

# Law Relating to Procedure for Providing Maintenance in India

Vandita Chahar<sup>1\*</sup>, Prof. (Dr.) Babita Chugh<sup>2</sup>

<sup>1</sup> Research Scholar, Apex School of Law, Apex University, Jaipur

<sup>2</sup> Supervisor, Apex School of Law, Apex University, Jaipur

**Abstract** - This article discusses different laws regarding the procedure for providing maintenance to women in India. This is a descriptive study based on secondary research. It studies the Section 488 (8) Code of Criminal Procedure, 1898 that talks about maintenance. The paper discusses provisions of Section 125 of the Code of Criminal Procedure, 1973. It compares the former law with the present law. It studies the different scenarios of dissolution of marriage vis a vis right of maintenance to wife and children in different cases. The paper also explains the procedural aspect to obtain Maintenance, according to Section 125 of the Cr.PC, 1973.

**Keywords** - Maintenance, Women, Children, Dissolution, Marriage, Entitlement, Husband, Wife, Section 126 (Cr.PC, 1973)

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## INTRODUCTION

The procedure regarding proceeding for obtaining the maintenance allowance under the provisions of Section 125 of the Code of Criminal Procedure, 1973 has been given in Section 126 of this Code. The Sub-section (1) of Section 126 is as under:

**Section 126 Procedure:** (i) Proceedings under Section 125 may be taken against any person on any district:

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

Before enforcement of the Code of Criminal Procedure, 1973 the choice of the aggrieved wife or child was limited only to the undermentioned three forms mentioned in Section 488(8) Code of Criminal Procedure, 1898. No fourth form was available to them.

- (i) Where he is, or
- (ii) Where he or his wife resides, or
- (iii) Where he past resided with his wife or as the case may be, with the mother of the illegitimate child. The Sub-section (1) of Section 126 of the Code of Criminal Procedure, 1973 should be so constructed liberally so that a helpless woman is not

deprived of assistance from a Court easily accessible.

One thing is clear that Section 177 of the Code of Criminal Procedure does not apply to maintenance proceedings under Section 125 of this Code as there is specific provision incorporated in Section 126(1).

It is also held that the old Section 489 prescribes alternative forums to enable a discarded wife or helpless child legitimate or illegitimate to get urgent relief. Proceedings under the Section can be taken against the husband or the father, as the case may be, in a place where he resided permanently or temporarily or where he last resided in any district in India or when he happens to be at the time proceedings are initiated. But this arrangement of forum was creating problems and was not conducive to the interest of the neglected and discarded wives.

Under Section 488(8) of the Code, the place where the wife resided after desertion by husband was not material. This caused great hardship to wives who after desertion were living far away from the place where the husband and wife last resided together. The Law Commission recommended that the venue of the proceeding should also include the place, where the wife may be residing on the date of application. New Section 126(1) of the New Code carries out the recommendation of the Law Commission. Hence the words 'his wife' were added in Section 126(1)(d) after the words where he 'or' and before the words 'resides or.'

It is also held than according to the provisions of Section 126(1)(d) of this Code, the proceedings under Section 125 may be taken against any person in any district 'where he or his wife resides'. Mere residing at the time of presenting is enough. It is not necessary that the petitioner shall continue to reside during the whole period of hearing of such petitions.

In case of maintenance allowance for the children, the jurisdiction of the Court is determined by the residence of the parties and so if the husband and the wife are residing within the jurisdiction of the Court, the Court can award maintenance even if the child is living outside the jurisdiction of the Court and even outside India. The marriage between the couple within the jurisdiction of the Court does not confer jurisdiction on the Court to pass maintenance order under Section 125(1) of this Code.

The term 'in the district' will reference to the jurisdiction of Magistrate has been defined in many cases, though the different view are expressed by the different High Courts in this matter.

In a case it is held that a first class Magistrate generally exercises jurisdiction throughout the whole of the district though he is in charge of a particular area in the district. The application under this Section may be moved in the Court of any Magistrate in the District in which the husband resides but now under the New Code 'or wife resides' is added or is, irrespective of the fact whether the Magistrate is according to the administrative distribution of work, exercising jurisdiction over the place where the husband resides or is or where the wife resides or is. This view is also supported and recommended by the Law Commission in its 41st Report Recommendation for amendment is recorded. But when an application for maintenance under Section 125(1) of the Code has been heard and adjudicated upon, that a second application on the same facts filed before another Magistrate having co-extensive jurisdiction was not maintainable. The provisions of Section 127 cannot be interpreted to mean that a wife will be able to file a fresh application on the same facts every time, she changes her place of residence.

The next term 'resides' has been subjected to conflicting judicial opinions. The word 'Resides' should be undoubtedly liberally construed but at the same time without doing any violence to the language and without defeating the very object of the maintenance provisions.

It is wrong to treat the term 'resides' an equivalent to something in the nature of having a domicile in a particular place or one's place of origin or where one's family lives. But 'resides' means to live or have a dwelling place or an abode, where there is something more than a flying visit and where the man leaves his houses and resides for some time, in the house of his parents in law with his wife Section 126(1) does not necessarily refer also to temporary residence. It suggests certain continuity and if thereby continuity for

such a period of time as to allow it fairly to be said that the husband did reside with his wife for some period, the Section should not be strictly construed to deprive the woman who often in such cases is helpless of assistance from court. It is not possible to fix any arbitrary period of time. Each case must however, be dealt with on its own merits. This distinction between mere visit and residence must be borne in mind. Therefore, it is essential that Court should always try to distinguish where the period of stay was meant merely for a visit or for purpose of residence, although of a temporary character. Therefore, the expression 'resides' unless some intention to remain at a place, something more than casual stay or a flying visit intending shortly to move to one's residence. The term does not cannot only the place whether the husband actually resided either for business or employment, but also his residence and joint family home in the place of birth. A person is at liberty to have two residences with the intention to have the freedom to reside in either of these houses whenever he chooses to do so for the purposes of jurisdiction such person shall be deemed to reside at both the residences.

