the learned counsel we are of the view that the learned Additional Sessions Judge and the High Court were right in taking into consideration the existing situation, the situation being that at the time the order was passed Chandra Kishore was a student of M.Com., and Ravindra Kishore was a student of M.B.E.S. "Course".

Thus, while considering the question as to whether major children were entitled to maintenance, the Supreme Court took into consideration "the existing situation" only and did not consider the said question in the light of their physical ability or capacity

to earn. Therefore while considering the question as to whether the wife or child is 'unable to maintain herself or itself', the existing situation alone is relevant and if the wife is not possessed of sufficient means to maintain herself then it will have to be held that she is unable to maintain herself.'

The Commission is satisfied that the view taken by the Kerala and Karnataka High Courts is patently erroneous and the reasoning of the Bombay High Court in Vimal's case is unexceptionable. There is no warrant to inject the concept of 'potentiaity to earn' in the phrase "unable to maintain herself" occurring in section 125(1)(a). This expression was introduced in 1973 in the context of the unsettled position of law as to whether or not a wife who had her independent source of income sufficient to maintain herself could even so claim maintenance from her husband. This is evident from the report of the Joint Committee ¹³ wherein the rationale for introducing this phrase has been made explicit:

"In the case of wife, the order can be passed only if she is unable to maintain herself. Having regard to the object behind these provisions, which is mainly to prevent vagrancy, there is in the Committee's opinion, no need to compel the husband to pay maintenance to a wife who is possessed of sufficient means".

The only condition which is required to be satisfied in order to claim maintenance under section 125(1)(a) is that the wife has no income or no adequate income of her own from which she

can maintain herself on the date of the institution of the petition. Whether or not she had the potential to secure an employment and/or to earn any income by exerting herself is a matter within the realm of conjecture. It is common knowledge that there is widespread unemployment and even if the wife makes effort to secure employment, she may not be able to secure a suitable employment. At times she may not feel safe in securing employment even if it is available. To enter into this arena of possibilities in order to assess the potential of the wife would be an exercise in speculation and would unnecessarily prolong the litigation and would defeat the very purpose of claiming maintenance. The provision is incapable of the interpretation which has been placed by the Kerala and Karnataka High Courts unless one is unmindful of rendering the provision otiose and purposeless. Since, however, the decision rendered by these High Courts hold the field as at present, the Commission is of the opinion that an Explanation should be added to section 125(1) that the phrase "unable to maintain herself" concerns itself with the actual separate income, if any, of the wife and not with the possibility or potentiality of the wife being able to earn for herself by securing employment or by exerting herself.

3.7. Need for spelling out the criteria for quantification of the amount of maintenance.

Section 125 as at present merely provides for awarding maintenance to the person entitled thereto but it does not spell out or even indicate the relevant criteria for determining the quantum of maintenance which can be awarded to the successful claimant. This has resulted in the determination being made by and large on subjective approach of the concerned magistrate. It would be virtually impossible to make a survey of the maintenance amount being awarded by the magistrates in different States from time to time by reason of the paucity of the economic and manpower resources and the time constraint. An analysis of the judgments of the different High Courts rendered in the context of section 125 of the Code for the years 1981, 1982, 1984, 1985, 1986 and 1987 reveals that very meagre amounts were being awarded to the wife and the child. ¹⁴ In order to illustrate the point, reference may be made to a decision rendered in 1981 wherein a husband whose salary was Rs.472 was directed to pay Rs.50 by way of maintenance for the child. In another case¹⁵, a husband who was earning a salary of Rs.600 per month was directed to pay Rs.75 for the wife and Rs.30 for the child. In a 1984 case¹⁶, a

husband with an income of Rs.600 was directed to pay Rs.200 by way of maintenance, whereas a husband - a textile engineer - said to be earning Rs.3,000 per month was directed to pay a sum of 18 19 Rs.500. In 1985, a husband with an income of Rs.517 was directed to pay Rs.75 per month and in 20 1987, a husband having an income of Rs.900 was ordered to pay Rs.300 per month. The reason for this pathetic state of affairs is apparent. In determining the amount of maintenance, perhaps a phychological factor operates on the mind of the magistrate which makes him take into account merely his monthly income and not all his resources. It would appear that the magistrate accordingly correlates the monthly allowance by way of maintenance to the monthly income of the husband. It is not realised that apart from the monthly income, the husband or the person liable to pay the amount would also have properties and other resources from which adequate maintenance allowance can be paid by him. The assets, movable and immovable, from which the husband or such person can meet the liability perhaps do not enter into the reckoning. It is not necessary that the husband or the liable person should pay only from his monthly income keeping his movable and immovable assets intact. The issue regarding obligation to maintain his wife or his child or

his parent having been decided in favour of the claimant, the obligation need not be dependent on the size of his income. His other resources and assets from which he can meet his obligation cannot be disregarded. It is, therefore, essential to provide by a suitable amendment that in determining the quantum of maintenance, not only the current income of the person liable to pay the allowance but also all his other resources and assets as existing on the date of the institution of the petition for maintenance may be taken into account with the end in view to award a sum considered just and fair to enable the claimant for allowance to maintain himself or herself on the basis of the need-based requirements of such neglected wife, child or parents, including the sum required for meeting future emergency needs of the claimant. It requires to be clarified that the need of the awardee not only for food, clothing, shelter, medicines, educational expenses, etc. but also the need to provide for unforeseen emergencies and expenses has to be taken into account.

