that there is reason to believe that he is doing so with a view to committing a cognizable offence, the Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit.

The object of his section is to check and control the persons who are likely to commit offences and it cannot be denied that this cannot be done unless they are prevented from doing so by resorting to provisions of this kind.[38]

The provisions of Section 109 are so stringent that it may be made an engine of oppression unless care is taken by Magistrates to prevent its abuse. The object of the section is to enable Magistrates to take action against suspicious strangers lurking within their jurisdiction.[39]

The words "conceal presence" in Section 109 are sufficiently wide to cover not only the concealment of bodily presence in a house or grove etc., but also the concealment of appearance by wearing a mask or covering the face, or disguising by wearing a uniform, etc.[40]

In order to attract the section two conditions will have to be satisfied: *i)* taking precautions to conceal presence; and *ii)* the concealment must be with a view to committing a cognizable offence.[41]

(c) *Proceedings against habitual offenders.*—Section no provides as follows:

no. When [42][an Executive Magistrate] receives information that there is within his local jurisdiction a person who—

Security for good behaviour from habitual

is by habit a robber, house-breaker, thief, or forger, or

is by habit a receiver of stolen property knowing the same to have been stolen, or

habitually protects or harbours thieves, or aids in the concealment or disposal of stolen property, or

habitually, commits, or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the Indian Penal Code (45 of i860), or under Section 489-A, Section 489-B, Section 489-C or Section 489-D of that Code, or

habitually commits, or attempts to commit, or abets the

38. **Joint Committee Report, p. xi.**

39. ***Dasappa* v, *State of Karnataka,* 1975 Cri Lj 1613, 1614 (Kant).**

40. ***Abdui Ghafoorv. Emperor,* (1944) 45 Cri LJ 2,19, 220: AIR 1943 AH**

46 *State of Mysore* v. *Koti Poo jury,* (1965} 2 Cri LJ 517: AIR 1965 Mys 264, 266; *Satish Chandra Sarkar* v. *Emperor,* (1912) 13 Cri LJ *161,* 162: ILR (1912) 39 Cal 456; *Sheetal Baksh Singh* v. *R.,* (195°) 5[1] Cri d 609: AIR 1950 All 184; *Preo Nath Datta* v.

42. *Subs,* for "a Judicial Magistrate of the first class" by Act 63 of 1980,

(z) any offence under one or more of the following Acts, namely—

{a) the Drugs and Cosmetics Act, 1940 (23 of 1940);

(b) the Foreign Exchange Regulation Act, 1973 (46 of 1973}[43] [44] [45] [46]

(c) the Employees' Provident Fund [43] [44][and Family Pension Fund] Act, 1952, {19 of 1952);

{d) the Prevention of Food Adulteration Act, 1954 (37 of 1954);

[e) the Essential Commodities Act, 1955 {10 of 1955); *if)* the Untouchability (Offences) Act, 1955 (22 of [1955);

[45] *(g)* the Customs Act, 1962 (52 of 1962);[45]

[46][* *

[4]*%h)* the Foreigners Act, 1946; or]

{it) any offence punishable under any other law providing for the prevention of hoarding or profiteering or of adulteration of food or drugs or of corruption, or *(g)* is so desperate and dangerous as to render his being at large without security hazardous to the community, such Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit.

Persons who habitually commit offences of anti-social nature such as those relating to adulteration of food or drugs or foreign exchange or customs or hoarding and profiteering or corruption deserve perhaps even greater control than persons who habitually commit offences like theft etc. These offences have, therefore, been included in the section.[47] [48] [49] The object of the section is to protect the public against hardened and habitual criminals.[48] [49]

The information received by the Magistrate under this section should not be vague and must indicate that the person against whom the information is given is by *habit* a robber, housebreaker, etc.[4'] The police report reproducing the words of the section and merely giving a bad name to a person does not really give information within the meaning of this section.[50]

The words "habit", "habitually" have been used in the sense of depravity of character as evidenced by the frequent repetition or commission of the offences mentioned in the section.[51] There is not the slightest doubt

43. Ed.: The Foreign
44. *Ins.* by the Repealing and Amending Act, 1974 (56 of 1974), S.
45. The word "or" *omitted* by Act 25 of 2005, S. 14(f) {w.e.f.
46. *Ins.* by Act 25 of 2005, S. 14(H) (w.e.f. 23-6-2006).
47. *See*, Joint Committee Report, p. xii.
48. *K.S. Rathinam Filial, re,* (1938) 39 Cri LJ
49. *Narendra Nath Jba, re*, (1938} 39 Cri LJ 811: AIR 1938 Pat 533.
50. *Nikka Ram* v. *State*, 1954 Cri LJ 49, 50: AIR 1954 Punj 6. See, *Harcharan* v. *State of U.F.*, 2008 Cri LJ 2972 (All).
51. *Bhubaneshwar Kuer* v. *Emperor*, (1927) 28 Cri LJ 359, 361:

that the expressions like "by habit";, "habitual", "desperate", "dangerous", "hazardous" cannot be flung in the face of the counter-petitioner with laxity of semantics. The court must insist on specificity of facts and be satisfied that a consistent course of conduct convincing enough to draw the inference that by confirmed habit the counter-petitioner is sure to commit the offences mentioned if he is not proceeded against under Section nod[2]

The Supreme Court has directed the trial Magistrates to discharge their duties when trying cases under Section no with great responsibility, and whenever the counter-petitioner is a prisoner to give him the facility of being defended by a counsel. If the State is not in a position to render legal aid to such a person in custody, whether it be on account of financial stringency or otherwise, the entire proceeding may be vitiated by such failure on the part of the state to render legal aidd[3]

It may be noticed that unlike in Sections 108, 109 the bond to be executed under this section must be with sureties.

28.7 Preliminary procedure for initiating action under Sections **107** to **110**

(1) *Order requiring the respondent to show cause*.—When a Magistrate acting under Sections 107, 108, 109 or no, deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.[52 53 54 55] [S. m]

Since the person to be proceeded against has to show cause, it is but natural that he must know the grounds for apprehending a breach of the peace or disturbance of the public tranquillity at his hands. Although Section in speaks of the "substance of the information" it does not mean the order should not be full. It may not repeat the information bodily but it must give proper notice of what has moved the Magistrate to take the action. This order is the foundation of the jurisdiction and the word "substance" means the essence of the most important parts of the information.[35] The purpose of incorporating in the order the substance of the information is to let the person proceeded against to know the charge against him so that he can answer it in his show cause. As such, once the notice served on him sets forth that substance, its absence in the order passed on the order sheet [52 53 54 55]

52. *Gopalanachari* v. *State of Kerala*, 1980 Supp SCC 649: 1981 SCC (Cri) 546, 550: 1981 Cri LJ 357. See also, *Jay want G. Tambe* v. *State of*

