

CHAPTER 7

Maintenance Cases

Part A

PROCEEDINGS UNDER SECTION 488, CRIMINAL PROCEDURE CODE [SECTION 125 OF NEW CODE]

1. Application of Section 488, Cr. P.C.—Proceedings under Section 488 of the Code of Criminal Procedure [Section 125 of new Code] are of a Criminal character, and its provisions must be strictly followed. The section is not intended to provide for all possible cases in which a wife may be entitled to receive separate maintenance from her husband and it in no way overrides the Civil law or excludes the jurisdiction of the Civil Courts. A Magistrate exercising jurisdiction under his section is bound to exercise it in accordance with its terms and not otherwise; and especially not to deviate from them into orders which may appear to him to be better adapted to secure a fitting support to the wife, but are not warranted by the section.

2. Complaint to be explained to husband—When a husband appears in obedience to a summons issued on the application of a wife for a maintenance order, the complaint and statements of the wife in her examination should be read and explained to him, and he should be called on to answer the claim.

3. Points to be proved—Before a maintenance order in favour of the wife can be made, it must be made to appear, first that the applicant is the wife of the husband at the time when the order is made; secondly, that the husband has sufficient means to maintain her, and thirdly, that he refuses or neglects to maintain her.

4. Proof of marriage—If the marriage is denied, the question must be inquired into and decided by the Magistrate.

5. Ground on which order may be refused—An order of maintenance must be refused, if it appears either:

(1) that the wife is living in adultery, or

(2) that without any sufficient reason she refused to live with her husband, or

(3) that she and her husband are living apart by mutual consent [sub-section (4) of Section 488] [now see Section 125 of new Code].

With regard to clause (2) above, attention is drawn to a proviso added to sub-section (3) of Section 488 [Now See 125 of new Code] by Act IX of 1949, which provides that if a husband has contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him. Act IX of 1949 has been repealed by Act XLVIII of 1952 but in view of Section 4 of the Repealing Act the substantive portions incorporated in the Code became a part and parcel of the Code and are not affected by the Repealing Act (vide, AIR 1955 Punjab 141). Attention may also be drawn here to Section 18(2) of the Hindu Adoptions and Maintenance Act, 1956 (No. 78 of 1956), which makes special provision for the right to separate residence and maintenance under certain circumstances in the case of Hindu married women.

Ordinarily, it will not be necessary to enter into any of these matters unless an objection is taken on one of the above grounds by the husband.

6. Maintenance order to be refused in certain cases—It follows, that if it should appear that the petitioner never was the wife, or has ceased to be the wife of the respondent, as, for instance, that she had only lived with the respondent as his mistress, or that the husband has validly divorced her before an order of maintenance is made, the application must be dismissed.

7. Means of husband to be considered—If the Magistrate is satisfied that the wife is entitled to an order for maintenance, he should further satisfy himself before making the order, what the actual means of the husband are and what other persons, if any, are lawfully dependant upon him.

The word 'means' in Section 488 includes earning capacity. Hence when a man is healthy and able bodied he should be taken to have the means to support his wife.

(Vide AIR 1955 All. 320, AIR 1944 Lahore 392, AIR 1939 Lahore 24).

8. Needs and social position of wife to be considered—In fixing the allowance payable by the husband, regard must be had to all these matters as well as to the needs and the social position of the wife.

9. Order must be for a cash monthly allowance not exceeding Rs. 500 a month—An order for maintenance must be for a sum of money, payable as a monthly allowance, from the date of the order of from the date of the application for maintenance. The maximum limit has been raised from rupees one hundred per month to rupees five hundred per month by Act No. 26 of 1955. The allowance should be made payable to the wife or to such other person on her behalf as the Magistrate may in his order direct. Under ordinary circumstances it should be made payable to the wife herself.

As it is found that irregularities are frequently committed in making this order, a form of order of maintenance has been prescribed by the High Court. This form should be used in all ordinary cases.

10. Maintenance order should be unconditional and for cash allowance only: Other conditions cannot be imputed even by consent of parties—The law does not warrant an order that the allowance be paid wholly or partly in grain either monthly or annually; nor that clothing be allowed, nor that the husband provide a house in addition to the allowance; nor an order conditional on the wife living in a house provided by her husband, or in any particular place; not an order for payment of cash as an alternative for payment in some other manner.

(*Vide* 13. PR. 1876, 3 P. R. 1887, 31 P.R. 1887, AIR 1943 Lahore 59).