3.8. Deleting onerous and embarrassing fetters imposed on the wife in order to entitle her to receive and continue to receive maintenance. For the purposes of comprehending the issue involved

in this part of the discussion, it is necessary to take a glance at sub-sections (4) and (5) of section 125(1), which provide:

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

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

The limitation imposed by the aforesaid provisions on her right to receive and to continue to receive maintenance, particularly in the context of the rider that she should not be entitled to such allowance "if she is living in adultery" works in an oppressive manner in so far as the wife is concerned. A wife can be embarrassed to no end by cross-examination being directed on this aspect.

Questions loaded with insinuations and embarrassing questions regarding the associations and movements of the wife may be posed regardless of whether or not there is substance in the insinuations. Such course may be adopted with a view to intimidate the wife and make her abandon the proceedings or submit to an unjust settlement. The wife would find herself under great pressure in view of her anxiety to save herself from such

predicament and resultant embarrassment in open court out of fear of social stigma. Even if a wife is living in adultery in the sense in which the expression has been interpreted by the courts²¹ (guilty not only of a mere lapse from morality but of being engaged in a persistent adulterous relationship), it would be scarcely possible to establish it in a court of law by leading satisfactory evidence. It would not suffice to establish that the wife is seen moving about in the company of a person with whom she is alleged to have a liaison. Nor would it suffice to adduce evidence about the frequency of their meeting or the extent of their familiarity. Much more would have to be established in order to succeed in establishing such a serious allegation which it is very easy to make and very difficult to prove, even if true. Under the circumstances, no purpose, other than of causing embarrassment to the wife and demoralising her, is served by retaining this part of the provision. It is not necessary for the present purpose to consider whether the sexual loyalty or fidelity to the husband who on the one hand refuses or neglects the wife and on the other is free to lead a promiscuous life on his own can justly be taken into account for enforcing an obligation to

maintain the wife arising out of the matrimonial bond and recognised by the law. The Commission, therefore, is of the view that the aforesaid two sub-sections of section 125 deserve to be amended by deleting the phrase "if she is living in adultery" occurring in the aforesaid two sub-sections.

3.9. Recovery of the monthly allowance awarded by way of maintenance from the person held liable to pay maintenance. The suffering of the wife, child or parent needing maintenance is in no way diminished either by awarding an appropriate amount or by awarding the said amount expeditiously if the claimant is unable to recover the amount or has to face almost insurmountable difficulties for recovering the same. Chapter IX of the Code of Criminal Procedure, 1973 as at present does not take sufficient care of this aspect. There are a number of deficiencies, anomalies, ambiguities and loopholes, which have been identified in the course of the working of the relevant provisions, which call for attention. The claimant who has successfully secured an order for payment of monthly allowance by way of maintenance faces a host of problems, namely:-

- (1) The awardee is required to approach the court to enforce the order for

maintenance every month if an intransigent person refuses or neglects to make payment regularly. The awardee has to engage an advocate, approach a court, incur expenses and invest time in starting a fresh round of litigation for the purpose of recovery of the allowance awarded to him or her and it is not only once that the awardee has to face such a situation. The same situation has to be faced as often as the person held liable to pay the allowance makes a default. It is unlike the problem of a decree-holder in a civil matter whose decree would be satisfied by approaching the executing court in one proceeding. The monthly allowance being payable from month to month, a default may be made every month or every couple of months or on a number of occasions periodically. And every time a proceeding has to be initiated to recover the amount which has fallen in arrears, which entails unbearable time-cost and money-cost to the awardee who is already in distress. The awardee cannot be made to spend a part of his or her life in running to the advocate and the court indefinitely and on numberless occasions. This is one of the most vital issues which demands an appropriate solution.

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

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

(3) The awardee wife can be obliged to face another round of litigation if the husband who has been held liable to pay the allowance makes an application to the court that he is prepared to maintain his wife on condition of her living with him and that she refuses to live with him in the context of the second proviso to sub-section (3) of section 125, which says:

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

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

Thus, almost insurmountable hurdles are placed in

the path of the awardee which virtually tantamount to conferring on such person a mere paper right which is, in practice, worth very little.

3.10. First problem. With regard to the most serious impediment arising in the context of the fact that the awardee would have to rush to the court and to counsel at unaffordable time-cost, money-cost and effort-cost, the Commission can think of only one solution. The magistrate passing the order for monthly allowance should be empowered to direct the person held liable to pay the allowance to deposit in advance six months' allowance at the rate determined by him and keep it deposited till the order of maintenance holds the field unless, for reasons to be recorded in writing, he considers it unjust to do so in the circumstances of the case. The concerned magistrate, of course, should be conferred the discretion to take into account all the relevant circumstances before passing such an order. If the magistrate is so empowered, the person held liable cannot harass the awardee by refusing or neglecting to make the payment from month to month and in time. The concerned magistrate must also be empowered to permit the awardee to withdraw the amount due from the deposited amount in case of default on the part of the person held liable.

