

SUMMARY OF WORKSHOP PAPER

ON THE SUBJECTS-

- 1] SECTION 125 OF CODE OF CRIMINAL PROCEDURE**
- 2] PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT,**
- 3] SECTION 97 OF CODE OF CRIMINAL PROCEDURE**
- 4] MAINTENANCE AND CUSTODY OF CHILDREN**

INTRODUCTION

1] The Chapter IX of the Code of Criminal Procedure deals with the order for maintenance of wives, children and parents. As per section 125 of Cr. P. C. if any person having sufficient means neglects or refuses to maintain his wife, his legitimate or illegitimate minor children whether married or not, and his father or mother unable to maintain themselves, the Magistrate of the First Class upon proof of such refusal or neglect direct such person to make monthly allowances and to pay the same to such persons from time to time.

2] Section 24 of Hindu Marriage Act deals with maintenance *pendente lite* during the proceedings between a husband and wife, while section 25 deals with permanent maintenance to be fixed at the time of passing any decree or subsequent thereto. Section 18 of Hindu Adoption and Maintenance Act deals with the right of maintenance of wife whereas section 19 casts duty upon Hindu [Male and Female] during his or her lifetime to maintain his or her minor legitimate or illegitimate children and his or her parents.

3] The provisions of the Protection of Womens From Domestic Violence Act deal with the term domestic violence. It includes physical abuse, sexual abuse, verbal - emotional abuse and economic abuse. The

aggrieved person can claim monetary relief, protection order, residence order, custody order under the provisions of Protection of Women from Domestic Violence Act. Therefore it can be seen that a very wide definition has been given to the term 'Domestic Violence' including various kinds of abuses faced by the aggrieved person. 'Domestic Violence' is any act of physical, mental or sexual violence and any attempted such violence, as well as the forcible restriction of individual freedom and of privacy, carried out against individuals who have or had family or kinship ties or cohabit or dwell in the same house. It infringes the basic right to feel comfortable within the confines of one's house to all domestic violence victims is not a home. A home where one can live without any fear or insecurity. It is with this in mind, the new Protection of Women from Domestic Violence Act was passed.

WHO CAN CLAIM MAINTENANCE

WIFE

4] A 'wife' is entitled to maintenance under section 125 of Cr.P.C ; PWDV Act; Hindu Marriage Act; Hindu Adoption and Maintenance Act and The Muslim Women (Protection of Rights On Divorce) Act as the case may be. To claim maintenance under section 125 of Cr.P.C a Wife must be legally wedded wife of the husband as held in **Yamunabai vs Anantrao AIR 1988 SC 644**. In case of **Chanmuniya vs Virendra Kumar (2011) 1 SCC 141** parties had been living together for a long time and on that basis question arose before Apex Court, as to whether presumption of marriage between the two because of said reason, thus giving rise to the claim of maintenance under section 125 of Cr.P.C, it is observed that if man and woman living together for a long time without a valid marriage they are entitled to maintenance under section 125 of Cr. P.C. In case of **Badshah vs Urmila Badshaha Godse AIR 2014 SC 869** on the facts where a man marries second time by keeping a woman in dark about the first surviving marriage, the Apex court held that at least for the purpose of claiming maintenance under section 125 of Cr.P.C such

a women is to treated as a legally wedded wife. However as laid down in the case of **Savitaben vs State of Gujarath (2005)3 SCC 636** when a women married a man with full knowledge of the first subsisting marriage she is not entitled for maintenance. In **Smt Hemalata Karayat vs Vijay Kumar Karayat 2014 CRI.L.J. 4935 (Chhattisgarh High Court)**, it is held that a already married women cannot claim maintenance from second husband during subsistence of her first marriage.

5] However a second wife is not entitled for maintenance under the Hindu Adoption and Maintenance Act as second marriage of hindu is void as held in **Mangala Lad vs Dhandiba AIR 2010 SC 122**

6] In **Sayyad Jabbar Ali ..vs.. Saheba Fatima 2002 Cr.LJ 1332 Bombay High Court** in the course of deposition the husband offered cohabitation and shown his readiness to take the applicant wife with him. The wife refused to go with him. In the circumstances granting of maintenance was held not justified. Thus the wife without justifiable reason if refuses conjugal life with husband, she is not entitled to maintenance under section 125 of Cr.P.C.