53. *Ibid*, 550; see also, *Subbayyan Achari* v. *State of Kerala*, 1981 Cri Lj

54. *See*, observations in *Tavinder Kumar* v. *State*, 1990 Cri LJ 40, 43

55. *Madbu Limaye* v. *Sub-Divisional Magistrate, Monghyr*, {1970) 3 SCC 746: 1971 Cri LJ 1720; see also, *Abdul Latifv. Amanat Alt*, 1974 Cri LJ 1092, 1095 (Gau); *Kutti Goundan, re*, (1925) 26 Cri LJ

is not very material.[56] The Magistrate cannot ask a person in respect of whom an order under Section in has been made to furnish security or bail for his appearance in court.[57] In a case where the show cause notice under Section in was issued in a cyclostyled form by filling in the blanks and conveying that it was being issued in consequence of a police report, it was held that the defect in notice was a curable irregularity only.[58] According to Allahabad High Court the provisions of Section in are mandatory and non-compliance with them cannot be treated as mere irregularity.[59]

(2) *Communication of the order*.—If the person in respect of whom such order *{i.e.* an order under S. 111} is made is present in court, it shall be read over to him, or, if he so desires, the substance thereof shall be explained to him. [S. 112]

If the order is not read out and explained as required by Section 112 above it is an illegality which vitiates the proceedings.[60]

If such person is not present in court, the Magistrate shall issue a summons requiring him to appear, or when such person is in custody, a warrant directing the officer in whose custody he is, to bring him before the court. [S. 113] However, whenever it appears to such Magistrate, upon the report of a police officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of peace, and that such breach of peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest, [proviso to S. 113]

The power of the Magistrate to issue warrant of arrest against a person in respect of whom an order under Section m has been passed is very limited. There is no provision in Section 113 or in any other section dealing with preventive action empowering the Magistrate to issue a warrant of arrest against a person if he fails to appear before him after the service of summons.[61] However if despite the service of notice the party does not appear in the court, then the provisions of Section 87 will be attracted and a warrant may be issued against such a party.[62]

Every summon or warrant issued under the abovementioned Section 113 shall be accompanied by a copy of the order made under Section in, and such copy shall be delivered by the officer serving or executing such

56. *Karlar Singh* v. *Sita Ram*, 1973 Cri
57. *Dhaneshwar* v. *State of Bihar*, 1973 Cri Lj 1055, 1058 (Pat).
58. *Jat Lai* v. *Cbander Pal*, 1973 Cri Lj 1515 (Del).
59. *Jahir Ahmed* v. *Ganga Prasad*, (1963) *1* Cri Lj 20,
60. *Malla Mohammedoo* v. *State*, 1966 Cri LJ 145: ./AIR 196(5 j&K 29.
61. *Dhaneshwar* v. *State of Bihar*, 1973 Cri Lj 1055, 1057 (Pat).
62. *Gopi* v. *State*, 1974 Cri Lj 1410, 1411 (Ail); for the text of S. 87, *see*

summons or warrant to the person served with, or arrested under, the same. [S. 114]

(3) *Personal attendance can be dispensed with.*—The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace or for good behaviour and may permit him to appear by a pleader. [S. 115]

28.8 Inquiry as to truth of information

In this connection Section *116* provides as follows:

Inquiry as to truth of information

116. (1) When an order under Section in has been read or explained under Section 112 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under Section 113, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

{2) Such inquiry shall be made, as nearly as may be practicable, in the manner hereinafter prescribed for conducting trial and recording evidence in summons cases.

(3) After the commencement, and before the completion of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under Section m has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded:

Provided that—

(a) no person against whom proceedings are not being taken under Section 108, Section 109, or Section no shall be directed to execute a bond for maintaining good behaviour;

{b} the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under Section in.

{4) For the purposes of this section the fact that a person is a habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

[6) The inquiry under this section shall be completed within a period of six months from the date of its commencement, and if such inquiry is not so completed, the proceedings under this Chapter shall, on the expiry

period, stand terminated unless, for special reasons to be recorded in writing, the Magistrate otherwise directs:

Provided that where any person has been kept in detention pending such inquiry, the proceeding against that person, unless terminated earlier, shall stand terminated on the expiry of a period of six months of such detention.

{7) Where any direction is made under sub-section (6) permitting the continuance of proceedings, the Sessions judge may, on an application made to him by the aggrieved party, vacate such direction if he is satisfied that it was not based on any special reason or was perverse.

The inquiry contemplated by the above section is a judicial inquiry and the court should reach its conclusions on the basis of the evidence recorded in the inquiry proceedings. Sub-section (2) provides that the inquiry should be made, as nearly as may be practicable, in the manner prescribed for conducting and recording evidence, in summons cases. The trial procedure for summons cases has been already discussed in Chapter 21 (see, paras. 21.2-21.n).

The words "take such further evidence as may appear necessary" in sub-section {1) mean that the Magistrate would take into consideration evidence relating to incidents and events which took place after the information was received.[63] The first sub-section read with sub-section {2} requires the Magistrate to proceed to inquire into the truth of the information. Sub-section (3} enables the Magistrate to ask for an interim bond pending the completion of the inquiry by him, *i.e.* after the commencement, and before the completion of the inquiry under sub-section (i). This is conditioned by the fact that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for public safety. This is applicable where the person is not in custody and his being at large without a bond may endanger public safety etc. The Magistrate has to justify his action by reasons to be recorded in writing.[64] If the person fails to execute a bond, with or without sureties, the Magistrate is empowered to detain him in custody. The section as it is drafted today is hedged in with proper safeguards and it would be moving too far away from the guarantee of freedom, if without any inquiry into the truth of the information sufficient to make out a prima facie case a person is to be put in jeopardy of detention. A

sA r-v , 4- fin +- T 4- 1 1

63. *Matuki Mahton* v. *State,* (1963) 2 Cri LJ 312, 313: AIR 196:

64. *M a d h u*

are necessary. Therefore it is not open to a Magistrate to adjourn the case and in the interval to send a person to jail if he fails to furnish a bond.[65]

It may be noted that Section 88[66] may be available till the order under Section in is drawn up. After it is drawn up the Magistrate has to act under Section IIZ and Section 116(1). Then there is no room for Section 88.[67]

A person against whom allegations have been made in a proceeding under Chapter VIII of the Code is not an accused. Therefore power under Section 309(2) could not be called in aid for a direction that a delinquent produced in custody could be remanded to magisterial detention as contemplated in Section 309.[68]

The evidence regarding the general reputation of the respondent can be given to prove matters mentioned in sub-section (4). This is an extraordinary rule of evidence and the court will have to consider It very carefully.[69] The reputation evidence is made admissible out of necessity as it is extremely difficult under ordinary law to prove cases against habitual offenders and desperate and dangerous persons. Evidence regarding general reputation being weak type of evidence, should be scrutinised carefully and depended upon very cautiously.