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

3.11. Second problem. There is no good or substantial reason for precluding the awardee from approaching the court for issuance of a warrant for recovery merely because the awardee does not approach the court within one year. In fact, it results in grave and serious injustice to the awardee, for the entire claim gets wiped out if the awardee is not in a position to approach the court for physical or economic or other reasons. By not approaching the court within one year of

the amount becoming due, the person held liable does not suffer any prejudice. There does not appear any purpose or principle in providing that if no approach is made within one year, the maintenance amount in arrears would become irrecoverable. The first proviso to section 125(3), therefore, deserves to be deleted altogether.

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

be permitted to be jeopardised by enabling the husband to make such an offer giving rise to a further proceeding and further delay during which period the husband may well refrain from honouring the obligation to pay the allowance, as ordered earlier. This proviso (along with the Explanation), therefore, deserves to be deleted altogether.

3.13. Need for conferring right of appeal on the aggrieved party against the order passed by the magistrate under section 125, Cr.P.C. - As at present, an order passed by the magistrate under section 125 is not appealable. The only course open to an aggrieved party is to approach the revisional court by way of a revision. There are two reasons why it has now become necessary to provide for an appeal against the final order of the magistrate rendered under section 125, Cr.P.C., namely:-

(1) With the enactment of the Family Courts Act of 1984, the jurisdiction to hear proceedings for maintenance is now vested in the Family Court [vide sections 7(1)(e) and 7(2)(a)]. The pending proceedings before the magistrates in places where a Family Court has been established will have to be transferred to the Family

Court and fresh proceedings will have to be initiated only in the said Court. Against every final decision rendered by a Family Court, an appeal has been provided under section 19 of the Family Courts Act. Under the circumstances, in the very same State, there will be discrimination against two sets of litigants. Litigants in areas under the jurisdiction of the Family Court will have a right of appeal against a final order granting or refusing maintenance, whereas, in the rest of the State, a similarly situated litigant will have no such right of appeal. This will introduce an anachronism. Under the circumstances, it will be appropriate to provide for an appeal against an order passed by a magistrate exercising jurisdiction under section 125, Cr.P.C. as well.

(2) The second reason in support of the proposal is that a wrong decision by a magistrate will become unassailable on merits in any forum inasmuch as the scope of a revision is limited. Hitherto the revisional court may not have been inhibited in exercising the revisional jurisdiction on the premise that the scope of a revision arising out of an order under section 125 was wider

than the scope of a jurisdiction exercised by the court in other matters. But it may not now be possible to exercise the revisional jurisdiction in the wider sense having regard to the recent decision of the Supreme Court ²² in Pathuma v. Muhammad holding to the effect that findings of fact recorded by the magistrate in a proceeding under section 125, Cr.P.C. are not amenable to review on merits in exercise of revisional jurisdiction.

In the light of these two considerations, it will be appropriate to provide for an appeal against a final order granting or refusing maintenance passed by a magistrate in a proceeding under section 125, Cr.P.C.

3.14. Protection of the awardee in matters where the liable person prefers an appeal. The wife, child or parent who has been awarded maintenance would have no real protection in case the person liable for payment of maintenance prefers an appeal. It is, therefore, necessary to provide that in an appeal by a person held liable to pay maintenance, the appeal will be maintainable only when it is accompanied by an affidavit of the appellant to the effect that he has deposited or paid all such arrears and will deposit future maintenance regularly. It may, however, be provided that the appellate court may, on being

satisfied that undue hardship would be caused to the appellant if he is required to pay all the arrears, in its discretion, extend the time for making deposit or exempt the appellant from making deposit of any part of the arrears.

3.15. Need for creating the office of "Maintenance Counsellor" to represent the cause of the wife, child or parent claiming maintenance under section 125, Cr.P.C. - The right conferred on a deserted wife, a neglected child or a helpless parent is of little avail if the claimant who himself or herself needs to be maintained has to collect sufficient funds to enable the concerned person to engage an advocate who would present the claimant's case and prosecute it with diligence. The claimant himself or herself would be in economic distress and it would be extremely harsh to require the claimant to collect the funds to pay to the counsel in order that his or her own need for maintenance may be satisfied at the conclusion of the proceedings. It is common experience that a claimant has to spend perhaps more than one year's maintenance in order to win an order for monthly allowance by way of maintenance at the conclusion of the proceeding. The hardship to the claimant is compounded when the said person has to again approach an advocate and to initiate proceedings

for recovery from time to time. Under the circumstances, the claimant is virtually deprived of maintenance allowance for considerable length of time in order to meet the legal expenses. It is no doubt true that with the legal aid schemes sponsored by the State, the hardship is somewhat mitigated. But then, when the Legal Aid Committee makes available the services of some advocate on the panel, the said advocate may not be able to devote sufficient time and attention by reason of the fact that the advocate concerned would be having his or her private practice and would be required to attend to the causes of such clients in different courts. The remuneration paid by the Legal Aid Committee may also not be to the satisfaction of the concerned advocate. Under the circumstances, the cause of the claimant would be served much better and effectively if the services of a Maintenance Counsellor attached to the court exercising jurisdiction under section 125, Cr.P.C., are made available to the claimant free of cost as a measure of social welfare and legal aid obligation of the State. An Additional or Assistant Public Prosecutor appointed under section 24/25 of the Cr.P.C. may be designated as a Maintenance Counsellor for this purpose with an obligation to devote himself or herself exclusively to matters of claimants under section

