
***LIVING IN ADULTERY – NOT A BAR TO SEEK
MAINTENANCE?***

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Abstract:

By way of this article, the author would like to highlight the jurisprudential and philosophical reasons which further the agenda of enabling the interpretation and amendment of existing laws, in a way which strikes a balance between the propagation of justice in favour of all sexes. More specifically, the author wishes to propose a more investigative and evaluative approach that ought to be adopted by the judiciary while deciding petitions under Section 125 of the Code of Criminal Procedure, 1973, when an objection under Section 125(4) of the same has been raised by the husband.

INTRODUCTION:

Man, whether in the role of a son, a father or a husband, has a socially embedded duty to provide for the well-being – physical as well as financial - of his elderly parents, children and wife. This duty cast upon men is a consequence of the entrenched societal belief and mindset which has prevailed over the world, and especially in India, that the husband is the bread-earner of the family, whereas the duty of the wife is limited to taking care of the household. It is, perhaps, because of this social system that women have often been considered to be the inferior gender, as they were never afforded an equal opportunity to be educationally qualified – a privilege afforded only to men.

In order to negate the above-mentioned societal perceptions, the laws in India have been framed in such a manner that they specifically envisage the betterment of women under the wider ambit of 'social justice'. The makers of our Constitution have gone a step ahead to ensure 'social justice' for women by allowing the State to make any special provision for women and children, despite the mandate of Article 15 of the Constitution of India which stipulates that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. The reason for such an exemption is the prejudice that women have been constrained to endure historically.

THE OVERRIDING IMPORTANCE OF SECTION 125 OF THE CODE OF CRIMINAL PROCEDURE, 1973:

Section 125 of the Code of Criminal Procedure, 1973 (Hereinafter referred to as the 'Code'), is one such exempting provision in favour of women, which casts upon a man a fundamental duty to financially support his wife in the event she is unable to maintain herself. It is well settled through various judicial pronouncements, that the criteria required to be fulfilled for availing maintenance under this provision is that the woman must be incapable of sustaining herself from the financial resources she currently possesses. Contentions of the husband such as, *inter alia*, his own limited financial means or other dependents of the family under his care, have been held by the judiciary to be mere "bald excuses" holding no weight in the eyes of law. The law is essentially sacrosanct on this aspect: if the husband is capable of earning and is able-bodied, there is no plausible reason for him to escape his financial liabilities towards his wife (and children).

The above-mentioned views of the judiciary can be sourced, *inter alia*, to the following judicial pronouncements:

In the judgment titled “[Chaturbhuj Vs Sitabai](#)”[2] the Hon'ble Supreme Court of India has observed as under:

“7. ... The appellant has placed material to show that the respondent-wife was earning some income. That is not sufficient to rule out application of Section 125 Cr.P.C. It has to be established that with the amount she earned the respondent-wife was able to maintain herself.

8. ... Where the personal income of the wife is insufficient she can claim maintenance under Section 125 Cr.P.C. The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband.”

Furthermore, *vide* judgment titled “[Shamima Farooqui Vs Shahid Khan](#)”[3] the Hon'ble Supreme Court of India has held as under:

15. ... Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance Under Section 125 Code of Criminal Procedure, unless disqualified, is absolute right.

THE EXCEPTIONS UNDER SUB-SECTION 4 TO THE GRANT OF MAINTENANCE UNDER SECTION 125 OF THE CODE:

Yes, the above mentioned judicial pronouncements clearly emphasise the overriding importance and gravity of a statute such as Section 125 of the Code; as seen above, there are virtually no excuses or reasons given by the husband for refusing to maintain his wife / children, which are acceptable

to the Indian Courts. However, perhaps the framers of this legislation sensed that this provision would be excessively onerous for men, for they also imposed a rider on the grant of maintenance to the woman under this section, in the form of sub-section 4 of Section 125 of the Code. Sub-section 4 of section 125 of the Code protects him from maintaining his wife, or bearing her litigation expenses, as the case may be, if the wife is living in adultery, is refusing to live with him without sufficient reason, or is living separately from him by mutual consent.