Sub-section {5) makes it possible to have a joint inquiry in respect of persons who are confederates or associated together. The discretion given to the Magistrate for having a joint inquiry is to be exercised after taking into consideration how far the evidence concerns the association and how far the persons would be prejudiced by a joint inquiry.[70]

Sub-section (6) prescribes a time-limit for completing the proceedings. The object of the provisions relating to security proceedings is to prevent breach of the peace and unless the proceedings are completed within a reasonable time, recourse to drastic powers under these provisions would not be justified. Similar considerations would apply also to proceedings relating to bonds for good behaviour. The first part of sub-section (6) accordingly provides that if the enquiry under the section is not completed

65. *Madhu*
66. For
67.
68.
69.
70. *Shan Ganti Veera Reddi, re,*

within a period of six months from the date of the commencement thereof, such inquiry stands terminated on the expiry of that period. A special power, however, has been retained with the Magistrate to extend this period where there are special reasons to do so. It has been held that the period of six months ordinarily prescribed under sub-section (6) cannot be extended beyond another six months by the order of the Magistrate.[71] This provision would apply to all proceedings whether or not the person concerned is in detention. If no final orders are passed up to six months of the commencement of the inquiry or the extended period, then the proceedings will automatically come to an end.[72] Where a person is in detention, according to the proviso, the proceedings shall stand terminated on the expiry of a period of six months of detention.[73]

It is well established that if a statutory period of limitation is prescribed for the completion of the proceedings and a power is also given to the concerned court to extend that period, then that power can only be exercised in accordance with law within the statutory period. After the expiry of that period the court does not have any power to extend the limitation for the continuance of the inquiry.[74] [75]

In Section *n6(6),* the expression "shall on the expiry of the said period, stand terminated" clearly shows that in the event of the inquiry not being completed within the prescribed period, the proceedings came to an end automatically and no order of the Magistrate is, at all, called for. Indeed, the Magistrate becomes *functus officio* and he is divested of the seisin of the case. This conclusion is further fortified by Section 116(7) which empowers the Sessions judge to vacate a direction made by the Magistrate under Section 116(6} permitting the continuance of the proceedings, if he is satisfied that it was not based on any special reason or was perverse. Evidently, the legislature, in its wisdom has not only circumscribed the power of the Magistrate to extend the life of inquiry by special reasons to be recorded in writing but has also placed a curb on the exercise of such power by subjecting it to scrutiny by a higher court. No corresponding provision, however, has been made in Section 116 or elsewhere in the Code empowering the Sessions Judge to direct continuance of the proceedings in the event of its coming to an end automatically as provided by Section 116(6). By necessary implication, therefore, the power of a revisional court to direct continuance of the proceedings after it has come to an end is excluded/[5]

71. *Krishnadeo Singh* v. *State of Bihar*, 1985 Cri Lj 1763 (Pat).
72. *Subas Rai* v. *State*, 1979 Cri Lj 115 (Ail).
73. *See*, joint Committee Report, pp. xii-xiii.
74. *Subas Rai* v. *State*, 1979 Cri LJ 225, 226 (All); *Nasiru v. State of Haryana*, 1978 Cri Lj 603 (P&H); *Prafulla* v. *Ajit*, 1978 Cri LJ 316, 318 (Cal); *J.C. Mehta* v. *State*, 1982 Cri LJ 1488 (Del).
75. *J.C. Mehta* v. *State*, 1982 Cri Lj 1488, 1491 (Del).

The reference to the date of the commencement of the inquiry in Section *n6(6}* above, is with reference to the stage when the Magistrate, after both the parties appear before him, proceeds to inquire with reference to the evidence- Commencement of inquiry starts when the Magistrate attempts in a legal way to put the allegations to test for finding out whether they are the facts. Both sub-sections {3} and (6) of Section 116 refer to this stage as the commencement of inquiry.[76] When the inquiry under Section 116 *is* to be in the nature of trial in summons cases, *[see supra,* S. 116(2,)] it must be held that it commences as soon as the opposite party challenges the allegations made against him or refuses to admit the same or submits a show-cause petition against the allegation, or the Magistrate otherwise has reason to proceed or proceeds or decides to ascertain the truth of the allegation made against the opposite party by taking evidence or otherwise.[77] It may, however, be noted that some High Courts have taken a different view. According to these High Courts, the proceedings in the inquiry shall be deemed to commence on the date on which the person sought to be proceeded against appears or is brought before the Magistrate.[78]

Sub-section (7) provides a remedy to the person aggrieved by the decision of the Magistrate under sub-section (6) to continue the proceedings after the prescribed time-limit of six months.

28.9 Result of the inquiry as to the truth of information

(i) *Order to give security*.—Section 117 provides as follows:

Order to give security 117. If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly:

Provided that—

{a) no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under Section in;

(b) the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive;

76. *Sana Khan* v. *State*,

77. *Baresh Chandra* v. *Ahitosh Panda*, 1978 Cri LJ 1171,1176 (Cal); see also, *Binapani Bora* v. *Narendra Nath Bora*, 1984 Cri LJ (NOC)

78. *J.C. Mehta* v. *State*

(c) when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

It has been provided by Section 354(6) that every order under Section 117 shall contain the point or points for determination, the decision thereon and the reasons for the decision. The provision regarding supply of copy of judgment to the accused shall, according to Section 363(3), apply in relation to an order under Section *iiy.*[79]

For the purpose of determining whether the sureties are fit or sufficient, the court may accept affidavits in proof of the facts contained therein relating to the sufficiency or fitness of the sureties, or if it considers necessary, may either hold an inquiry itself or cause an inquiry to be made by a Magistrate subordinate to the court, as to such sufficiency or fitness.

[S. 441(4)]

The amount of the bond should ordinarily be such as may enable the party to get a surety, and should not be excessive.

In relation to clause *(c)* of the proviso, it will be pertinent to take note of Section 17, Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) (or similar provisions in the State Children Acts), That section provides:

> Notwithstanding anything to the contrary contained in the Criminal Procedure Code, 1973 (2 of 1974) no proceeding shall be instituted and no order shall be passed against a juvenile under Chapter VIII of the said Code.

Therefore clause (c) of the proviso to Section 117 will apply to only those cases of minors which are not within the purview of Section 17, Juvenile Justice (Care and Protection of Children) Act, 2000 (or similar provision in the State Children Act).[80]

(2) *Discharge of person informed against.*—Section 118 provides as follows:

> 118. If, on an inquiry under Section 116, it is not proved that it is necessary *Discharge of person* for keeping the peace or maintaining good behaviour, as the case may be, that *informed against* the person in respect of whom the inquiry is made, should execute a bond, the Magistrate shall make an entry on the record to that effect, and if such person is in custody only for the purposes of the inquiry, shall release him, or if such person is not in custody, shall discharge him.

As there is no charge as such in the security proceedings, the term "discharged" should not be taken in its technical sense.

The court is not precluded from taking into consideration incidents and events subsequent to the passing of the preliminary orders under Section in.