125 with liberty to attend to other matters only when the maintenance work has been attended to. It would be desirable, so far as possible, to appoint women advocates to discharge these functions. Since the Counsellor concerned would be attached to the concerned court, he would always be available and would also be fully conversant and familiar with the concerned subject and procedure, being engaged in this work throughout the year. Of course, the services of such a Maintenance Counsellor would be optional in the sense that the claimant would have a right to engage a counsel of choice at the claimant's own expense, if so desired.

3.10. The right of the wife, child or parent who has been awarded the monthly allowance should not be allowed to be deflected by the liable person transferring the properties in order to deprive the awardee. - An order passed in favour of a claimant for maintenance can easily be defeated by transferring the properties possessed by the liable person with the end in view to deprive the awardee of the benefit of the order secured by the awardee on investing considerable time, money and effort in procuring the same. The right to maintenance conferred by the statute would then be rendered illusory for all intents and purposes.

It has to be realised that, with the change in times and the increase of the workload in the civil courts which has crossed the breaking point, the wife, child or parent in need of maintenance cannot afford to have another round of litigation in the civil courts with any hope of obtaining a final order from the hierarchy of courts during the lifetime of such person. The ground realities cannot be ignored. A proceeding under section 125 is the only proceeding which is ordinarily made recourse to by such a person who cannot and does not approach the civil court. The proceeding under section 125, therefore, virtually becomes the only proceeding which is resorted to by the person entitled to maintenance. Under the circumstances, in order to make the order of maintenance 'real' instead of 'illusory', it is necessary to make a provision to the effect that the monthly allowance ordered to be payable shall be a charge on the properties of the liable person and shall be recoverable from the transferee as also from the person inheriting the properties by testamentary and non-testamentary succession. And also that the right, title and interest of any person acquiring a property from the liable person during the interregnum between the date of the institution of the petition claiming maintenance in the court of the magistrate till

the final order shall be subject to the right of the awardee to seek satisfaction of the order for maintenance against such property.

3.17. Need to provide that the order for monthly allowance shall not stand discharged or satisfied except by actual payment or with a settlement with the imprimatur of the court passing the order for maintenance. The woes of the wife claiming maintenance and other claimants are not over on securing an order for monthly allowance from the court. Not infrequently when the proceeding for enforcing the order is initiated, the awardee is faced with the plea that the claim has been satisfied by a compromise or arrangement arrived at between the parties after the passing of the order. It provides scope for another round of litigation and harassment to the awardee. Under the circumstances, it is necessary to provide that an order for maintenance will not be treated as having been discharged or satisfied unless an application is made to the court of the magistrate which passed the original order signed by both the parties recording any arrangement or compromise which might have been arrived at between them. Such an arrangement or compromise must be in writing and must be confirmed to have been arrived at voluntarily and for good consideration by the

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

CHAPTER IV

STREAMLINING OF THE PROCEDURE WITH THE END IN VIEW TO EXPEDITIOUS DISPOSAL OF A PROCEEDING CLAIMING MAINTENANCE

4.1. Proceedings initiated under section 125, Cr.P.C., in order to claim maintenance are meant to be summary proceedings designed in order to afford swift and quick relief to the claimants entitled to maintenance. In actual practice, it is common experience that such proceedings are not being disposed of for a number of years. In some States, presumably on account of the overcrowding of the dockets, the proceedings take about four years to be disposed of in the court of the magistrate itself. By the very nature of the proceeding, an expeditious determination as regards the claim for maintenance is of the essence of the matter. The claimant who is in need of maintenance and is entitled to maintenance under the law can hardly survive for a couple of years in the hope and expectation of a favourable decision without the economic wherewithal for maintenance. The need for devising a summary procedure, which would enable the concerned magistrate to dispose of the matter speedily, is, therefore, self-evident. It appears that Chapter IX pertaining to maintenance does not spell out any such procedure with an eye on this dimension of

the matter. It is, therefore, essential to incorporate in Chapter IX such a procedure calculated to shorten the span of the litigation at the trial court stage. The problem can by and large be tackled at three levels: (1) prescribing a time limit for filing a written statement or statement of objections coupled with conferment of the power on the magistrate to pass an order as prayed on failure of the respondent to file the statement with the prescribed time limit; (2) deciding the matter on affidavits with opportunity to the other side to cross-examine the witnesses of the deponents; and (3) requiring the magistrate as far as practicable to dispose of the matter within six months after hearing it from day to day.