In light of sub-section 4 of Section 125, it now becomes essential to evaluate the nature and extent of the action(s) of the wife which may preclude her from claiming maintenance from her husband under Section 125 of the Code, by considering the following questions:

- A. Firstly, will just a single, solitary and isolated instance of adultery be enough to disqualify a woman from her rights under Section 125 of the Code?
- B. Secondly, will the extenuating circumstances surrounding her living in adultery/adulterous actions be relevant and ought to be considered while allowing or dismissing her petition for maintenance in light of section 125(4) of the Code?

A SINGLE, SOLITARY AND ISOLATED INSTANCE OF ADULTERY, WHETHER SUFFICIENT DO DISQUALIFY A WOMAN FROM HER RIGHTS UNDER SECTION 125 OF THE CODE:

The first question posed above has been extensively and effectively dealt with by various courts of India in multiple judicial pronouncements. The language of the concerned provision itself uses the phrase “living in adultery”, which implies something more substantial than a single act of adultery. This interpretation has been adopted by the judiciary as well: the Hon’ble High Court of Gujarat in [*Giraben Sandipbhai Jotangiya & Ors. v. State of Gujarat & Ors*](#)[4] has held that a *continuous* adulterous relationship

on the part of the wife is a vital requirement for her to be disentitled to claim maintenance from her husband under section 125 of the Code. The Hon'ble Court, while delivering a detailed judgment, has also relied upon the observations of various courts from different parts of the country to the effect that a *continuing* adulterous relationship on the part of the wife is one of the fundamental requirements for her to be disqualified from claiming maintenance from her husband by virtue of section 125(4) of the Code. The relevant portion of this judgment is as under:

“10. ... The expression “living in adultery” has been discussed and decided by the Court to how that this connotes a course of adulterous conduct more or less continuous. An occasional lapse would not be a sufficient reason for refusing maintenance within the ambit of Subsection (4) of Section 125 of Code.

11. ... The Orissa High Court has also held that there must be clear proof of adultery and a suspicion nurtured by the husband will not disentitle the wife to receive the maintenance under the Code” 12(a) Reference is made of the decision of the Madras High Court of Kasturi v. Ramaswamy, reported in 1979 Cr.LJ 741, wherein it is held and observed that “living in adultery” means outright adulterous conduct on the part of the wife and stray act of illicit relationship will not amount to “living in adultery”.”

THE EXTENUATING CIRCUMSTANCES SURROUNDING THE WIFE'S LIVING IN ADULTERY / ADULTEROUS ACTIONS, WHETHER RELEVANT FOR ADJUDICATING HER PETITION FOR MAINTENANCE IN LIGHT OF SECTION 125(4) OF THE CODE?

With the first question having been answered in the negative, it is now expedient that the second question, which is perhaps the more important one, also be delved into. In this regard, it is important to emphasize on another portion of Section 125(4) of the Code, which states as under:

“No wife should be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceedings, 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.”

Emphasis Supplied

The words “without any sufficient reason” in the above-mentioned provision open the door for scrutiny and debate on which circumstances constitute *sufficient reasons* for justifying, or at least condoning, the wife’s refusal to live with her husband as his wife, irrespective of whether they are staying under the same roof or not, for the purpose of granting her maintenance under Section 125 of the Code. The Hon'ble High Court of Delhi in its judgment titled “[Pradeep Pant & Anr vs Govt Of Nct Delhi](#)”[5], which has relied upon the judgment of the Hon'ble Supreme Court of India titled “[Sureshta Devi Vs Om Prakash](#)”[6] has clarified the concept of a couple “living separately” as under:

“The expression “living separately”, connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition.”

Seeing that it has always been the endeavour of the legislature and the judiciary to make and interpret, respectively, laws in the most benevolent and favourable manner possible, will the courts be inclined towards dismissing a petition under Section 125 of the Code filed by the woman (in capacity of a wife) simply because the narrow pre-requisites, with respect to ‘living in adultery’, mentioned under sub-section (4) of Section 125 are met in black and white? No. This simply cannot be the manner in which such cases are decided.

The objective of beneficial legislations such as Section 125 of the Code has been clearly brought out in [Savitaben Somabhai Bhatiya Vs State of Gujarat and Ors](#) [7].:

“It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves.”