There can be no objection to the parties compromising before a Magistrate in a proceeding under Section 488 [Section 125 of new Code] by agreeing between themselves as to what is the proper rate of maintenance. This agreement may in itself be sufficient proof of neglect or refusal to maintain on the part of the husband. Where, however, the compromise is with respect to other matters as well which do not come within the purview of Section 488 [Section 125 of new Code] or where the compromise amounts to an agreement to live separately by mutual consent, then the compromise cannot be given effect to in a Criminal Court. But if husband and wife agree to the rate of maintenance without adding conditions which cannot form a part of the order under Section 488 the Magistrate may award a monthly allowance in terms of the compromise; but no other order for maintenance can be made by the Magistrate on the ground that the parties consent to it [*Vide*, AIR 1932 Lahore 349 (2)].

11. Security from husband cannot be taken even by agreement—Similarly, if the wife, as sometimes happens, either of her own accord or upon her husband's offer to maintain her, agrees to live with him, provided, that he gives security for her good treatment, the Magistrate has no authority under this section either to require security from the husband or to accept it if offered by him. The wife must be referred to a separate proceeding under Section 107 of the Code of Criminal Procedure if she desires security to be taken from him for keeping the peace.

12. Orders permissible—In short, the only final order a Magistrate can properly make on an application by the wife for maintenance is (1) an order granting a monthly cash allowance unconditionally, or (2) an order either dismissing the application or, for sufficient cause, permitting the wife to withdraw her application, which would have the same effect as an order of dismissal.

13. Ex parte trial, Procedure—As to procedure, the Magistrate should ordinarily insist upon the personal attendance of both the wife and the husband at one of the preliminary hearings and should examine them fully in order to ascertain the true facts, but if the Magistrate is satisfied that the husband is wilfully avoiding service or wilfully neglects to attend the Court, he may proceed to hear and determine the case *ex parte*.

The evidence taken should be recorded in the manner prescribed in Section 355 [Section 274(1)(2) of new Code] of the Code of Criminal Procedure for summons-cases, that is, by the Magistrate making a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

Sub-Section (6) of Section 488

14. Contents of Judgment—At the close of the proceedings, a judgment should be written in the language of the Court or in English, which should state briefly the points for decision, the decision thereon and the reason for the decision. When the application for maintenance is granted, the form prescribed should be filled up and attached to the judgment as the formal ‘order of maintenance’.

15. Enforcement of order—In view of Section 490 [Section 128 of new Code] of the Code, a copy of the said order shall be given without payment to the person in whose favour the order is made or to his guardian, if any, or to the person to whom the allowance is to be paid. Such order can be enforced by any Magistrate in any place where the person against whom it is made may be, after the Magistrate has satisfied himself about the identity of the parties and the non-payment of the allowance.

16. Enforcement of order—No warrant can issue for the recovery of any amount due as maintenance under Section 488 unless application is made to the Court within a period of one year from the date on which the amount became due. [Second proviso to sub-section (3) of Section 488 (See Section 125 of new Code)].

17. Ditto—The mode of enforcement of an order of maintenance is provided in sub-section (3) of Section 488 (See Section 125 of new Code) of the Code of Criminal Procedure. If the husband offers to maintain his wife on condition of her living with him, and she refuses to live with him, the Magistrate may consider any grounds of refusal stated by her and enforce the maintenance order notwithstanding such offer if he is satisfied that there is just ground for so doing”.

Part B

ENFORCEMENT OF MAINTENANCE ORDERS BETWEEN INDIA AND OTHER COUNTRIES ON RECIPROCAL BASIS

I. The Maintenance Orders Enforcement Act, 1921 (XVII of 1921) which was originally enacted to facilitate the enforcement in India of Maintenance Orders made in His Majesty’s Dominions and Protectorates and vice versa has been amended by Act XLVII of 1952. Now, under the amended Act arrangements can be established for the enforcement of Maintenance Orders on a reciprocal basis between India and any other ‘reciprocating territory’ outside India.

II. ‘Reciprocating territory’ is defined in the amended Act as any country or territory outside India in respect of which the Act for the time being applies by virtue of a declaration under Section 3 of that Act. Section 3, as substituted by Act XLVII of 1952, provides that if the Central Government is satisfied that legal provision exists in any country or territory outside India for the enforcement within that country or territory of maintenance orders made by Courts in India, the Central Government may by notification in the official Gazette, declare that the Act applies in respect of that country or territory and thereupon it shall apply accordingly.

III. In exercise of the powers conferred by Section 12 of the Maintenance Orders Enforcement Act, 1921 (XVIII of 1921) and in supersession of the notification of the Government of India in

the late Home Department, No. F. 120-22, dated the 22nd September, 1923, the Central Government has made the following rules, namely:

- 1.** (1) These rules may be called the Maintenance Orders Enforcement Rules, 1955.