4.2. Filing of statement. - The summons for appearance issued by the magistrate, with which shall be annexed a copy of the petition instituted by the applicant and the accompaniments thereof, shall require the respondent to file his statement containing grounds of objection supported by an affidavit inter alia specifying - (1) the factual grounds for resisting the prayer for monthly allowance, (2) the legal grounds for resisting the claim for monthly allowance, (3) his monthly income from all sources in the two preceding

calendar years, and (4) without prejudice to his contentions as regards his liability to pay monthly allowance, what amount should be awarded in case the court reaches the conclusion that the applicant is entitled to claim the allowance.

4.3. Requirement to file statement of objections and the consequences of failure to do so. - The respondent shall file his statement of objections specifying the aforesaid grounds and furnishing the aforesaid particulars within 15 days of the service of the summons. The time for filing the statement may be extended by 15 days upon sufficient cause being shown by the respondent.

On the failure of the respondent to file the written statement or the statement of objections in the aforesaid terms, the court may treat the averments made by the applicant in the petition as correct and proceed to pass an order in favour of the applicant as prayed.

4.4. Evidence on affidavits. - In case the respondent files his grounds of objections as per the aforesaid requirement, the court may require both sides to file the affidavits of witnesses in support of their respective contentions within 15 days. The court may grant a further time of 15 days to the parties in case the parties want to

file additional affidavits.

The court may fix an early date for cross-examination of the deponents of the affidavits by the opposite side, and their re-examination, if any.

The court may thereafter proceed to hear the arguments and dispose of the matter as early as possible.

4.5. If on the date of hearing, the witnesses of a party are present for being subjected to cross-examination and re-examination on the affidavits already filed, the magistrate shall record their evidence. However, if the magistrate is unable to record the evidence by reason of the pressure of some part-heard matter or other urgent matters, he shall appoint an officer of the court as a Commissioner for recording their evidence so that the witnesses do not have to come back once again and the matter is not delayed without the parties being required to pay any fees in this behalf.

4.6. As far as practicable, a proceeding under section 125 of the Code of Criminal Procedure shall be taken up from day to day after the filing of the objections and shall be completed and finally disposed of within six months of the service of the notice on the other side.

4.7. Power to enforce an order directing the liable person to keep deposited six months' allowance in advance as per the recommendation made in para 3.10. The purpose of empowering the magistrate to pass an appropriate order directing the liable person to keep deposited six months' maintenance allowance would be frustrated if the order can be flouted with impunity. Under the circumstances, it is essential to empower the concerned magistrate to enforce the order. A wilful disobedience of such an order by a person who is unable to show, by discharging the burden resting on him in this behalf, that he has no sufficient means or resources to comply with the order even by raising a loan on his properties shall constitute disobedience of the order of the court. The magistrate may, upon being satisfied that the order is being wilfully disobeyed, order any property of the person guilty of such disobedience to be attached and sold in order to recover the amount and may also detain such a person in jail at the cost of the State for a period not exceeding three months in order to secure compliance with the order. The concerned magistrate may transmit the order for attachment and sale of the property to a civil court with a request to enforce the order in the same manner in which a decree passed by a civil court may be

executed. The civil court to which such a request is addressed shall have the legal authority to enforce the order as if it was executing an order under rule 2A of Order XXXIX of C.P.C.

4.8. Without prejudice to the other modes of execution, an order for payment of monthly allowance may also, at the instance of the awardee, be executed by sending the same to a civil court for executing the same as if it is a decree of civil court and the civil court shall have the power to do so.

4.9. For setting aside an ex parte order under section 126(2), the magistrate may impose a condition that the respondent shall deposit the arrears of monthly allowance ordered to be paid by him and shall also continue to deposit the same from month to month with liberty to the claimant to withdraw the amount subsequent to the final result of the matter. Section 126 may be suitably amended with this end in view.

CHAPTER V
CONCLUSIONS AND RECOMMENDATIONS

5.1. In the light of the discussion made in the earlier part of the report, the Commission is of the opinion that the law pertaining to maintenance of wives, parents and children embodied in Chapter IX of the Code requires to be revised by incorporating suitable amendments with a view to update the law. And in order to make it more just, more relevant, more purposeful and more effective, so as to subserve the purpose of the legislation. Modification is called for to the extent and in the manner indicated here below:-

(1) The statutory ceiling of Rs.500 incorporated in section 125(1), which precludes a magistrate from awarding a monthly allowance for maintenance at a rate exceeding Rs.500 in favour of the wife, the children and the parents entitled to claim such maintenance from a person who, having sufficient means, neglects or refuse to maintain his wife, children or parents falling in the category described in clauses (b), (c) and (d) of section 125(1), deserves to be removed. Because, it has become irrelevant by reason of inflation and

rise in the cost of living since 1955 when the aforesaid figure was embodied and since imposition of such a statutory ceiling results in injustice and defeats the purpose for which the provision has been enacted. Besides, incorporating a statutory ceiling which cannot be updated without amending the law from time to time is impracticable and unnecessary. Consequential amendment will also have to be made in section 127(1) by deleting the reference to the ceiling of Rs.500. (See para 3.4).