UNABLE TO MAINTAIN

7] A wife is entitled to maintenance only when she is unable to maintain herself. “The phrase unable to maintain herself” does not cannote that the wife should be absolute, substitute and should be on the street, should beg and be in a tattered clothes. Where the wife is maintained by her parents, it must be held that, she is unable to maintain herself. The phrase '**unable to maintain herself**' meant unable to maintain herself in the way she was living with her husband. **Chaturbhuj ..vs.. Sitabai, AIR 2008, Supreme Court 530.** A well educated wife seating idle though has capacity to earn livelihood is not entitled for maintenance from husband **Mohd. Firdos Mohd. Shoyeb ..vs.. Mohd. Shoyeb, Bombay High Court DD. 20.02.2015.**

DIVORCE WOMAN

8] A woman who has been divorced by her husband on account of a decree passed by the Family Court under the Hindu Marriage Act continues to enjoy the status of wife for the limited purpose of claiming maintenance allowance from her ex-husband. A woman has two distinct rights for maintenance. As a wife, she is entitled to maintenance unless she suffers from any of the disabilities indicated in section 125(4). In another capacity, a divorced woman is again entitled to claim maintenance from the person of whom she was once the wife. A woman with a divorce becomes destitute. If she cannot maintain herself or remains unmarried, the man who was once her husband continues to be under a statutory duty and obligation to provide maintenance to her. **Rohatash Singh vs. Ramendr, 2000 Supreme Court Cases (Criminal) 597.**

Muslim Divorced women

9] In the case of **Shamim Bano vs Asraf Khan 2014 ALLMR (Cri) 2200** it is held that even an application filed under section 3 of the Muslim Women (Protection of Rights On Divorce) Act, Magistrate under the Act has power to grant Maintenance in favour of divorced Muslim women under section 125 of Cr. P. C. as parameters are same as stipulated in section 125 of Cr.P.C. Same view is taken in **Khatoun Nisa v. State of U.P. and Ors. MANU/SC/1143/2002 : 2002 (6) SCALE 165**

10] In **Danial Latifi and Anr. v. Union of India MANU/SC/0595/2001: (2001) 7 SCC 740** while interpreting Sections 3 and 4 of the Act, it is held that the intention of the Parliament is that the divorced woman gets sufficient means of livelihood after the divorce and, therefore, the word "provision" indicates that something is provided in advance for meeting some needs. At the time of divorce the Muslim husband is required to make preparatory arrangements in advance for

meeting future needs of wife. Reasonable and fair provision may include provision for her residence, her food, her clothes, and other articles. Reasonable and fair provision and maintenance is not limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

11] In ***Shabana Bano vs. Imran Khan*** **MANU/SC/1859/2009 : (2010) 1 SCC 666**, it is held that petition Under Section 125 Code of Criminal Procedure would be maintainable so long as applicant/woman does not remarry. The amount of maintenance to be awarded Under Section 125 Code of Criminal Procedure cannot be restricted for the iddat period only.

10] As per section 3 of The Muslim Women (Protection of Rights On Divorce) Act, a Muslim divorced wife irrespective of her income and means is entitled to fair provisions. [***Abdul Rahaman Vs Hariunnesa Abdul AIR 2011 Ker 148***]

FATHER/MOTHER

12] The expression “ his father/ mother” in section 125(1) (d) should be construed as “ her father/mother”. Even a married daughter has obligation to maintain her father/mother if they are unable to maintain themselves. A daughter after her marriage does not ceased to be daughter of the father/mother. [***Vijaya Manohar vs. Kahirao 1987(89)Bom L R 131 (Bom)***]

13] Mother includes adoptive mother. [***Baban @ Madhav Dange vs. Parvati Dange, 1978(80) Bom L R 305 (Bom)***]

14] In ***Mahendrakumar Ramrao Gaikwad ..vs.. Gulabbai Ramrao Gaikwad, 2001(2) Mh. L. J 378*** the son of the applicant/ woman contested the application on the grounds that, his

father is alive and possess sufficient means to maintain himself and the applicant. Moreover she has two other sons. The parents did not discharge their parental duty during his childhood and did not care for his education. It was held that a son is bound to maintain his mother unable to maintain herself. The sec. 125 of the Cr.P.C. imposed the statutory obligation on the son to maintain his parents so as to avoid starvation and penury.

STEP-MOTHER

15] A childless step mother may claim maintenance from her step son provided she is a widow or her husband if leaving is in capable of supporting or maintaining her. **In the case of Kirtikant D. Vadodariya ..vs.. State of Gujrat and another, 1996(4) SCC, 489, the Supreme Court** observed that the expression 'mother' in **clause(d) of s/sec.(1) of sec. 125 of the Cr.P.C.** means and is referable to real natural mother who has actually given birth to child. However, considering the benevolence carved out exception in respect of step mother who is childless and is unable to maintain was held entitled for maintenance. In the matter of **Dr. Rajkumar Gopalkrushna Chetalawar ..vs.. Radhabai Gopalkrishana Chetalawar, 2012 All MR (Cri) 3874**, the Hon'ble Bombay High Court held a childless step mother entitled to claim maintenance from her step son.

MINOR CHILD

16] Minor child legitimate or illegitimate, whether married or not , is entitled for maintenance.