(2) They extend to the whole of India except the State of Jammu & Kashmir.
- 2.** In these rules the expression “the Act” means the Maintenance Orders Enforcement Act, 1921 (XVIII of 1921).
- 3.** The Officer to whom copies of maintenance orders shall be sent under sub-section (1) of Section 4 of the Act shall be, in the case of a High Court, the Registrar of such Court and, in the case of a Court of summary jurisdiction, the presiding officer of such Court.
- 4.** When such copy is received by the Registrar or Officer the contents thereof shall be entered in a register maintained for the purpose in the form shown in the Schedule to these rules.
- 5.** The notice referred to in sub-section (4) of Section 6 of the Act shall be issued to the person who applied under sub-section (1) of that section; it shall contain particulars of the further evidence which is required by the Court in the reciprocating territory and shall also state the date when the further evidence will be taken.
- 6.** The Officer of a Court of summary jurisdiction to whom the documents referred to in sub-section (1) of Section 7 of the Act may be sent under the provision of that sub-section shall be the presiding officer of such Court.
- 7.** (1) When an order has been registered under Rule 4, the party in whose favour the order has been made shall be entitled to appear, either in person or by pleader or duly authorised agent before the High Court or Court of summary jurisdiction in which the order has been registered or as the case may be, before the Civil Court named by such High Court under sub-section (1) of Section 8 of the Act and to move such Court to enforce the order.

(2) If within a period of one month from the date of the registration of the order, or as the case may be, of its transfer to the Civil Court named by the High Court no such appearance has been made, the High Court, Civil Court or Court of summary jurisdiction as the case may be, shall appoint an officer of the Court to apply for execution of the order as such officer shall be entitled to obtain execution thereof on behalf of the person in whose favour the order has been made and shall pay into the Court any monies realised in execution of the order.

Provided that the appointment of such officer shall cease to have effect in the event of the subsequent appearance under sub-rule (1) of the party in whose favour the order has been made.
- 8.** A Court of summary jurisdiction shall exercise in respect of a maintenance order registered or confirmed by it under the Act the powers conferred on it by sub-section (3) excluding the proviso thereto and sub-section (7) of Section 488 of the Code of Criminal Procedure, 1898, [See Section 125 of new Code] in respect of an order passed by it under sub-section (1) of that section.

9. (1) During the pendency of proceedings under the Act or these rules with reference to a maintenance order made in reciprocating territory, whether such order be provisional or otherwise, the person against whom the order has been made shall without delay notify the Court in which such proceedings are pending of any change in his address.

(2) The Court shall at the outset of all such proceedings give notice to such person of the obligation imposed by sub-rule (1).

10. The charges referred to in Section 9 of the Act, and the sum in rupees required for the purchase of a draft for the amount of the sum awarded as maintenance in sterling or other non-rupee currency shall be assessed by the Court at the time of the registration or confirmation of the order as the case may be and any sum recovered in excess as the result of such assessment from the person against whom the order has been made shall be refunded to such person.

11. Any payment required by a Court to be made in respect of a maintenance order registered or confirmed by it shall be made through the Court unless the Court otherwise directs.

12. A Court recovering any one on account of maintenance in accordance with a maintenance order registered or confirmed by it under the Act shall forthwith cause the said sum to be remitted by the local head office or branch of the State Bank of India, or, where there is no such local head office or branch, by any other agency which the Court considers suitable to the Clerk of the Court from which the order has been received or such other officer or person as may be specified by that Court for that purpose.

13. (1) For every summons requiring the attendance of a witness or the production of a document which is issued by a Court of summary jurisdiction in the course of proceedings under Section 6 or Section 7 of the Act, there shall be charged to the person at whose instance the summons is issued such fee as would be chargeable for the issue of a like summons in a proceeding under Section 488 of the Code of Criminal Procedure, 1898. [See Section 125 of new Code].

(2) For any process issued in the course of proceedings taken in pursuance of Section 8 of the Act there shall be chargeable in the case of proceedings in a High Court or of a subordinate Civil Court named by a High Court such fee as would be chargeable for the issue of a like process in the course of the execution of a decree of such Court and in the case of proceedings in a Court of summary jurisdiction such fee as would be chargeable for the issue of a like process in the course of proceedings under Section 488 of the Code of Criminal Procedure 1898. [See Section 125 of new Code].

(3) Fees of the nature referred to in sub-rule (2) shall not be chargeable in advance but the amount thereof shall be added to the amount to be recovered from the person against whom the order has been made.