- (2) An Explanation should be added to section 125(1) that the phrase "unable to maintain herself" relates to the then actual separate income of the wife, if any, and not to the possibility or potentiality of the wife being able to earn for herself by securing an employment or by exerting herself in future. (See para 3.6).
- (3) It needs to be clarified by adding an Explanation to sub-section (1) of section 125 that in determining the rates of the monthly allowance, the magistrate may take into account not

only the expenditure needed for food, shelter, clothing, education of children, etc., but also such sum as may be needed for being set apart in order to meet future emergencies arising on account of accidents, sickness, physical disability or for any other reason. (See para 3.7).

- (4) Sub-section (2) of section 125 should be so amended that the order of maintenance operates from the date of the filing of the application claiming monthly allowance by way of maintenance and the magistrate has no option or discretion to make it operative from the date of the magistrate's order awarding maintenance allowance. (See para 3.5).
- (5) First proviso to section 125(3) disabling a wife or claimant from recovering the maintenance amount on expiry of one year should be deleted. (See para 3.11).
- (6) Proviso (2) to section 125(3) pertaining to consideration of the offer of the person (against whom an order for monthly allowance by way of maintenance is claimed) to maintain the wife after

the passing of the order may be deleted.

(See para 3.12).

- (7) Sub-sections (4) and (5) of section 125, depriving a wife from claiming maintenance if 'living in adultery', should be deleted inter alia as it is by and large invoked to embarrass and harass a wife. (See para 3.8).
- (8) In determining the amount, a magistrate exercising powers under section 125 -
- may take into account not only the personal income of the person against whom the order for monthly allowance by way of maintenance is sought but also his other resources, such as, the property possessed by him, his interest, if any, in joint family properties and the fact that he can meet the obligation from the corpus of such properties; (See para 3.10).
 - may also take into account the independent income of the wife, if any. (See para 3.7).
- (9) The magistrate passing an order for maintenance under section 125 should be empowered to pass an order directing a person liable to pay the monthly

allowance to deposit the monthly allowance for a period up to six months in advance in fit cases taking into account the facts and circumstances of the case. (See para 3.10).

- (10) A magistrate passing an order for maintenance under section 125 shall be empowered to issue an order against the employer of the person liable to pay the monthly allowance determined by him, directing such employer to deduct from the salary of such person a sum equivalent to the amount of maintenance determined by him and to deposit the same in the court within a week of such deduction from month to month whenever it appears appropriate to do so on account of the failure of such person to regularly pay the amount directly to the wife, child or parents in whose favour an order has been passed. (See para 3.10).
- (11) The amount of monthly allowance ordered to be paid, including the arrears, shall be a charge on the properties of the person against whom the order has been passed. (See para 3.16).

- (12) An order for monthly allowance shall not stand discharged or satisfied except by actual payment from time to time or with a settlement with the imprimatur of the court recording its satisfaction that the arrangement or settlement is for good consideration, genuine, voluntary, lawful and fair. (See para 3.17).
- (13) A person aggrieved by an order of maintenance passed by the magistrate shall have a right of appeal to the Court of Sessions. However, when the appeal is directed against an order awarding maintenance, the appeal shall not be maintainable unless the appellant deposits the amount of arrears of maintenance from the date of institution of the petition till the date of the order under appeal in the court of the magistrate and produces along with the memorandum of appeal an affidavit to the effect that such amount has been deposited and future amount will be regularly deposited. (See paras 3.13 and 3.14).
- (14) An officer, to be designated as Maintenance Counsellor, shall be appointed by the State to represent the

case of the wife, child or parent claiming maintenance free of cost as a measure of social welfare with the option to the concerned person to appoint an advocate of his or her choice at the cost of such person, if so desired. (See para 3.15).

(15) A special procedure for speedy disposal of the matters pertaining to maintenance under section 125, as outlined in Chapter IV of this report, should be incorporated in Chapter IX of the Code.

5.2. The Commission is confident that the suffering and distress of the neglected women, children and parents will be ameliorated in great measure and they will have a sigh of relief if and when these recommendations are accepted and acted upon, and concludes this report on this note of hope.

(M.P. THAKKAR)
CHAIRMAN

(V.S. RAMA DEVI)
MEMBER SECRETARY

NEW DELHI, DATED THE 19TH APRIL, 1989.

Notes and References

1. Appendix III
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7. Major Joginder Singh v. Bibi Raj Mohinder Kaur, AIR 1960 Punjab 249
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- 8A. P.T. Ramankutty Achan v. Kalyanikutty, AIR 1971 Ker.22.
9. Malan v. Baburao, 1981 Cr.L.J.184 (Kant)
Aijaz Ahmed v. Shahjehan Begum, 1982 Cr.L.J.1022 (All);
Udaivir Singh v. Vinod Kumari, 1985 Cr.L.J.1923 (All);
10. Saraswati v. Madhavan, 1961 (2) Cr.L.J.642 at 644 (Ker)
11. Abdul Manaf v. Salima, 1979 Cr.L.J.172 at 174 and 175 (Kant)
12. Vimal v. Sukumar, 1981 Cr.L.J.210 at 214-215 (Bom)
13. Report of the Joint Committee on the Code of Criminal Procedure Bill, 1970,-
14. See Appendix I
15. Pedmanathan v. Bhargavi arjini, 1981 Cr.L.J. 826 (Ker)
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17. Purna Bahadur v. Santa Bista, 1984 Cr.L.J.1145 (Sikkim)
18. K.Narayan Rao v. Bhagyalakshmi, 1984 Cr.L.J.276 (Kant)
19. Juliet Vasantha v. Antomy Marimuthu, 1985 Cr.L.J 1613 (Mad)
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21. Shravan Kanwar v. Anjanbai, 1985 Cr.L.J 1213 (Bom);
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Kasturi v. Ramaswamy, 1979 Cr.L.J.741 (Mad)
22. Vimla Devi v. Session Judge & Others, 1981 Cr.L.J NOC 89 (All)
23. Supra note 4