If the material on record discloses that though there was a danger of breach of peace at one time, because of the happening of a

79. For the text of S. 363, *see supra*, para. 2.3.18.

80. See, *Riyazv. State of Maharashtra*, (2005) 36 AIC 657 (Bom).

subsequent event the danger of breach has disappeared, the court can drop the proceedings and discharge the person proceeded against. If the court finds that since the date of the incident complained of, a very long period has elapsed during the course of which nothing untoward has happened, the court may well draw the inference that the danger of breach of peace has vanished.[81 82]

28.10 Proceedings subsequent to the order under Section 117

(a) Commencement of period for which security is required.—If any person, in respect of whom an order requiring security is made under Section 106 or Section 117, is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence. [S. 119(1)]

In other cases such period shall commence on the date of such order unless the Magistrate, for sufficient reason, fixes a later date. [S. 119(2.)]

In a case where an appeal has been filed against the order passed under Section 117, the period for which the security is required commences from the date of dismissal of appeal.[82]

(b) Contents of bond.—The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond. [S. 120]

The forms prescribed in Second Schedule for bonds to keep the peace and for good behaviour are as follows:

FORM 12
[See, Sections 106 and 107]

BOND TO KEEP THE PEACE

Whereas I, *{name)* _____ , inhabitant of *{place)*_____ , have been called upon to enter into a bond to keep the peace for the term of_____ or until the completion of the inquiry in the matter of_____ now pending in the Court of _____ , I hereby bind myself not to commit a breach of the peace, or do any act that may probably occasion a breach of the peace, during the said term or until the completion of the said inquiry and, in case of my making default therein, I hereby bind myself to forfeit to

{Signature) [81 82]

81. *Ram Narain*
82. *Abdul*

FORM 13
[See, Sections 108, 109 and 110]

BOND FOR GOOD BEHAVIOUR

Whereas I, *{name)*_____ , inhabitant of *{place)*_____, have been called upon to enter into a bond to be of good behaviour to Government and all the citizens of India for the term of *(state the period)*_____ or until the completion of the inquiry in the matter of _____now pending in the Court of_____ , I hereby bind myself to be of good behaviour to Government and all the citizens of India during the said term or until the completion of the said inquiry; and, in case of my making default therein, I hereby bind myself to forfeit to Government the sum of rupees_____ .

Dated, this_____ day of _____ , zo_____ .

(Signature)

(Where a bond with sureties is to be executed, add _____ }.

We do hereby declare ourselves sureties for the above-named _____ _____that he will be of good behaviour to Government and all the citizens of India during the said term or until the completion of the said inquiry; and, in case of his making default therein, we bind ourselves, jointly and severally, to forfeit to Government the sum of rupees _____ .

Dated, this_____ day of _____ , 20_____ .

(Signature)

Power to reject sureties

(c) Power to reject sureties.—Section 121 provides as follows:

121. (1) A Magistrate may refuse to accept any surety offered, or may reject any surety previously accepted by him or his predecessor under this Chapter on the ground that such surety is an unfit person for the purposes of the bond:

Provided that, before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety, or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him.

(2) Such Magistrate shall, before holding the inquiry, give reasonable notice [83]

83. *Ramdhatii Mahto*

The sureties offered should not be refused except after judicial enquiry by the Magistrate under the provisions of Section m.[84] It is well settled that the question whether a particular person who is offered as a surety is or is not fit within the meaning of Section 121, must be decided by the Magistrate himself, and his decision must be based upon evidence taken for the purpose; sureties offered should not be refused except after judicial inquiry.[85] Rejection of a surety cannot be perfunctory and it is desirable that the order rejecting the surety should be passed within reasonable .. 86 time.

The question of the fitness of a surety will be determined by the Magistrate after inquiry. That the surety may not be able to have sufficient control over the accused, cannot be a valid ground in itself for rejection of surety.[87] The ability to exercise proper control over the accused person was however considered essential in some cases for the fitness of the surety.[88]

28.11 Imprisonment in default of security

In this connection Section 122 provides as follows:

122. {1 *)(a)* If any person ordered to give security under Section 106 or Section 117 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned, be committed to prison, or, if he is already in prison, be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it.

(b} If any person after having executed a bond [89][, with or] without sureties for keeping the peace in pursuance of an order of a Magistrate under Section 117, is proved, to the satisfaction of such Magistrate or his successor- in-office, to have committed breach of the bond, such Magistrate or successor-in-office may, after recording the grounds of such proof, order that the person be arrested and detained in prison until the expiry of the period of the bond and such order shall be without prejudice to any other punishment or forfeiture to which the said person may be liable in accordance with law.

Imprisonment in default of security

(2) When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing

Hiran v. ***Emperor,*** (1915} 16 Cri Lj 527: ILR (1914} 42 Cal 706.

85. ***Rayan Khan*** v. ***Emperor,*** (1915) 18 Cri LJ 408: ILR (1916) 43 Cal 1024,
See, 37th Report, p. 86, paras 311 & 312.
Jugal Singh v. ***Emperor,*** (1929) 30 Cri Lj 45: AIR 1928 Pat 374; ***Jesa Bhatha, re,*** {1920} 21 Cri LJ 377: AIR 1920 Bom 292.
Narain Sahai v. Emperor, {1946) 47 Cri Lj 757: AIR 1946 All 333 (FB); ***Abdul Karim v. Emperor,*** (1917} 18 Cri Lj 453: AIR 1917 Cal 209; ***Asiraddi Mandal*** v. ***Emperor,*** (1914) 15 Cri LJ 169: AIR 1914
Ins. by Act 25 of 2005, S. 15 (w.ei. 23-6-2006).

prison pending the orders of the Sessions judge and the proceedings shall be laid, as soon as conveniently may be, before such Court.

(3) Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, and after giving the concerned person a reasonable opportunity of being heard, may pass such order on the case as it thinks fit:

Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years.

(4) If security has been required in the course of the same proceeding from two or more persons in respect of any one of whom the proceedings are referred to the Sessions judge under sub-section (2.), such reference shall also include the case of any other of such persons who has been ordered to give security, and the provisions of sub-sections (2) and (3) shall, in that event, apply to the case of such other person also, except that the period (if any) for -which he may be imprisoned, shall not exceed the period for which he was ordered to give security.

(5) A Sessions judge may in his discretion transfer any proceedings laid before him under sub-section (2} or sub-section (4) to an Additional Sessions Judge or Assistant Sessions Judge and upon such transfer, such Additional Sessions Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings.

(6) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate.

(7) Imprisonment for failure to give security for keeping the peace shall be simple.

(8) Imprisonment for failure to give security for good behaviour shall, where the proceedings have been taken under Section 108, be simple, and, where the proceedings have been taken under Section 109 or Section iro, be rigorous or simple, as the Court or Magistrate in each case directs.