17] In **Riyas .Vs. Haseena 2014 CRI.L.J. 4588 (Kerala High Court)**, the child was born out of the alleged incident of rape. The Court not found the accused guilty for the offence of rape. The maintenance was allowed to the illegitimate child by Family Court. The said order was challenged before the Hon'ble High Court. The revision petitioner did not make effective denial of specific instance of intercourse. He only made

evasive or casual denial. He also did not explain as to how he had acquaintance with the lady. There was no stand of previous enmity or dishonest motive of lady behind the claim. Therefore, it was held that merely because the evidence of lady was not accepted in Criminal Proceeding of rape, the claim of lady cannot be rejected in a proceeding of maintenance under section 125 of Cr.P.C. as the nature and standard of evidence required into proceeding are different.

18] In **Allabuksh Karim Shaikh .Vs. Noorjahan 1994(2) Mh.L.J.1376**, it is held that a Muslim child has an independent right of maintenance and the application for his maintenance is maintainable under section 125 of Cr.P.C. Similar view is taken in the case of **Mohammed Abdul .Vs. Saleha Khatun 2006(2) Mh.L.J. (Cri.) 520**.

19] In **Dwarika Halba .Vs. Savitri Bai and another 2014 CRI.L.J. 4681 (Chhattisgarh High Court)**, it is held that result of DNA test is scientifically accurate and can be relied upon to determine paternity of child. Therefore, the grant of monthly allowance to illegitimate child is held to be proper by holding the person as biological father based on DNA report.

MAJOR HANDICAPPED CHILD

20] In the case of **Yasinbhai vs Rizvanbanu 2013ALLMR(Cri)161** it is held that in a case where the child on account of physical disability, is unable to maintain himself, even if he attains majority, the case would be covered under the provisions of section 125(1)(c) of Cr.P.C. and the Court would be within its power to order maintenance if it was satisfied that there is neglect to maintain the child.

MAJOR CHILD INCAPABLE OF MAINTAINING

21] In the case of **Jayvardhan Sinh Chapotkat vs. Ajayveer. Chapotkat MANU/MH/2581/2014 [Bombay High Court]** it is held that A major son may not be entitled for maintenance under the Hindu Marriage Act. In the present case, the Petitioner has made out a specific claim for educational expenses which can be availed by him after attaining the age of 18 years. The son/claimant would attain majority as far as age is concerned, however, it would not be the proper age for becoming economically independent so as to earn his living. In the given facts of the case, a major son of the well-educated and economically sound parents can claim educational expenses from his father or mother irrespective of the fact that he has attained majority. It is not maintenance in strict sense as contemplated under Section [125](#) of the Code of Criminal Procedure or maintenance as contemplated under Section under Hindu Marriage Act.

22] In the case of **Smt. Jasbir Kaur Sehgal v/s. District Judge, Dehradun and ors. reported in MANU/SC/0835/1997 : AIR. 1997 SC 3397**, the Hon'ble Apex Court has observed that under the Hindu Adoption and Maintenance Act, 1956 it is the obligation of a person to maintain his unmarried daughter, if she is unable to maintain herself.

DAUGHTER-IN-LAW

23] Section 19 of Hindu adoption and Maintenance Act is an enabling provision under which right of widow daughter-in-law to receive maintenance from father-in-law is recognized. In case of **Madhukar Kisan Lokhande vs Shalu Lokhande 2013(6) Mh L J 391** [Division Bench consisting of Hon'ble Justice B. P. Dharmadhikari and Hon'ble Justice A. S. Chandurkar] after discussing the provisions of section 19 and 21 of the Hindu Adoption and Maintenance Act, it is observed after construing the provisions harmoniously, first obligation to maintain his widowed daughter-in-law is always on father-in-law. It shifts to the father

of such widow only in case of inability of father-in-law or to the extent of such inability. The circumstances in which or extent to which father-in-law is obliged to discharge this obligation are the only facets regulated by Section [19](#).

24] In the case of ***Venubai vs Laxman AIR 2008 BOM 13***, it is held that if there is no coparcenary property held by father in law then widow daughter-in-law can not claim maintenance under Hindu Adoption and Maintenance Act.

Maintenance to Mother in law- from daughter in law :-

25] The mother in law not able to maintain herself can claim maintenance under section 125 of Cr.P.C from the daughter in law. In the matter of ***SAROJ GOVINDA MUKKAVAR ..Vs.. CHNDRAKALABAI POLSETWAR, AIR 2009, NOC 2408 (BOMBAY)***, it has been held that, a mother in law is entitled for maintenance from her daughter in law if she is unable to maintain herself. In the said case the daughter in law was appointed on compassionate ground on the death of her husband who was only the son of the claimant. The daughter in law had given an undertaking as part of compassionate appointment that, she would support her mother in law. For this reason she was held liable for maintenance of mother in law under section 125 of the Cr.P.C.