Additionally, the Hon'ble Supreme Court of India has, in relation to the Protection of Women from Domestic Violence Act, 2005, observed as under vide [Krishna Bhattacharjee Vs Sarathi Choudhury and Ors](#) [8].

4. Regard being had to the nature of the legislation, a more sensitive approach is expected from the courts where under the 2005 Act no relief can be granted, it should never be conceived of but, before throwing a petition at the threshold on the ground of maintainability, there has to be an apposite discussion and through deliberation on the issues raised. It should be borne in mind that helpless and hapless “aggrieved person” under the 2005 Act approaches the court under the compelling circumstances. It is the duty of the court to scrutinise the facts from all angles whether a plea advanced by the Respondent to nullify the grievance of the aggrieved person is really legally sound and correct. ... Before throwing a petition at the threshold, it is obligatory to see that the person aggrieved under such a legislation is not faced with a situation of non-adjudication, for the 2005 Act as we have stated is a beneficial as well as assertively affirmative enactment for the realisation of the constitutional rights of women and to ensure that they do not become victims of any kind of domestic violence. “

THE PROCEDURE SUGGESTED TO BE ADOPTED BY COURTS WHILE CONSIDERING SUCH EXTENUATING CIRCUMSTANCES:

In keeping with the above guidelines, in order to hold that a woman is disentitled from claiming maintenance from her husband, by reason of having fallen under any of the 3 exceptions provided under sub-section 4 of Section 125 of the Code, the courts must attempt to identify and evaluate the circumstances outside the woman's control that might have constrained her to take such a drastic step in the first place; be it her involvement in an adulterous relationship, or her refusal to live with her husband. The husband may have abandoned his wife; the husband may have entered into an adulterous relationship himself with another woman; the husband may be impotent on account of which the consummation of the marriage may have become impossible; or the husband may have emotionally neglected and deserted his wife, leading to severe loneliness, despair, hopelessness and a loss of self-confidence in the wife, which in turn may have pushed her to seek happiness outside her marriage as a last resort. These circumstance are merely indicative and not exhaustive. However, despite these circumstances, the wife may not want to sever the marital ties for reasons such as, *inter alia*, the sake of her children, financial dependency, lack of support from her own parents or societal beliefs.

If during the process of inquiry and evaluation, the court is satisfied that the adulterous actions of the woman were triggered by some *mala fide* or immoral conduct of her husband, or on account of the husband's actions and inactions, then the woman ought to be held to be entitled to maintenance from her husband despite her adulterous actions, and the husband's objections to such entitlement ought not to be accorded value by the Courts while deciding her claim to maintenance under this provision. From a legal standpoint, doing so would be in keeping with the manner in which the legislature would have wanted this provision to be interpreted; these extenuating circumstances ought to constitute

“sufficient reasons” for all 3 exceptions stipulated in Section 125(4) of the Code, including ‘living in adultery’.

CONCLUSION:

In conclusion, it is pertinent to emphasize that, in the event a petition filed by a woman is dismissed on a *prima facie* objection by her husband to the effect that she is has been adulterous or is living in adultery, without any judicial inspection of the circumstances which constrained her to take such a step, the entire intent of the legislation of Section 125 of the Code shall be defeated. Therefore, to preserve and uphold this legislative intent of the provision, the Courts ought to make a substantive effort to understand the compelling circumstances which constrained the wife to take any of the steps described under Section 125(4) of the Code (be it living in adultery and / or refusing to live with the husband), as well as the extent of the impact of the husband’s own actions and inactions on such actions of the wife. Only after scrutinising these factors, and keeping in mind the sanctity of Section 125 of the Code, must the Courts take a conscious and informed decision regarding the disentitlement of the wife to maintenance under this provision.

- 1 Proprietor, Adab Singh Kapoor & Associates (“Firm”), assisted by
Shefali Menezes, Associate at the Firm
- 2 AIR 2008 SC 530
- 3 Criminal Appeal Nos. 564-565 of 2015 (Arising out of SLP (Crl.) Nos.
6380-6381 of 2014), Decided On 06.04.2015
- 4 (2016) 1 GLR 856
- 5 Decided on 27th April 2012 by the Hon'ble High Court of Delhi
- 6 1992 AIR 1904
- 7 2005 Cri LJ 2141
- 8 2015 12 SCALE 521