APPENDIX I

Note: W - Wife; H - Husband; C - Child; Mag. - Magistrate;
 Sc - Session Court; HC - High Court; SC - Supreme Court;
 All the citations refer to Criminal Law Journal.

<u>Year</u>	<u>Page</u>	<u>Claimants</u>	<u>H' Salary</u>	<u>Amount Awarded</u>		
				<u>Mag.</u>	<u>Session</u>	<u>HC</u>
1981						
	674	W + C	-	150+150		
	690	W	-	50		
	493	C	-	150		
	754	W + C	-	100	-	40 (C)
						100 (SC)
	826	W + C	472	500	50+50	50+50
	830	W + C	-	40+15	-	-
	789	W + C	-	150	-	-
	74	W	-	30	-	-
	1355	W	-	60	-	-
	1430	W	-	--	-	150
	1532	W + C	600	75+30	-	75+30
1982						
	485	W	-	--	-	75
	491	W + C	-	20+10	-	
	539	W	-	30	-	30
	1022	W + C	-	50+30	-	
	1081	W	-	30 increased to	70	
	1461	W	-	500	-	
	1953	W	3 acres + grocery shop	40 (W earning Rs. 2-4 per day).		
	2033	W	-	75	-	
	2365	W	-	300	-	
1983						
1984	99	W	-	100	-	
	1146	W	600	200	-	
	1297	W	-	100	75	
	1522	W + C	-	100+25	-	
	206	W	Insolvent	75	-	
	276	W + 3C	3000 (alleged) Tex. Engineer.	500	-	

<u>Year</u>	<u>Page</u>	<u>Claimants</u>	<u>H'Salary</u>	<u>Amount Awarded</u>		
				Mag.	Session	HC
1985	875	W	5000 Approx.	25	-	179.20
	1613	W	517	75	-	-
	1706	W+O	-	100+75	-	-
	1909	W	-	100	-	-
	1923	W	-	-	150	150
	1802	W+O	-	100+50	-	-
	1124	M	-	70	-	-
	1213	W	-	50	-	-
1986	103	W	-	-	300	300
	556	W+O	-	100	100	100+40
	692	W	-	50	-	96
	1129	W+20	600	200	Cancelled	(S:127) 200
	1199	W+O	-	125+50	-	125+50
	1216	-	-	-	150	-
	1432	W	-	500	-	-
	1633	W	-	100	-	-
1987	399	W+O	-	300+200	-	-
	1278	W+O	-	-	200+100	-
	1509	W	900	300	-	300
	1653	W	-	-	200	-
	1952	W	-	150	150	-
	1779	W	-	100	-	-
	1657	-	-	80	-	-

Appendix II

List of respondents

Judges

1. Justice V.K.Mehrotra,
Chief Justice, Himachal Pradesh
2. Justice S.S.Ganguly, Calcutta
3. Justice Srinivasan, Madras
4. Justice Ramalingam, Madras
5. Justice S.S.Grewal, Punjab & Haryana
6. Justice Bakthavatsalam, Madras
7. Justice David Annusamy, Madras
8. Justice G.C.Mittal, Punjab & Haryana
9. Justice Gopal Rao Ekbote, A.P. (Retd)
10. Justice D.K.Rajepandbare, J.M.F.C. Ahmedpur.
11. N.G.Patel, J.M. Sangli
12. Subhash Kulkarni, D&S Judge, Nanded, Maharashtra
13. Pratibha Upasani, Judge, Bombay City Civil Court
14. S.K.Misra, DJ Pauri Garhwal
15. Radhey Shyam Aggarwal, D.J. Meerut

Advocates

1. B.V.Nagarathna, Bangalore
2. Ashok D.Shah, Ahmedabad.
3. Jeevan K.Mittal, Delhi
4. Ashok Boghani, Bombay.
5. Ramesh Nayak, Bombay
6. Geeta Luthra & Pinky Anand, Delhi
7. Ruma Pal, Calcutta
8. P.K.Ghosh, Calcutta
9. Krishnakant Vakharia, Ahmedabad.
10. Seita Vaidyalingam, Delhi
11. S.K.Jain, Khurja.
12. Khurshid Ali, Hyderabad.
13. Kusuma Mantur, Dhanbad.
14. V.Kulkarni, Dhanbad.
15. Rona Swamy, Delhi.