AGGRIEVED PERSON

26] As per section 2(a) as per PWDV Act, only a woman can be aggrieved person. Provided that she was subjected to domestic violence by the respondent in domestic relationship. Thus a male child can not be a aggrieved person although reliefs can be claimed on his behalf.

Domestic Relationship - What Includes

27] **Living together :** In the case of **Harbans Lal Malik vs Payal Malik 2011 (1) Crimes 496** [Delhi High Court], it is observed that the persons who constitute domestic relationship must be living together in the same house under one head. If they are living separate then they are not a family but only relatives. There can be no domestic relationship of the wife of son with the parents when the parents are not living along with the son.

28] **Residence :** Living together at a residence should not be casual visit or casual stay to get relief under PWDV Act. [**Advocate Ramesh Mohanlal Bhutada vs. St of Maharashtra 2011 Cr. L. J. 4518**]

RELATIONSHIP IN NATURE OF MARRIAGE

29] In the case of **D.Velusamy .Vs. D.Patchaiammal, AIR 2011 SC 479** it has been observed by the Hon'ble Apex Court that all live in relationship will not amount to relationship in nature of marriage to get the benefit of the DV Act and if a man has a 'keep' whom he maintains financially it would not be a relationship in nature of marriage. It is necessary for the applicant and the non-applicant to live in such a way that they are treated by the society at large as husband and wife and not only that they should also otherwise be qualified to enter into a legal marriage, with both of them being of legal age to marry, both of them being unmarried at the time when they enter into a relationship which is akin to a marriage and so on.

30] In the case of **Indra Sarma .Vs. V.K.V Sarma AIR 2014 SC 309** the Hon'ble Apex Court has held that even though long standing relationship as a concubine deserves some protection in order to provide her financial stability, her such relationship not being in the nature of marriage cannot be termed as domestic relationship as

contemplated by the Act, 2005. Hon'ble Apex Court has categorically held that the provisions of the Act, 2005 do not take care of such a relationship because the definition of Section 2(f) of the Act, 2005 is restricted and exhaustive. Hon'ble Apex Court has also expressed a view that perhaps this definition may call for an amendment.

31] **Respondent** : In the case of [Razia Begum vs State Nct Of Delhi & Ors, 2011\(1\)Crimes376](#) it is held that Before passing an order under Domestic Violence Act, it must be satisfied that there existed a domestic relationship between the Petitioner and the Respondent. Under Domestic Violence Act every relative of the husband cannot be made as a respondent. In order to fix liability upon a respondent the respondent must be a person who is or has been in domestic relationship with the aggrieved person. In order to constitute domestic relationship there must have been living together in a shared household and there must be relationship as specified in Section 2(f).

32] **Female Relative** : In the case of [Sandhya Manoj Wankhade v/s Manoj Bhimrao Wankhade 2011 CriLJ 1687 \(SC\)](#) it is held that expression "female" has not been used in the proviso to Section 2 (q), but if the legislature intended to exclude females from the ambit of the complaint, which can be filed by an aggrieved wife, females would have been specifically excluded, instead of it being provided in the proviso that a complaint could also be filed against a relative of the husband or the male partner. No restrictive meaning has been given to the expression 'relative' nor has the said expression been specifically defined in the Act to make it specific to males only. In such circumstances it is clear that the legislature never intended to exclude female relatives of the husband or male partner from the ambit of complaint.

33] In [Archana Hemant Naik v/s Urmilaben I Naik, 2010 CriLJ 751 \(Bom\)](#) it has been observed that the word 'relative' used in the proviso of Section 2(q) is not restricted to a male relative of the

husband or a male relative of a male partner it includes female relative also.

Non payment of maintenance is Domestic Violence

34] In case of **Aradhana Walkade Vs. Chandrashekar Vaidya, 2014 ALLMR(Cri) 1658 : 2014 (2) Bom C R (Cri) 588** the Honble Bombay High Court (Panji Bench), considering the question of law as to whether subsistence of marriage is sine qua non for maintainability of a complaint under section 12 of Act, has observed that definition of "*Economic abuse*" means that if a woman is deprived of any economic or financial resources to which she is entitled reliefs under the law, or custom whether payable under the order of the Court or otherwise, to her as an aggrieved person out of necessity can be granted. Therefore, if there is an order of the Court to pay maintenance to the "aggrieved person" then if such maintenance is stopped or aggrieved person is deprived of such maintenance, it can be considered as an economic abuse.

Non giving share in property to Widow daughter in law is Domestic Violence

35] In the case of **Gangadhar Pradhan vs Rashmibala Pradhan 2013 ALLMR(Cri) 145 : 2012 CriLJ 4106** [Orissa High Court] after considering definition of 'domestic violence' given in Section 3 of the Act, and its Explanation (iv) explaining the economic abuse, it has been held that aggrieved person (wife) had acquired right of her deceased husband in joint family property and she is entitled to get maintenance till she gets her share in the said properties. In absence of getting a share in the ancestral joint family properties, she is deprived of her "*economic and financial resources*" to which she is legally entitled to get.

