



HARYANA STATE LAW COMMISSION

FIRST REPORT

Recommendation to amend Section 125 of The Code of Criminal Procedure, 1973

Government of Haryana

HARYANA STATE LAW COMMISSION

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Member Secretary

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Government of Haryana

HARYANA STATE LAW COMMISSION

Ist Floor, DHL Square, Plot No. 9, HSIIDC IT Park, Sector 22, Panchkula (HR)-134109,

Telephone No.0172-4004268

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Section 125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the ‘Code’) provides a summary remedy to wife, children and parents of securing maintenance from the husband/father/son who refuses or neglects to maintain them. Section 126 prescribes the procedure for dealing with applications for maintenance made under Section 125. Section 127 provides for alteration of the amount of maintenance granted under Section 125 when there are changes of circumstances justifying such action. Section 128 provides for enforcement of the order of maintenance.

2. For the sake of convenience, Section 125 is reproduced below:

“Section 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 [***] 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.

[Provided further that the Magistrate may, during the pendency of the proceeding 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 and expenses of proceeding under the second

proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person." ;]

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) Any such allowance for the maintenance or interim maintenance and expenses of 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 of proceeding, as the case may be." ;]

(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, 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 month's allowance [allowance for the maintenance or the interim maintenance and expenses of proceeding, 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 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 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 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.”

3. It is the fundamental moral duty of every person to maintain his wife, children and parents, when they are not able to maintain themselves. Section 125 provides a summary remedy to the aggrieved persons. It does not bar them from availing of other remedies under civil or personal laws.

4. Only the following persons can seek maintenance under Section 125 of the Code:

- i) Wife who is unable to maintain herself
- ii) Legitimate or illegitimate minor child whether married or not, unable to maintain itself
- iii) Unmarried legitimate or illegitimate child which has attained majority and is unable to maintain itself on account of any physical or mental abnormality or injury
- iv) Father or mother who is unable to maintain himself or herself. This is however subject to the condition that the person against whom maintenance is claimed has sufficient means to maintain such persons
- v) If however, the minor female child attains majority and her husband has sufficient means to maintain his wife, the obligation of the father to maintain the daughter ceases
- vi) The wife who is living in adultery is not entitled to receive any maintenance. The Magistrate is empowered to cancel the order of maintenance already made if the wife lives in adultery or refuses

to live with her husband without sufficient reason or when they start living separately by mutual consent.

5. The Magistrate to whom the application for maintenance is made has to take into consideration all the facts and circumstances about the means of the person to maintain his wife, child, father and mother and the reasonable amount required for maintenance having regard to the background of the family and fix reasonable amount required for maintenance. The Magistrate is also conferred power of awarding interim maintenance pending consideration of the application for grant of maintenance. The Magistrate has power not only to award maintenance but also to award expenses of the proceedings for grant of maintenance. The statute empowers the Magistrate to award maintenance and interim maintenance from the date of the application and not for any period before the date of application.

6. The law requires that the Magistrate should dispose of the application as far as possible within 60 days from the date of service of notice of the application.

7. The expression “Minor” has been defined to mean a person who is deemed not to have attained majority under the Indian Majority Act,

1875. The expression “Wife” has been defined to include a divorced woman who has not remarried.

8. Section 125 also prescribes the procedure for enforcing the order when a person against whom the order for paying maintenance is made fails without sufficient cause to make the payment. For every breach of the order, the Magistrate can issue a warrant for levying the amount due in the manner provided for levying fines. In addition, the Magistrate may sentence such person to imprisonment for a term which may extend to one month or until payment if made sooner. The procedure for enforcing the order has to be invoked within one year from the date on which the amount became due.

9. If the person offers to maintain his wife on condition of her living with him and she refuses to live with him, the Magistrate is required to consider the reasons, if any given by the wife for not agreeing to live with her husband. If the Magistrate is satisfied with the reasons given by the wife, he cannot refuse to grant maintenance. If the husband has contracted or married with another woman or has kept a mistress, it is deemed that there is sufficient ground for the wife to refuse to live with him. The wife would not be entitled to be granted maintenance, if there are no sufficient reasons for her to refuse to live with her husband or if they are living separately by mutual consent.

10. Though the object of Section 125 of the code is quite laudable, it often gets defeated because of some inadequacies in the definitions and other clauses of Section 125. Therefore, the Commission took up for close scrutiny of the provisions Section 125 with the object of ensuring that all the deserving persons should receive maintenance expeditiously without undue hardship.