The words 'or' 'and' 'is' are used in the Section 126 of the Code and the Supreme Court held that the word 'is' connotes in the context of the presence or existence of a person in the district when the proceedings are taken. It is much wider than the word 'resides'. It is not limited by the *animus manendi* of the person or the duration or the nature of his stay. It contemplates the physical presence or of the person at a particular point of limit. This meaning is intended to mean a person, who deserts his wife or child leaving her or it or both of them in any particular district and goes to a distant place or even foreign country but return to that district or neighboring one on a casual or flying visit. The wife can take advantage of this visit and file a petition in the district where he is during his stay. So, too if the husband who deserts his wife, has no permanent residence but is always on the move, the wife can catch hold of him at a convenient place and file a petition under Section 125, when she may accidentally meet him in a place. Where he happens to come coincidentally and take action against him before he leaves the said place. This is a salutary provisions intended to provide for such abnormal crisis.

The provisions of Section 126(2) show by implication that a notice of the application should be issued to the person from whom the maintenance is claimed. This principle is based on the well known Latin Maxim *audi alteram partem*, "it means both sides show should be heard before a conclusion or decision is arrived at. Service of notice or summons has always been a major cause of delay in disposal of maintenance proceedings in Section 126 dealing with the procedure to be adopted in maintenance; proceeding does not contain any specific and distinct provisions for service or procedure on the person

against whom maintenance is claimed. The Section 126(2) only provides that 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 unless such person is willfully avoiding service or willfully neglecting to attend the Court, this provision further establishes the necessity of good and sufficient service of notice of hearing of maintenance application. In proceedings under Section 125 summons must be served in accordance with the provisions of 62 of this Code. The summons should be signed by the Presiding Officer and the same should be served by the police officer.

The maintenance proceedings are according to some decisions of Criminal Proceedings in nature. Hence, the service of summons should be served in the manner laid down in Sections 61 to 67 of this Code. In the absence of service of summons as provided in Sections 61 to 67, an *ex parte* order made under Section 126 of the Code is liable to be set aside.

The provisions of *ex parte* hearing are against the basic principle of natural justice. Both parties shall be heard before a decision is arrived at (*Audi Altaram Partem*). But in maintenance proceedings, the person against whom an order for payment of maintenance is proposed to be made does his best to willfully avoid service or willfully neglect to attend the court. The framers of the Code in form of Section 126(2) provided that all evidence in such Criminal 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 summon cases, provided that if a Magistrate is satisfied that the person against when an order for payment of maintenance is proposed to be made is willfully avoiding or 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 in an application made within three months from the date thereof subject to just terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

It is essential for an *ex-parte* order to be classified as an 'order so made' is that there should be a finding by the Magistrate of his satisfaction about the willful avoidance of service of willful neglect to attend the Court on the part of the respondent husband, it is not further necessary that the finding should be correct.

It is, however, not necessary that the Magistrate must record reasons for his satisfaction before he proceeds to decide the case *ex parte*. If such satisfaction is writ large on the record and reflected in the final order that is sufficient and the failure to record reasons will not be fatal. Section 126(2) does not lay down any form in which the satisfaction is to be recorded. The crux of the matter is whether the Magistrate mind was focused on the aspect in question before proceeded *ex-parte*

or not. If his mind was focused though he referred to any wrong fact or did not refer to mere fact, that would not completely vitiate the proceedings and at best for the petitioner that would be irregularity.

The law is well-settled when it is provided by law that limitation runs from the date of a particular order. limitation runs from the date of the knowledge, actual or constructive of the order, but when the opposite party did not attend the Court and willfully avoided his presence in the Court in spite of the clear notice, then his conduct amounted to willful negligence to attend the Court and it shall be presumed that he had constructive knowledge of the *ex-parte* order and such limitation will run from the date of that order. The knowledge may be actual or constructive. The satisfaction of the Court regarding willful negligence or avoidance must be reflected either in the order-sheet or in *ex-parte* orders.

The aggrieved party may also invoke Section 5 of the Limitation Act for condoning the delay. Section 14 of the Limitation Act requires that each day's delay in filing the application should be explained therefore if there is any unexplained period of delay the same is not to be condoned.

The procedure for recording maintenance proceedings under Section 125 is laid down in Section 126 of this Code which states "All evidences 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 that the person when an order for payment of maintenance proposed to be made willful avoiding services or willfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case *ex-parte* and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to the payment of costs to the opposite party as the Magistrate may think just and proper.

Evidence of both parties should be recorded as provided in summons cases. But the party who is claiming maintenance should lead its evidence first. When the record shows that the Court did not follow the summon procedure as laid down by Section 126(2) of the Code. But Court followed summary trial procedure, and then on this ground the proceedings are liable to be quashed since the defect is not a curable one. The Court should pass an order under Section 125 of this Code on an application of maintenance after examining the witnesses and not merely on the affidavits of the parties.

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**Corresponding Author**
**Vandita Chahar\***

Research Scholar, Apex School of Law, Apex University, Jaipur