Domestic violence Must occur during existence of Domestic relationship .

36] In the case of **Sejal Dharmesh Ved Vs. The State of Maharashtra & Ors , 2014 ALLMR (cri) 636** [Bombay High Court]it is observed that “wife who lived in a domestic relationship earlier, but which ceases only because of any domestic violence can certainly file an application for such domestic violence that took place whilst she lived in that relationship. Such application is required to be filed within a reasonable time to show that relationship would give her the cause of action to sue under the D.V. Act for the reliefs under the Act.

All facts must be taken into consideration

37] In the case of **Saraswathy Vs. Balu, AIR 2014 SC 857,** Hon'ble Apex Court held that, the conduct of the parties prior to the coming into force P.W.D. Act, 2005 can be taken into consideration while passing an order.

38] In the case of **kishor shrirampant kale v sau shalini kishor kale, 2010 cri L J 4049,** it has been held that Explanation - II of section 3 of the Act shows that the Court is required to take into consideration overall facts and circumstances with a view to enable the Court to find out the deserving and undeserving cases and for the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes “domestic violence”. It is held that alleging domestic violence after the elapse of 15 years, where there is no factum of living together for last 15 years, would constitute an abuse of process of law”

Domestic violence against Divorced Wife

39] In the case of **Harbans Lal Malik vs Payal Malik. 2011 (1) Crimes 496** [Delhi High Court], it has been observed that an act of domestic violence cannot be committed on a divorced wife, who is not living with her husband or family and is free to live wherever she

wants. She has a right to claim maintenance and enforce other rights as per law. She has a right to claim custody of children as per law but denial of these rights do not amount to domestic violence. Domestic Violence is not perceived in this manner.

MEANING OF SHARED HOUSEHOLD AND DOMESTIC RELATIONSHIP

40] The definition of 'Domestic Relationship' and 'Shared Household' as given in Sections 2(f) and 2(s) of the PWDV Act. For claiming reliefs under Act an aggrieved person has to establish domestic relationship with the respondent as contemplated under section 2(f) of the said Act. If there is no domestic relationship in between the parties, the provisions of the D V Act would not be applicable.

Casual Visit does not amount to living together in shared household

41] In **Vijay Verma v. State (NCT of Delhi), (Delhi High Court) MANU/DE/1946/2010**, the shared household has been discussed in detail. Following are the important observation made by the Hon'ble High Court :-

[a] It is held that casual visits of a daughter-in-law to the house of father-in-law will not amount to living or lived together in a shared household for the purpose of domestic relationship.

[b] "At any point of time" under the Act only means where an aggrieved person has been continuously living in the shared household as a matter of right but for some reason the aggrieved person has to leave the house temporarily and when she returns, she is not allowed to enjoy her right to live in the property.

[c] However, "at any point of time" cannot be defined as "at any point of time in the past" whether the right to live survives or not

[d] Domestic relationship comes to an end once the son along with his family moved out of the joint family and established his own household or when a daughter gets married and establishes her own household with her husband.

[e] Domestic relationship continues so long as the parties live under the same roof and enjoy living together in a shared household.

[f] However, where the living together has been given up and a separate household is established and belongings are removed, domestic relationship comes to an end and a relationship of being relatives of each other survives.

RIGHT OF RESIDENCE IN HOUSE OF MOTHER-IN-LAW

42] In the case of **S.R. Batra & Anr. vs. Tarun Batra, 2006(4) Cri 433(SC)**, the Hon'ble Apex Court has negated the wife's claim for residence in the house belonging to her mother-in-law. The Hon'ble Apex Court observed that as regards Section 17(1) of the Act, the wife is only entitled to claim a right to residence in a shared household, and a 'shared household' would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member. In the case of **Neeta Mittal .vs. Kanta Mittal 2009 ALL MR JOURNAL 1** it is held that a woman cannot claim right to live in the house of parents of her husband against their consent and wishes.

Domestic Relationship - Already Married Women

43] In the recent case of **Narayan Thool ..VS. Sou. Mala Wani AIR 2015 Bom 36 : MANU/MH/0103/2015** it is held that a woman, who is married, cannot enter into a domestic relationship as contemplated under Section 2(f) of the Act, 2005 and even if she establishes a long standing relationship with a man as his concubine or mistress, she would not be entitled for protection under the provisions of the Act, 2005.

MAINTENANANC UNDER HINDU MARRIAGE ACT

44] In **Jasbir Kaur Sehgal v. District Judge, Dehradun and Others - 1997 (7) SCC 7** , It is held that wife's right to maintenance includes maintenance to the child as well.