According to Section 122(3) ^ Sessions judge is to form his independent opinion as to the propriety of the order, and has to deal with the case on merits.[90] [91] Section 122 is now very effective because it empowers the court to deal with the violator of the terms of the bond which could be with

Power to release persons imprisoned for failing to give security

2S.12

Power to release persons imprisoned for failing to give

In this connection Section 123 provides as follows:

123. (1} Whenever [92][the District Magistrate, in the case of an order passed by an Executive Magistrate under Section 117, or the Chief judicial Magistrate in any other case] is of opinion that any person imprisoned for

90. *Emperor* v. *Amir Bala*, {1911) 12 Cri Lj 257, 258: ILR (1911) 35 Bom 271, 274.

91. See, Criminal Procedure (Amendment) Act, 2005.

92. *Subs*, by Act 45 of 1978, S. 12 for "the Chief Judicial Magistrate".

security under this Chapter may be released without hazard to the community or to any other person, he may order such person to be discharged.

(2) Whenever any person has been imprisoned for failing to give security under this Chapter, the High Court or Court of Session, or, where the order was made by any other Court, the [93][District Magistrate, in the case of an order passed by an Executive Magistrate under Section 1x7, or the Chief Judicial Magistrate in any other case], may make an order reducing the amount of the security or the number of sureties or the time for which security has been required.

(3} An order under sub-section fi) may direct the discharge of such person either without conditions or upon any conditions which such person accepts:

Provided that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired.

(4) The State Government may prescribe the conditions upon which a conditional discharge may be made.

{5) If any condition upon which any person has been discharged is, in the opinion of the [4][District Magistrate, in the case of an order passed by an Executive Magistrate under Section 1x7, or the Chief judicial Magistrate in any other case] by whom the order of discharge was made or of his successor, not fulfilled, he may cancel the same.

(6) When a conditional order of discharge has been cancelled under subsection (5), such person may be arrested by any police officer without warrant, and shall thereupon be produced before the [93 95] [District Magistrate, in the case of an order passed by an Executive Magistrate under Section 117, or the Chief judicial Magistrate in any other case].

(7) Unless such person gives security in accordance with the terms of the original order for the unexpired portion of the terms for which he was in the first instance committed or ordered to be detained {such portion being deemed to be a period equal to the period between the date of the breach of the conditions of discharge and the date on which, except for such conditional discharge, he would have been entitled to release), the [District Magistrate in the case of an order passed by an Executive Magistrate under Section 117, or the Chief judicial Magistrate in any other case] may remand such person to prison to undergo such unexpired portion.

(8) A person remanded to prison under sub-section (7) shall, subject to the provisions of Section 122, be released at any time on giving security in accordance with the terms of the original order for the unexpired portion aforesaid to the Court or Magistrate by whom such order was made, or to its or his successor.

(9) The High Court or Court of Session may at any ti^ne for sufficient

Magistrate under Section 117, or the Chief judicial Magistrate in any other case] **may** make such cancellation where such bond was executed under his order or under the order of any Court in his district.

(10) Any surety for the peaceable conduct or good behaviour of another person ordered to executive a bond under this Chapter may at any time apply to the Court making such order to cancel the bond and on such application being made, the Court shall issue a summons or warrant, as it thinks fit, requiring the person for w'hom such surety is bound to appear or to be brought before it.

This section gives power to the District Magistrate and the Chief judicial Magistrate to release persons jailed for failure to give security if he thinks that it can be done without hazard to the community. This power appears to be analogous to the power vested in the government to suspend, commute or remit sentences passed on persons convicted of offences.[95]

Security for unexpired period of the bond **28.13**

In this connection Section 124 provides as follows:

Security for unexpired period of bond

124. (1) When a person for whose appearance a summons or warrant has been issued under the proviso to sub-section (3) of Section 121 or under sub-section {10) of Section 123, appears or is brought before the Magistrate or Court, the Magistrate or Court shall cancel the bond executed by such person and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security.

(2} Every such order shall, for the purposes of Sections 120 to 123 (both inclusive), be deemed to be an order made under Section 106 or Section 117, as the case may be.

When a Magistrate rejects a previously accepted surety under Section 121(3) or when a surety applies for his discharge under Section 123(10), then the present Section 124 provides procedure for dealing with such cases.

Appeal from orders requiring security or refusal to accept or **28.14** rejecting surety for keeping peace or good behaviour Any person:

(i) who has been ordered under Section 117 to give security for keeping the peace or for good behaviour, or *{it)* who is aggrieved by any order refusing to accept or rejecting a surety under Section 121, may appeal against such order to the Court of Session. [S. 373]

However, the above provision *[i.e.* S. 373] shall not apply to persons the proceedings against whom are laid before a Sessions Judge in accordance

98. *See,* 41st Report, p. 53, para. 8.16.

with the provisions of sub-section (z) or sub-section (4) of Section 122. [proviso to S. 373]

There are no specific provisions in the Code enabling the appellate court to stay the order passed under Section 117, in the event of admitting the appeal under Section 373. It has been held that in such a contingency the appellate court can stay the order under Section 386.[1]

Part III

Dispersal of Unlawful Assemblies

28.15 Dispersal of unlawful or potentially unlawful assemblies

(a) By use of civil force.—Section 129 provides as follows:

Dispersal of assembly by use of civil force

129. (1) Any Executive Magistrate or officer in charge of a police station or, in the absence of such officer in charge, any police officer, not below the rank of a sub-inspector, may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

(2) If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Executive Magistrate or police officer referred to in sub-section (1), may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer or member of the armed forces and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.

Primarily, the power is to disperse an "unlawful assembly". The power to disperse other assemblies likely to cause a disturbance of the peace etc. is only an extension of the first power. The extension is considered necessary, because such assemblies are *potentially* unlawful assemblies.[2] The "unlawful assembly" as such has been defined by Section 141, Penal Code, 1860 (IPC). It says:

141. *Unlawful assembly.*—An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is—

First.—To overawe by criminal force, or show of criminal force, [3][the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or

Second.—To resist the execution of any law, or of any legal process; or

Third.—To commit any mischief or criminal trespass, or other offence; or

Fourth.—By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

For the purposes of dispersal of unlawful assemblies powers are conferred primarily on any Magistrate or officer in charge of a police station. Sometimes it may however happen that an officer in charge of a police station is not readily available at the place where there in an unlawful assembly, to order the dispersal of such assembly although there are other officers of police equal in rank to such officer in charge. The delay in getting in touch with such officer, might result in the situation becoming unmanageable.[4] The section therefore gives powers to other police officers (in the absence of the officer in charge of a police station) not below the rank of sub-inspector. Generally speaking, before any force can be used for the dispersal of the unlawful assembly as mentioned above, three prerequisites are to be satisfied. *Firstly*, there should be an unlawful assembly with the object of committing violence or an assembly of five or more persons likely to cause a disturbance of the public peace. *Secondly,* such assembly is ordered to be dispersed and thirdly, in spite of such order to disperse, such assembly does not disperse.[5] In a situation which did not justify firing, firing took place and that too not on the orders of the authorised officers; the dependants of victim were ordered to be compensated by the State.[6]

(b) By use of armed forces.—In this connection Section 130 provides as follows:

130. (1) If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Executive Magistrate of the highest rank who is present may cause it to be dispersed by the armed forces.