11. Section 125 (1) provides that the liability arises when the person having sufficient means neglects or refused to maintain the wife, the children or the parents. Whether the person concerned has sufficient means or not is quite relevant for considering the application for grant of maintenance. The wife, children and aged parents are not the persons who would have adequate knowledge about the income and assets of the person against whom maintenance is sought. It is common that information about the assets, moveable and immovable, money kept in the bank and other places, and if employed about the name and address of the employer is not normally shared with the wife, children or the parents. Therefore it becomes very difficult for the applicant to place satisfactory evidence before the Magistrate about sufficiency of the means possessed by the person against whom maintenance is claimed. Whether the person has sufficient means or not is certainly within the knowledge of the person concerned. In the absence of material placed before the Magistrate in regard to the extent of means possessed by the

person concerned, the Magistrate will not be able to determine the reasonable amount of maintenance that should be awarded. Thus the very object of Section 125 will be frustrated. It is quite unreasonable to place the burden on the applicant of collecting evidence about the means possessed by the person against whom maintenance is claimed and placing the same before the Magistrate. If on the other hand, the burden is placed on the person against whom maintenance is claimed of disclosing to the Magistrate the means possessed by him, it would not cause any great hardship to him. This will also avoid delay in disposing of the application. The commission is therefore, of the considered opinion that the burden of disclosing the means possessed by the person against whom maintenance is claimed should be placed on such person. Therefore, the Commission recommends that Section 125 should be amended requiring the person against whom maintenance is claimed of disclosing on oath in the prescribed form full particulars of the properties possessed by him, about the income from the same and if he is employed, about all the emoluments he is receiving, the name and address of the employer and the dates on which his salary is payable. It should be further provided that if he suppresses any information in this behalf or furnishes false information he would be liable to be prosecuted and punished for making a false statement before the Court.

It has come to the notice of the Courts in several cases that many women are not able to produce satisfactory evidence about their marriage. It is also noticed that many innocent women get married

without knowing that the person had married earlier and his first wife is living. As the second marriage during the subsistence of the first marriage, is void in law, the husband would plead that the applicant is not his legally married wife and as such is not entitled to maintenance. In other words, he would take advantage of his own wrong to defeat the claim of the second wife who married him without knowing that the person is married and his first wife is living. This puts the innocent second wife into a hopeless situation. She not only loses her right and status as the wife but also the right to claim maintenance. Section 125 thus enables the law breaking husband to escape his liability to maintain the lady whom he has taken as his wife. It is very odd that a man who was already legitimately married cannot be compelled to pay maintenance under Section 125 of the Code to a woman married to him during the subsistence of the first marriage, though a child born of the alleged second marriage is bound to be maintained by the putative father under the second sub-section of Section 125 of the code. This incongruous situation can be averted by rendering the mother of such child also eligible for maintenance. It is most unfair to deny maintenance to such a woman. The least that the law should in the circumstances do, is to provide for maintenance to the unfortunate woman.

12. The position of the woman who though not legally married but has lived with the person like wife is similar. Innocent women are often

cheated and exploited. Man should not be allowed to take undue advantage of the innocent woman who has lived with him like his wife. Such a man should be estopped from denying her status as his wife. A lady who has lived with the person like his wife would be in the position of a defacto wife. It would be most unjust, unfair and inequitable to deny such a woman the right to maintenance. The man who has lived with the woman like her husband should be held responsible to provide maintenance to the woman. The Commission, therefore, feels that the definition of the expression “Wife” given in clause ‘B’ of the explanation should be enlarged so as to include a woman whose marriage is void as a result of concealment of facts by the husband, and also a woman who has lived with the person like his wife. This will also help preventing unfortunate women from becoming vagrant. It would also deter men from cheating innocent women and taking undue advantage of their innocence. The law must lean in favour of protecting the innocent and punishing the wrong doer.

13. The Commission therefore recommends that the definition of the expression “wife” given in explanation “b” to Section 125(1) of the Cr.P.C shall be amended by adding the following at the end of the said provision:

“or a woman whose marriage is void on the ground that her husband was married earlier and his first wife is living or a woman who has lived with him like his wife”.

14. The commission has discussed the plight of the applicant under Section 125 of Cr. P C in getting the amount of interim maintenance from the respondent as generally the respondent use various tactics to delay the payment of interim maintenance as the applicant has no source of income, therefore, for day to day expenses and other urgently required articles such as medicine, the applicant has to borrow money at exorbitant rate of interest. Therefore, the commission is of the view that some coercive provisions be added in the Cr.P.C so that the applicant may get interim maintenance at appropriate time. The commission, therefore, recommends that the following 4th proviso be added to Section 125 (1) of Cr.P.C.

“provided that on the request of applicant, the Magistrate can direct the respondent to pay the entire amount of interim maintenance to the applicant on the next date of hearing, failing which the defense of the respondent may be struck of.”

15. Sub-section 2 of Section 125 gives discretion to the Magistrate to award maintenance or interim maintenance either from the date of the

application or from the date of the order. Section 125 can be invoked only when the respondent neglects or refuses to maintain. Therefore, it is most unreasonable to award maintenance from a much later date when the order is passed. The Commission therefore favours grant of maintenance and interim maintenance from the date of the application or interim application. In the circumstances, the Commission recommends deletion from sub-section (2) the words “*from the date of the order or if so ordered*”.