45] In case of **Rachna Oswald Malhotra -v- Oswald, 2014 (3) Mh L J 711**, the Division Bench of our High Court observed that in assessing financial liability one must have regard not only to disclose sources of income but to the true state of affairs as revealed by cross examination. In case of **U. Sree -v- U. Srinivas, AIR 2013 SC 415**, it is held that while granting permanent alimony no arithmetical formula can be adopted as there cannot be mathematical exactitude. It shall depend upon status of the parties, their respective social needs, the financial capacity of the husband and other obligations. In case of **Vinny Parmar -v- Paramveer Parmar, AIR 2011 SC 2748**, the Apex Court held that while granting permanent alimony the Court is required to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband. At the same time, the amount so fixed cannot be excessive of affect the living condition of the other party.

MAINTENANANCE FROM WHICH DATE

46] The proviso empowered the Magistrate for granting interim maintenance and expenses of proceeding during its pendency. The allowances either can be granted from the date of application or from the date of order. The Division Bench of Hon'ble Apex Court observed in **Jaimini Ben Hirenbai Vyas and another ..vs.. Hirenbai Rameshchandra Vyas and another, 2015 All MR. (Cri) 376, Supreme Court**, that the Court should record reasons while granting maintenance either from date of order or from date of application.

Effect of relinquishment of maintenance

47] In **Nagendrappa Natikar -Versus- Neelamma,2013 AIR(SC) 1541** the question that is raised for consideration in this case is whether a compromise entered into by husband and wife under Order XXIII Rule 3 of the Code of Civil Procedure, agreeing for a consolidated amount towards permanent alimony, thereby giving up any future claim for maintenance, accepted by the Court in a proceeding under Section 125 of the Code of Criminal Procedure. Would preclude the wife from claiming maintenance in a suit filed under Section 18 of the Hindu Adoption and Maintenance Act , 1956. It is held that Section 25 of the Contract Act provides that any agreement which is opposed to public policy is not enforceable in a Court of Law and such an agreement is void, since the object is unlawful. Proceeding under Section 125 Cr.P.C. is summary in nature and intended to provide a speedy remedy to the wife and any order passed under Section 125 Cr.P.C. by compromise or otherwise cannot foreclose the remedy available to a wife under Section 18(2) of the Act.

JURISDICTION

48] In the case of **Amit Satish Shaha Vs. Archana Amit Shaha, 2014(6) Mh.L.J. 707** it is held that any relief which is available under section 18 to 22 of the D.V. Act from the Magistrate, may also be sought in any legal proceeding, before a Civil Court, Family Court, or a Criminal Court, affecting the aggrieved person and the respondent, whether such proceedings were initiated before or after commencement of the Act. Sub Section (3) of Sec. 26 the D.V. Act. only provides that, in case any relief has been obtained by the aggrieved person in any proceedings other than the proceedings under the D.V. Act, then she should be bound to inform the Magistrate of the ground of such relief or perhaps so that, such relief is not obtained twice over.

49] Where the Sessions Court in exercise of its jurisdiction under PWDV Act he has power to pass orders as that of Magistrate . When the

interim order of Magistrate challenged before the Sessions Court he has no power to interfere in that interim order unless it is found that it is not passed applying judicial discretion and it is passed arbitrarily. Remedy of appeal is there against any order passed by Magistrate. Whether Session Court in exercise of its jurisdiction under PWDV Act has any power to pass interim order staying executing of order appealed before it, is a matter to be examined in a appropriate case. [**Shalu Ojha ..vs.. Prashant Ojha , AIR 2015 SC 170, Super Cassetts ..vs.. Music Broadcast AIR 2012 SC 2144**]

ENFORCEMENT OF ORDER

50] A order of maintenance including interim maintenance under PWDV Act can not be enforced through section 31 of PWDV Act and it can be enforced in the same manner as laid down under section 125 of the Cr. P. C. as held in **Manoj Anand vs St of UP Criminal Revision. No. 635/2011.**

51] In the case of **Sachin Suresh Bodhane vs. Sushma Sachin Bodhane 2015 (1) ABR Criminal 435** an interim order was passed granting monetary relief the husband had not paid the amount. A non bailable warrant was issued for non payment of interim maintenance. The said order was challenged by husband before Hon'ble High Court. By considering provisions of section 28 of D.V. Act, 125 (3) and 421 of Cr.P.C. As such the first option available to the Magistrate was to issue a warrant for levying fine. If whole of the amount was recovered by adopting the procedure under Section 421 of the Code of Criminal Procedure, the question of putting the defaulter in prison did not arise. In case amount was not recovered or part of it was recovered and part of it was not recovered, then the question would have arisen as to how much sentence should be imposed on the defaulter as per the provision laid down in the Code of Criminal Procedure. The stage of issuing warrant comes only after sentencing and not before that.