(2) Such Magistrate may require any officer in command of any group of persons belonging to the armed forces to disperse the assembly with the help of the armed forces under his command, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as

Use of armed forces to disperse assembly

4. *See,* joint Committee Report, p. xiv.
5. *Karam Singh* v. *Hardayal Singh,* 1979 Cri Lj 1211, 1214 (P&H).
6. *State of Karnataka* v. *B. Padmanabba Beliya,* 1992 Cri LJ

arrest and confine In order to disperse the assembly or to have them punished according to law.

(3) Every such officer of the armed forces shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

(c) Power of certain armed forces officers to disperse assembly.—Section 131 provides as follows:

Power of certain armed force officers to disperse assembly

131. When the public security is manifestly endangered by any such assembly and no Executive Magistrate can be communicated with, any commissioned or gazetted officer of the armed forces may disperse such assembly with the help of the armed forces under his command, and may arrest and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law; but if, while he is acting under this section, it becomes practicable for him to communicate with an Executive Magistrate, he shall do so, and shall thenceforward obey the instructions of the Magistrate, as to whether he shall or shall not continue such action.

When the public security is manifestly endangered and when no Magistrate can be communicated with, any commissioned or gazetted officer of the armed forces may disperse the assembly with the help of the forces under his command.[7]

28.16 Protection against prosecution for acts done under Sections **129** to **131**

In this connection Section 13 a provides as follows:

Protection against prosecution for acts done under preceding sections

132. (1) No prosecution against any person for any act purporting to be done under Section 129, Section 130 or Section 131 shall be instituted in any Criminal Court except—

(a) with the sanction of the Central Government where such person is an officer or member of the armed forces;

(b) with the sanction of the State Government in any other case.

(z}(a) No Executive Magistrate or police officer acting under any of the said sections in good faith;

[b) no person doing any act in good faith in compliance with a requisition under Section 129 or Section 130.

{c) no officer of the armed forces acting under Section 131 in good faith;

[d] no member of the armed forces doing any act in obedience to any order which he was bound to obey, shall be deemed to have thereby committed an offence.

{3) In this section and in the preceding sections of this Chapter,—

{a) the expression "armed forces" means the military, naval and air forces, operating as land forces and includes any other Armed Forces of the Union so operating;

7. See, 41st Report p. 54, para. 9.1

(b) "officer", in relation to the armed forces, means a person commissioned, gazetted or in pay as an officer of the armed forces and includes a junior commissioned officer, a warrant officer, a petty officer, a noncommissioned officer and a non-gazetted officer;

(c) "member", in relation to the armed forces, means a person in the armed forces other than an officer.

PART IV

Removal of Public Nuisance

Conditional order for removal of nuisance and consequential **28.17** steps

(a) Conditional order of Executive Magistrate.—**Section 133 provides as follows:**

133. (1) Whenever a District Magistrate or a Sub-Divisional Magistrate or *Cmditimal* *or der for removal of* any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers—

(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(1b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

(c) that the construction of any building, or, the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public

{») to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(Hi) to prevent or stop the construction of such building, or to alter the disposal of such substance; or

{iv) to remove, repair or support such building, tent or structure, or to remove or support such trees, or

(v) to fence such tank, well or excavation; or

{vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order;

or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

(a) No order duly made by a Magistrate under this section shall be called in question in any civil court.

Explanation.—A "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.

The section is designed to afford a rough and ready procedure for removing public nuisances, and is intended to be used in urgent cases.[8] [9] The public nuisances no doubt are not as dangerous as the situations requiring the use of security proceedings, nor their removal is so urgent as the dispersal of unlawful assemblies; however they are yet fraught with potential danger requiring summary action for their removal.

It is pertinent to recall the observations of the Punjab and Haryana High Court with reference to the nature and consequences of orders made under 144 and 147. The court said:

> The proceedings are just to maintain peace and tranquillity and the orders rendered under these Sections are merely temporary orders. The orders of the courts are coterminus with the judgment or decree of the civil court. No sooner the civil court declares the right of the parties the temporary orders rendered lay the courts under Sections 133, 145 and 147 of the Code come to an end.[8] [9]

On the receipt of a police report or other information, the appropriate Executive Magistrate can exercise powers under this section in the six circumstances enumerated in sub-section (1).

Section 133 deals with certain specific public nuisances and provides a summary remedy for their removal. In some cases the view taken is that the section has been formulated to deal with *emergent* evils which are either existent or imminent.[10] (The section does not justify an action

8. *See*, 37th Report, p. 91, para.

9. *Bhaba Kama* v. *Ramchandra*,

10. *Ramesbwar Prasad* v. *State of Bihar*, (1958) 59 Cri LJ

being taken in regard to anticipated obstruction or nuisance}.[11] There must be imminent danger to property and consequential nuisance to the public.[12] It is, however, equally true that no period is prescribed within winch the court could be moved under this section for the removal of an evil in existence,[13] and each case will have to be regulated by its own circumstances.

In order to invoke Section the nuisance has got to be public nuisance and then only it can be stated to affect the members of public and hence can be removed from the public place. The phrase "public nuisance" has been defined in Section 2,68 IPC and this definition can very well be imported for the purposes of Section 133. According to that definition, in order to constitute a public nuisance, the injury, danger or annoyance must be caused to the public, or to the people in the vicinity, or to persons who may have occasion to exercise any public right.[14]

The object and purpose behind Section 133 is to prevent public nuisance, that if the Magistrate fails to take immediate recourse to Section 133, irreparable damage would be done to the public. However, under Section 133, no action seems possible if the nuisance has been in existence for a long period.[15] In that case the only remedy open to the aggrieved party is to move the civil court.[16]

According to Section 12 IPC, the word "public" includes any class of the public or community; but that class must be numerically sufficient to be designated "the public". The word community cannot be taken to mean the residents of a particular house. Community means something wider than that. Therefore if a particular individual or his family is only affected by the nuisance, such nuisance cannot be considered to be a public nuisance and hence its removal from any public place cannot be ordered under Section

17

[1]**33**-

The expression "public place" occurring in Section 133(1 *)(a)* has not been defined in the Code or in the IPC, though the explanation to Section 133 mentions that a "public place" includes also property belonging to the

v. *Jogesbwar Rain*, 1973 Cri LJ 1375, 1377 (HP); *Asharfi Lai* v. *State*, (1965) 1 Cri Lj 535*. AIR 1965 All 215; *T.K.S.M. Kalyanasundaram* v, *Kalyani Ammal*, 1975 Cri Lj 1717, 1718