(4) The amount of the actual expenditure incurred in sending a certified copy of the record to the Central Government under sub-section (6) of Section 7 of the Act and in its subsequent transmission to the Court which made the provisional order, shall be recovered from the applicant for the rescission or variation of that order as confirmed and the confirming Court may

decline to send the copy for transmission until the probable amount of such expenditure has been deposited by the applicant:

Provided that any excess of an amount so deposited over the actual expenditure shall be refunded to the applicant.

14. When a Court of summary jurisdiction has under sub-section (4) of Section 7 of the Act confirmed with or without modification a provisional maintenance order made by a Court in a reciprocating territory has decided not to confirm such order, notice of such confirmation or decision as the case may be, shall be sent to the Court from which the order, issued and to the Central Government.

SCHEDULE

(Referred to in Rule 4)

Register of maintenance orders made by Court outside India for enforcement in India

(Except the States of Jammu and Kashmir)

Serial No.	Name of the Court making the order	Nature of the order with particulars as to parties	Name and address of the person against whom the order is made	Amount recoverable	Date of order	Date of receipt of the order by Court in India	Date of Issue of notice or order	Date of recovery of any amount due under the order	Date of despatch of money for remittance under Rule 12
1	2	3	4	5	6	7	8	9	10

Government of India, Ministry of Law, Notification No. S.R.O. 1618, dated the 25th July, 1955.

IV. The Central Government has by notification in the official Gazette, issued under Section 3 of the Act declared the Act to apply to the following countries and territories:

(i) *Colony of Mauritius.*

(Government of India Ministry of Law, Notification No. S.R.O. 3389, dated 6th November, 1954, published in Gazette of India of the same date).

(ii) *Zanzibar Protectorate.*

(Government of India, Ministry of Law, Notification No. S.R.O. 3425, dated 8th November 1954, published in Gazette of India dated October 2, 1954).

(iii) *Somaliland Protectorate.*

(Government of India, Ministry of Law, Notification No. S.R.O. 3425, dated 8th November, 1954, published in Gazette of India dated November 20, 1954).

(iv) *Colony and Protectorate of Kenya.*

(Government of India, Ministry of Law, Notification No. S.R.O. 818, dated 4th March, 1954, published in Gazette of India dated March 13, 1954).

(v) *Uganda Protectorate.*

(Government of India, Ministry of Law, Notification No. S.R.O. 2411, dated 16th July, 1954, published in Gazette of India dated July 24, 1954).

(vi) *Colony of Sevchelles.*

(Government of India, Ministry of Law, Notification No. S.R.O. 2 dated 21st December, 1954, published in Gazette of India dated January 1, 1955).

(vii) *Northern Rhodesia.*

(Government of India, Ministry of Law, Notification No. S.R.O. 6, dated 23rd December 1954, published in Gazette of India, dated January 1, 1955).

(viii) *Colony of Singapore.*

(Government of India, Ministry of Law, Notification No. S.R.O. 1768 dated 12th August, 1955, published in Gazette of India, dated August 13, 1955).

(ix) *Federation of Malaya.*

(Government of India, Ministry of Law, Notification No. S.R.O. 1869, dated 27th August 1955, published in Gazette of India, dated September 3, 1955).

(x) *Nyasaland.*

(Government of India, Ministry of Law, Notification No. S.R.O. 3523, dated 16th November, 1955, published in the Gazette of India, dated November 26, 1955).

(xi) *Southern Rhodesia.*

(Government of India, Ministry of Law, Notification No. S.R.O. 1075 dated 8th May, 1956, published in the Gazette of India, dated May 8, 1956).

(xii) *Union of Burma.*

(Government of India, Ministry of Law, Notification No. S.R.O. 673, dated 16th March, 1956, published in the Gazette of India, dated 24th March, 1956).

(xiii) *Colony of Sarawak.*

(Government of India, Ministry of Law, Notification No. S.R.O. 1891, dated 27th August, 1956, published in the Gazette of India, Part II, Section 3, dated September 1, 1956).

V. The Central Government had by orders passed under old Section 3 (before its substitution by Act XLVII of 1952) extended the Act to the following parts of His Majesty's Dominions and British Protectorates' besides the territories mentioned in Para IV above.

(i) England and Ireland.

(ii) Western Australia.

(iii) New South Wales.

(iv) Basutoland, the Bechuanaland Protectorate and Swaziland.

(v) Victoria.

(vi) Commonwealth of Australia.

(vii) Union of South Africa.

(viii) Colony of Ceylon.