52] In the case of **Shaikh Ishaq Budhanbhai vs. Shayeen Ishaq Shaikh and others, 2012 CRI. L.J. 4518** [Bombay High Court] it was held that, application filed by wife for protection order can not be viewed as complaint of offence u/s 31. Provision of bar of limitation for taking cognizance, laid down u/s 468 of Cr.P.C. would not be applicable.

Section 125(3) and 128 OF Cr. P. C

53] In **Poongodi vs Thangavel AIR 2014 SC 24** it is held that Provision of statutes shall not extinguish or limit entitlement of Claimants to maintenance granted by lower Court.

54] In **Kuldip Kaur v. Surinder Singh and Anr. MANU/SC/0451/1988: (1989) 1 SCC 405** held the provision of sentencing Under Section **125(3)** to be a "mode of enforcement" as distinguished from the "mode of satisfaction" of the liability which can only be by means of actual payment. It is further held that a distinction has to be drawn between a mode of enforcing recovery on the one hand and effecting actual recovery of the amount of monthly allowance which has fallen in arrears on the other. Sentencing a person to jail is a "*mode of enforcement*". It is not a "*mode of satisfaction*" of the liability. The liability can be satisfied only by making actual payment of the arrears. The whole purpose of sending to jail is to oblige a person liable to pay the monthly allowance who refuses to comply with the order without sufficient cause, to obey the order and to make the payment. The purpose of sending him to jail is not to wipe out the liability which he has refused to discharge. Be it also realised that a person ordered to pay monthly allowance can be sent to jail only if he fails to pay monthly allowance "without sufficient cause" to comply with the order. It would indeed be strange to hold that a person who "without reasonable cause" refuses to comply with the order of the court to maintain his neglected wife or child would be absolved of his liability merely because he prefers to go to jail. A sentence of jail is no

substitute for the recovery of the amount of monthly allowance which has fallen in arrears. Monthly allowance is paid in order to enable the wife and child to live by providing with the essential economic wherewithal. Neither the neglected wife nor the neglected child can live without funds for purchasing food and the essential articles to enable them to live. Instead of providing them with the funds, no useful purpose would be served by sending the husband to jail. Sentencing to jail is the means for achieving the end of enforcing the order by recovering the amount of arrears. It is not a mode of discharging liability. The section does not say so. At the cost of repetition it may be stated that it is only a mode or method of recovery and not a substitute for recovery.

55] In the case of **Shahada Khatoon v. Amjad Ali MANU/SC/0956/1999: 1999 Criminal Law Journal 5060** in which Section 125(3) of the Cr. P.C. came up for consideration and it was observed that the Magistrate had the power to impose imprisonment for a term extending one month or until payment if sooner made. After that sentence has been suffered for one month, the wife could again approach the Magistrate for similar reliefs, but the Magistrate could not impose sentence for more than one month. This observation came to be made upon rejection of the contention that the liability was a continuing one. For each offence the liability was separate and distinct. This aspect is also came to be considered by a Division Bench of Bombay High Court in the case of **Gorakshnath Khandu Bagal v. State of Maharashtra and Ors. MANU/MH/0517/2005: 2005 Criminal Law Journal 3158**. In that case various judgments of various Courts, including the judgment in the case of Shahada Khatoon (supra) came to be considered. The question of whether the liability of the husband was continuing or not was seen. It was observed that what was considered in the case of Shahada Khatoon (supra) was that until an amount is paid, the husband was not required to be kept in jail. Hence the Division Bench considered that for every breach of the order the maximum sentence was one month and that even if the

breach continued the husband would have to be released if he had served one month's sentence for one breach. This judgment in paragraph 9 considered the consequences of a number of breaches in a single Application that if there are arrears for more than one month then the imprisonment exceeding for a period of one month can be imposed. It further observed that in view of the first proviso to the Section, 12 defaults could be clubbed together and after every 12 defaults, a separate Application is to be filed. Consequently, it is further observed that in that eventuality in each application, as there are maximum 12 defaults, the Magistrate may impose imprisonment extending upto a period of 12 months, but that is outer limit. This view is reiterated in case of **Manoj Thorat vs State of Maharashtra 2010(1)Crimes749**

56] In **Shantha alias Ushadevi and Anr. v. B.G. Shivananjappa MANU/SC/0366/2005: (2005) 4 SCC 468** it has been held that the liability to pay maintenance Under Section 125 Code of Criminal Procedure is in the nature of a continuing liability.

SEARCH FOR PERSONS WRONGFULLY CONFINED :SEC.- 97 CR. P.C.