16. M.Nosulla Sharif, Bangalore.
17. Rama Arora, Delhi
18. Mridula Roy, Delhi
19. Dr.Kajali Dhar, Calcutta
20. Manjusri Datta, Calcutta
21. Sipra Mazumdar, Calcutta
22. Ajiya Mitra, Calcutta
23. Shyamala Pappu, Delhi
24. Dr Asati Goswami, Calcutta

Law Teachers/Jurists

1. K.P.S.Mahalwar, Rohtak.
2. P.C.Juneja, Rohtak.
3. P.G.Gokual, Lecturer
TMC Law College, Thane.
4. Kamalini Bhamsah, VC, SNDT
Women's University, Bombay.
5. P.M.Bakshi, Delhi

State Law Depts./Advisory Board

1. R.K.Jain, Secy.Chandigarh
Social Welfare.
2. N.Krishnadattin,
Member Secretary
Pondicherry Legal Aid and
Advice Board
3. Tamil Nadu Social Welfare Board
4. J&K State Legal Aid and
Advice Board
5. Kerala State Legal and Advice Board
6. ~~Miss~~issa Legal Aid and
Advice Board
7. West Bengal Social
Welfare Advisory Board
8. Govt. of Mizoram, Law Deptt.
9. Chairman, Arunachal Pradesh
Social Welfare Advisory Board
10. ~~District~~ Legal Aid and Advice
Committee, Ratnagiri.

11. R.K. Mahajan,
Secretary(Law), H.P.
12. Karnataka Social Welfare
Advisory Board.
13. Asha Das,
Joint Secretary, Ministry of Welfare.
14. Haryana Legal Service and Advisory
Committee (through P. Diwan).
15. Gujrat State Legal and Advisory Board.
16. Madras District Committee for Legal
and Advice.
17. Legal Remembrancer cum Director of
Prosecution, CHANDIGARH.
18. Government of West Bengal,
Judicial Department.

ORGANISATIONS

1. Guild of Service, Delhi.
2. Astitiva, Valsad.
3. All India Council of Christian Women.
4. Stree Seva Mandir, Madras.
5. Mahila Hakk Savankshan Samiti, Nasik.
6. Princess Esin Woman's Educational Centre.
7. Centre of Concern for Child Labour.
8. Surat District Bar Association.
9. Joint Women's Programme, Delhi.
10. Gujrat State Legal and Advice Board.
11. I.S.S.T., Delhi
12. Xavier Institute of Communications, Bombay.
13. Bharatiya Grameen Mahila Sangh, Delhi.
14. Andhra Pradesh Muslim Advocate Forum.
15. Forum Against Oppression of Women, Bombay.
16. Shree Mukti Manch, Pune.
17. Centre for Women's Studies, Jaipur.
18. Shaila Lohiya Manavlok, Amba Jogai.

19. Centre for Women's Development Studies, Delhi.
 20. Lakshadweep State Social Welfare Board.
 21. Mahila Dakshita Samiti, Delhi.
 22. Vikasgriha, Ahmedabad.
 23. Coimbatore Bar Association.
 24. Ahmedabad Women's Action Group, AWAG.
 25. Bar Council of Tamilnadu.
 26. Madras Bar Association.
1. C.,
27. Metropolitan Magistrate's Courts, Dadar Bar Association.
 28. National Law School, Bangalore.
 29. Feminist Association for Social Action, Madras.
 30. Gujarat State Crime Prevention Trust, Ahmedabad.

GENERAL PUBLIC

1. Shiv Dayal, Devgaon.
2. H.C. Kukreti, Dehradun.
3. Arvind Prakash Rastogi, Badaun.
4. Raj Kumar, Dehradun.
5. Raghunandan, Delhi.
6. N.K. Sharma, Kota.
7. Dr. Ram Tirth Aggarwal, Delhi.
8. Jagdish Rai, Bombay.
9. Ompal Arya, Delhi.
10. Sushma Rani, Meerut.
11. D.F. Mehta, Rajkot.
12. H.N. Behera, Cuttack.
13. L.C. Dhamani, Nagpur.
14. Karmachand Saxena, A.P.
15. Mrs. Billimoria, Navsari.
16. Shri Digamber Rana, Dehradun.
17. Shri S.H. Gupta, Bombay.
18. Shri D.P. Sharma, Meerut.
19. Shri R.S. Tiwari, Bombay.

Order for Maintenance of Wives, Children and Parents

125. Order for maintenance of wives, children and Parents -

- (1) If any person having sufficient means neglects or refuses to maintain -
- (a) his wife, unable to maintain herself, or
 - (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
 - (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
 - (d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

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

Explanation.- For the purposes of this Chapter,-

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is deemed not to have attained his majority;

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

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

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

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

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

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

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

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

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

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

(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases:-

Provided that if the Magistrate is satisfied the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex parte and any order so made may be set aside for good cause shown on an application an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

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

127. Alteration in allowance.- (1) On proof of a change in the circumstances of any person, receiving, under section 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit:

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

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

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

(a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;

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

(i) in the case where such sum was paid before such order, from the date on which such order was made,
(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

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

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a monthly allowance has been ordered to be paid under section 125, the Civil Court shall take into account the sum which has been paid to, or recovered by, such person as monthly allowance in pursuance of the said order.

128. Enforcement of order of maintenance. - A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.