11. *Sohan Lai* v. *Mohan Lai*, 1976 Cri Lj 1354, t355 (HP).
12. *Kachrulal Bhagirath Agrawal* v. *State of Maharashtra*, (2005) 9 SCC 3 6*:* 2005 SCC (Cri) 119T.
13. *Chhitar* v. *Chhoga*, 1974 Cri Lj 1230, 1233 (Raj); *Satya Sunder Ghose* v. *Sailandra Kinkar Pal*, {1954) 55 Cri Lj 1712: AIR 1954 Cal 560; *Raj Kumar* v. *State*, (1962) 2 Cri Lj 413, 414 (All); *State of* M.P. v. *Manji Raghu*, {1964) 2 Cri LJ 94, 96 (MP); *Asharfi*
14. *Hiralal* v. *Jogeshwar Ram*, 1973 Cri Lj 1375, 1377 (HP).
15. See, *Makhan Lai* v. *Buta Singh*, 2003 Cri LJ 4147 (P&H).
16. See, *Vasant Manga Nikumba* v. *Baburao Bhikanna Naidu*, 1995 Supp (4) SCC 54: 1996 SCC (Cri) 27.
17. *Ibid;* see *3.\so, jatindra Nath* v. *Manindra Nath*, (1950) 51 Cri Lj 1241: AIR 1950 Cal 530; *Dwarika Prasad* v. *B.K. Roy Cboudhury*,

State camping grounds and grounds left unoccupied for sanitary or recreative purposes. It has been held that a place in order to be public must be open to the public *i.e.* a place to which the public have access by right, permission, usage or otherwise.[1S]

It should be clearly understood that Section 133 is not be used as a substitute for litigation in the civil courts in order to secure the settlement of a private dispute. Action under Section can only be taken where there has been an invasion of public rights.[18 19] The first test which should be applied is that if the Magistrate does not take any action and direct the public to take recourse to the ordinary course of law, irreparable damage would be done and secondly, obstruction or nuisance should be an invasion on public right and not on individual.[20 21]

It was asserted by the Allahabad High Court that air pollution could be ordered to be prevented not only under the provisions of the Air (Prevention and Control of Pollution) Act, 1981 but also under Section 133 of the Code. In *Ramesh Chandra* v. *U.P. Pollution Control Board*[11], the court stressed that a Magistrate acting under Section 133 could prevent an industry from polluting air by passing an order and making it absolute under Section 13d or Section 138 of the Code.

Although Section 133 reads discretionary, it is categoric and has a mandatory import. It permits enforcement of civic rights under the municipal law where neglect has led to a public nuisance. Therefore when a Magistrate has before him information and evidence, which disclose the existence of a public nuisance and, on materials placed, he considers that such unlawful obstruction or nuisance should be removed from any public place which may be lawfully used by the public, he shall act under Section 133 and order removal of such nuisance within a time to be fixed in the order.[22 23] For exercising the powers under Section 133 it is necessary that the Magistrate draws up a preliminary order. It has been held by the Supreme Court in *Avarachan* v. *Srinivasan*[23] that the omission of the SDM to draw up a preliminary order, which is a *sine qua non* for initiating proceedings under Section 133 and without following procedure provided for under Section 138 the order of SDM to permanently close down a quarry was not valid. [18 19 20 21 22 23]

18. *Ram Kisbore* v.
19. *State ofMysore* v.
20. *Vijaya Bank*
21. 2000 Cri LJ
22. *Executive*
23. C.A.

Failure to comply with the direction will be punishable under Section 188 IPC.[24]

It has been ruled by the Madhya Pradesh High Court that Section 133 cannot be invoked to remove the public nuisance of water pollution caused by industrial waste discharged by an industry inasmuch as there are other laws such as Water (Prevention and Control of Pollution) Act, 1974 to deal with it,[25]

The Supreme Court dwelt with the question of application of pollution laws vis-a-vis criminal procedure law. The court explained that the areas of operation of the Code and the pollution laws are different with wholly different aims and objects and though they alleviate nuisance that is not of identical nature. There is no impediment for their existence side by side.[26 27 28]

Clause *(b)* of Section 133(1) is applicable only in such cases where the conduct of any trade or occupation etc. is injurious to the health or physical comfort of the community. Where the trade of auctioning vegetables was carried on in a private house, and the noise caused by auctioning disturbed the comfort of the persons living in the locality, an order restraining such trade under Section 133 was held to be not justified by the Supreme Court. According to the Supreme Court the conduct of a trade in vegetables was not that injurious to the health or physical comfort of the community so as to attract preventive action under Section 133.[27 28]

The Supreme Court has held that any noise which has the effect of materially interfering with ordinary comforts of life, judged by the standards of a reasonable man is nuisance and is actionable under Section 133.[2S]

It has been held that the working of a glucose saline manufacturing unit in a residential area was a nuisance causing disturbance to the people. The M.P. High Court reinstated the SDM's order asking the firm to remove the unit from there.[29 30 31]

An order passed by the Magistrate under Section 133 on the complaint that there was noise pollution, to close down a gas and electric welding workshop was sustained by the Rajasthan High Court though the owner was running it with permission from *1964*.[30 31]

In a case[21] where the Magistrate issued an order under Section 133(1} *(b)(ii)* to prohibit working of a tea factory on the allegation that it was

24. *Municipal Council* v. *Vardichan*, (1980) 4 SCC *i6z:* 1980 SCC (Cri) 933: 1980 Cri LJ 1075.
25. *Abdul Hamid* v. *Gwalior Rayons Silk Mfg. Co. Ltd.*, 1989 Cri LJ 2013
26. *State of M.P.* v, *Kedia Leather & Liquor*, {2003) 7 SCC 389: 2003 SCC
27. *Ram Autarv. State ofU.P.*, (1963) 1 Cri Lj 14, 15-16: AIR 1962 SC 1794: see also, *Sallitho Ores* v. *Bhimappa*, 1979
28. *Noise Pollution ($}, re*, (2005} 5 SCC 733: AIR 2005 SC 3136.
29. *Krishna Gopal* v. *State of M.P.*, 1986 Cri LJ 396 (MP).
30. See, *Mohd. Ahsan* v. *State*, 2000 Cri LJ 2504 (Raj).
31. *Donniiigton Tea Factory* v. *S.D.M., & Sub-Collector, Connoor*, 1998 Cri Lj 3585 (Mad).

manufacturing adulterated tea powder, the Madras High Court held that that order was not proper. The court's response is revealing:

> In the light of these observations if we look at the impugned order, it is clear that it cannot be said that there is an imminent danger to the health or physical comfort of the community in the locality at present. The act of the petitioners must be injurious *in praesenti*. The mere manufacturing of the tea powder suspected to be adulterated would not be construed to be an act of causing imminent injury to the health or physical comfort of the community.[32]

The court also pointed out that at present it is possible for the authorities to take action under the Prevention of Food Adulteration Act or Essential Commodities Act.