Confinement must amount to an Offence is sine qua non

57] In the case of **Vishal Jiwan Jogure vs. Smt. Megha Vishal Jogure and another, 2006(1) Criminal Court Cases 1078 (Bombay)**, it was held that power under section 97 of the Code can be exercised only if it is asserted and established that confinement of any person amounts to an offence. By no stretch of imagination, custody of the children with the real father by itself can amount to an offence. Something more has to be alleged and established to support that position.

58] In case of **Marotrao S/O Shamrao Pachare And ... vs. Usha Marotrao Pachare 2004 (1) MhLj 253 [Bombay High Court] [Achalpur Court Case]** it is held that the action under section 97 is to meet emergency. Confinement amounts to an offence sine qua non for the exercise of the jurisdiction under this section. Section 97 does not authorise the Magistrate to decide which of the claimants is entitled to custody of a minor. Such question will always have to be left to the Civil Courts.

Taking away child by father does not amount to confinement

59] In case of **Anil s/o. Baburao Angalwar v/s St. Cyuthia Bernard Samuel w/o. Anil Baburao angalwar and Anr 2007 ALL MR (Cri) 1611** , it was held that the 'taking away of a child by the father from the mother of the child and detaining him in the father's custody does not amount to confinement and consequently under the said circumstances search warrant could not be issued for the production of the child.'

60] In case of **Pramod Kamble vs Joti Kamble 2013BomCR (Cri) 63** It is observed that the invocation of the provisions of Section [97](#), just for securing the custody of the child from the other parent, would not be proper or legal.

CUSTODY OF CHILD

61] Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the Court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the 'welfare of

the child' and not rights of the parents under a statute for the time being in force. In many decisions, the courts have applied the principles relating to grant of custody of minor children by taking into account their interest and well-being as paramount consideration.

62] The word 'welfare' used in Sec. 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weight with the Court as well as its physical well being. **Gourao Nagpal -vs- Sumedha 2009(1) All MR 925 SC.**

63] In **Saraswathibai Shripad v. Shripad VasANJI, AIR 1941 Bom 103**; the High Court of Bombay stated It is not the welfare of the father, nor the welfare of the mother but it is the welfare of the minor alone which is the paramount consideration. Similar view has been expressed in following cases:

- ***In Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840;***
- ***Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, (1982) 2 SCC 544,***
- ***Surinder Kaur Sandhu (Smt.) v. Harbax Singh Sandhu, (1984) 3 SCC 698,***
- ***Chandrakala Menon (Mrs.) v. Vipin Menon (Capt), (1993) 2 SCC 6]***

A just and proper balance must be there in between welfare of the minor and the rights of parents

64] In **Gaurav Nagpal Vs Sumedha Nagpal AIR 2009 SC 557.** It is observed that merely because there is no defect in his personal care and his attachment for his children--which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not

necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

65] In the case of **Mausmi Ganguli vs Jayant Ganguli** **AIR 2008 SC 2262** it is held that no statute can ignore the vital factor of the welfare of the minor. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents insofar as the factual aspects of the case are concerned. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child. It is here that a heavy duty is cast on the Court to exercise its judicial discretion judiciously in the background of all the relevant facts and circumstances, bearing in mind the welfare of the child as the paramount consideration. Thus Welfare of child is paramount consideration for deciding custody of child"

A minor below age of 5 years shall ordinarily be with the mother

66] In recent case of **ROXANN SHARMA . Vs. ARUN SHARMA** **2015 (2) SCALE 488 : MANU/SC/0165/2015** the Honble Apex Court has held that custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother. The onus is on the father to prove that it is not in the welfare of the infant child to be placed in the custody of his/her mother. The wisdom of the Parliament or the Legislature should not be trifled away by a curial interpretation which

virtually nullifies the spirit of the enactment. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the livelihood of the welfare and interest of the child being undermined or jeopardised if the custody retained by the mother.

Custody of Child and Role of mother.

67] In **Anita Kachba .Vs. Krishanakumar Kachba, 2003(1) Mh.L.J. 828** , it is held that the role of mother is of greater importance than that of a father during the earlier years of a child. The basic education plays an important role in the formative age of the child. In the formative years first teacher is the mother. Clean habits can easily be taught by the mother, to the extent it becomes a habit for the child. Interactions with the mother pays rich dividends.

68] In Kiran Lakhani **.Vs. Ajit Lakhani, 2006(2) Mh.L.J. 894** , it is held that a company of mother is most vital and important for all side development of child.

=====

Paper prepared by-

[S. S. Das]
District Judge-2
& Addl. Sessions Judge,
Amaravati

[S. M. Bhosle]
District Judge-4
& Addl. Sessions Judge,
Amaravati

[S.R. Bhajipale]
4th Jt CJSD & Addl. CJM,
Amaravati

[C.R. Balwani]
2nd Jt. CJJD & JMFC
Amaravati

[Y.D. Koinkar]
7th Jt. CJJD & JMFC
Amaravati

=====