16. Sub-section (4) of Section 125 provides that no wife shall be entitled to maintenance if she is living in adultery. This provision encourages many husbands to take a false defense that the wife who seeks maintenance is living in adultery only to escape their liability to maintain the applicant. For the wife to be falsely accused of living in adultery with another person is a very serious matter which hurts her mentally and her image and reputation are adversely affected. The pain, suffering and loss of image are irreversible. The stigma often continues even when the allegation is not proved or is found to be false. It is desirable to discourage the husbands from making false and baseless allegations about morality of the lady. With a view to deter such false allegations being made, the Commission recommends that in the event of the husband failing to prove that the wife is living in adultery he should be directed to pay compensation of not less than Rs.25, 000/- (Rupees twenty five thousand only) and not more than Rs.1, 00,000/-

(Rupees one lakh only) as the Magistrate deems proper to impose. The Commission, therefore, recommends that the following proviso shall be added at the end of sub-section (5) of Section 125 of Cr.P.C:

“provided that the husband shall be liable to pay to the wife compensation of not less than Rs.25,000/- and not more than Rs.1,00,000/- as may be determined by the Magistrate in the event of the husband failing to prove his allegations under sub-sections 4 or 5 that the applicant is living in adultery”.

17. Quite often it is noticed that the orders of maintenance passed by the Magistrate are not promptly complied thereby unnecessarily subjecting the applicant to great misery and hardship. The Respondent often takes pleasure in harassing the applicant. The very object of providing maintenance to neglected wife, children and parents, gets defeated if they don't receive the amount in time for their maintenance. As the person has to live he/she would be forced to raise money by taking loans for his/her maintenance and survival by paying heavy interest. On the other hand, the defaulting person benefits by retaining the money. The very object of granting maintenance would be defeated if the maintenance amount is not paid punctually. The Commission, therefore, feels that law should be deterrent against the Respondent to ensure prompt payment and the aggrieved party must be compensated

for the delay. The Commission therefore recommends that in the event of the husband failing to pay the awarded maintenance amount on or before the due date, he should be liable to compensate by paying the said amount with interest at the rate of 12% per month. Accordingly, the Commission recommends that the following shall be added above explanation to Section 125(1):

“provided that the amount awarded shall be paid within one month from the date of the order and for the succeeding months within one week from the beginning of each month failing which, the amount shall be paid with interest at 12% per month from the date of default till the date of payment.”

RECOMMENDATIONS

18. For the reasons stated above, the Commission recommends amendment of Section 125 of Criminal Procedure Code as follows:

- i. The following shall be added as the first proviso to Section 125 (1) of the Cr.P.C:**

“provided that within 15 days from the date of service of the notice of the application for maintenance, the person against whom the application is made shall file before the Court an affidavit giving full information about all his income and assets, movable and immovable and if employed about the income he is receiving and the name and address of the employer.”

- ii. The definition of the expression ‘wife’ given in explanation “b” to section 125(1) of the Cr.P.C shall be amended by adding the following at the end of the said provision:**

“or a woman whose marriage is void on the ground that her husband was married earlier and his first wife is living or a woman who has lived with him like his wife”.

- iii. The following shall be added above the explanation to Section 125(1):

“provided that the amount awarded shall be paid within one month from the date of the order and for the succeeding months within one week from the beginning of each month failing which, the amount shall be paid with interest at 12% per month from the date of default till the date of payment.”

- iv. The following proviso shall be added at the end of sub- section 1 of Section 125 of the Cr.P.C

“provided that on the request of applicant, the Magistrate can direct the respondent to pay the entire amount of interim maintenance to the applicant on the next date of hearing, failing which the defense of the respondent may be struck of.”

- v. Delete the following from sub-section 2 of Section 125:

“from the date of the order or if so ordered”

- vi. The following proviso shall be added at the end of sub- section 5 of Section 125 of the Cr.P.C

“provided that the husband shall be liable to pay to the wife compensation of not less than Rs 25,000/- and not more than Rs 1,00,000/- as may be determined by the Magistrate in the event of the husband failing to prove his allegations under sub-sections 4 or 5 that the applicant is living in adultery”.

NOTE:

Section 125 of the Code of Criminal Procedure, 1973 has been enacted under Entry 2 of Concurrent List 3 to the Constitution of India. Therefore Parliament as well as the State Legislature has concurrent power to enact laws to regulate Criminal Procedure. As the Parliament has already enacted the Code of Criminal Procedure, 1973, Article 254 of the Constitution comes into play. It provides that where the law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent list contains any provision repugnant to the provision of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for consideration of the President and has received his assent shall prevail in that State. It is therefore clear that the amendments proposed above can be passed by the Legislature and reserved for consideration of the President. After receipt of the assent of the President, the amendments can come into operation in the State of Haryana.