The word "regulated" in clause *(b)* of Section 133(1) indicates that the court, instead of prohibiting the trade etc. completely, can regulate the same in such a way as not to become a nuisance.[33]

Clause *(d)* of Section 133(1) does not specify the minimum number of persons that should be living or carrying on business in the neighbourhood *etc.* Therefore if more than one person is living etc. that will amount to persons, and the provisions of Section 133 will be attracted. The requirement of the section is satisfied even if the danger is confined to the members of a single household.[34]

However, the proceedings are summary, and are more in the nature of civil rather than criminal proceedings.[35] It has also been opined that in passing a conditional order under Section 133, the Magistrate is not bound to take evidence.[36] However, In a case seeking removal of a dilapidated house, the Magistrate was advised by the Madhya Pradesh High Court to get the opinion of an engineer before ordering demolition.[37]

{b) Service or notification of order.—The order shall, if practicable, be served on the person against whom it is made, in the manner herein provided for service of a summons. [S. .134(1)]

If such order cannot be so served, it shall be notified by proclamation, published in such manner as the State Government, by rules, direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person. [S. 134(a)]

The provisions regarding service of summons are contained in Sections 6z to 68 and have already been discussed in para. 5.3.

32. *Ibid*, 35S7.
33. *Gobind Singh* v. *Shanti Sarup*, (1979) 2 SCC 2.67, 269: 1979 SCC {Cri} 444, 447: 1979 Cri LJ 59; *also see*, observations in
34. *Somnath* v. *State*, 1974 Cri Lj 522, 524 (Goa JCC); see also, *State of Kerala* v. *Chacko*, (1962) 2 Cri LJ *666, 667* (Ker); *Vayalele Veettil Balakrishna Nambiar* v. *R. Madhavan*
35. *Kachrulal Bhagirath Agrawal* v. *State of Maharashtra*, (2005) 9 SCC 36; 2005 SCC (Cri) 1191.
36. *Tejmal Punamchand Burad* v. *State of Maharashtra*, 1992 Cri LJ 379
37. See , *Niranjan Singh* v. *State of M.P.*, 2009 Cri LJ (NOQ 944 (MP).

(c) *Person to whom the order is addressed to obey or show cause.*—The person against whom such order is made shall

(a) perform, within the time and in the manner specified in the order, the act directed thereby; or

(b) Appear in accordance with such order and show cause against the same. [S. 135]

A conditional order under Section 133 gives the defaulting party two options—either to comply with the conditional order passed or to appear and show cause against the same. Where, by a corrigendum to order issued by SDO, he substituted word "or" by "and". The corrigendum was set aside on the ground that the very essence of scheme under Section 133 has been tinkered with.[38]

(d) Consequence of his failing to do so.—If such person does not perform such act or appear and show cause, he shall be liable to the penalty prescribed in that behalf in Section 188 of the Indian Penal Code and the order shall be made absolute. [S, 136]

Section 136 clearly shows that a preliminary order made under Section 133 can be made absolute if a person fails to appear on receipt of preliminary order. If such person appears and denies the public right and thereafter fails to appear to lead evidence the Magistrate cannot invoke Section 136 to make the preliminary order absolute.[39]

28.18 Procedure where existence of public right is denied

Procedure where existence of public right is denied

In this connection Section 137 provides as follows:

137. (1) Where an order is made under Section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if he does so, the Magistrate shall, before proceeding under Section 138, inquire into the matter.

(2} If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Court; and, if he finds that there is no such evidence, he shall proceed as laid down in Section 138.

{3) A person who has, on being questioned by the Magistrate under subsection (1), failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial.

38. *Rohan Vaman Savaiker* v. *State*, 2010 Cri LJ 2719 (Bom).

39. *Pavithran Madukkani* v. *Konjukochu*, 1982 Cri LJ 103, 104

The expression "inquire into the matter" used in sub-section (i) above has reference very ciearly to the denial of the existence of the public right made by the person against whom the conditional order under Section 133 is passed. This interpretation of the expression is reinforced by the other expression used in the same sub-section *viz.* "before proceeding under Section 138", which clearly means that the inquiry respecting the merits of the alleged obstruction or nuisance is to be deferred until a decision has been recorded on the denial of public right. The matter is further clarified by sub-section (2} which enjoins that if the person proceeded against has been able to establish prima facie his denial of the public right respecting the way, river, channel or place concerned, the Magistrate will cease to proceed further with the case until "the matter of the existence of such right has been decided by the competent civil court". If however,

0 the evidence led by the person is altogether frivolous, the Magistrate has been given jurisdiction to proceed with the case in the manner provided in Section 138. Sub-section {3) also yields an identical conclusion. It is therefore evident that the enquiry contemplated by Section 137 is confined only to the denial of the public right made by the person against whom the conditional order is issued, and that it has nothing to do with the inquiry made for determining whether or not the conditional order made under Section 133(1) is reasonable or proper. This latter inquiry can be made after the inquiry contemplated by Section 137 has resulted in a finding against the person to whom the conditional order was issued.[40]

The scope of the inquiry under Section 137 is only to find whether there is prima facie reliable evidence in support of the case taken by the opposite party about denial of the existence of public right.[41]

The expression "reliable evidence" as used in sub-sections (2) and (3) of Section 137 means evidence on which a competent court may place reliance. The expression does not mean "evidence" which definitely establishes the right of claim. It is not expected that the Magistrate should weigh the evidence produced by both the parties and then come to the conclusion which is more reliable or should be preferred. The object of Section 137 is that if the denial of the public pathway etc. involves a bona fide claim on the part of the persons denying the public right, the matter should be decided by a competent civil court and not by a Magistrate in a summary inquiry provided under Section 137.[42] It has been held in

40. N.L. *Sin gh*
41. *Arnar Singh*
42. *Jai Ra m Sin gh*

Omanakutty Amma v. *Sajeev Kumar,* M.R.[43] that the term "reliable evidence" must be interpreted strictly and a mere "copy of plaint" filed in a civil court cannot be treated as evidence as required under Section 137(a).

If the Magistrate omits to question the person concerned when he appears before him after a conditional order was made under Section 133 and puts in a statement in writing denying the existence of public right, the omission may be an irregularity curable under Section 465; but if the Magistrate holds a joint enquiry under Sections 137 and 138 or allows the complainant to adduce evidence in rebuttal of the evidence of the objector and scrutinises or weighs the evidence of the parties with a view to determine the truth of the denial or to arrive at the finding whether the non-existence of the public right is conclusively established it would not be a case of mere irregularity which could be cured by Section 465 but would be beyond the jurisdiction of the Magistrate.[44] The failure to comply with the procedure contained in Section 137(1) cannot be brought within the domain of a curable irregularity. It is a defect vitally affecting the jurisdiction of the order and hence non-compliance with this mandate vitiates the orders.[45]

When the party appears and denies the public right, the Magistrate has to enquire into the denial put forward and pass appropriate orders on such inquiry in accordance with Section 137(2). If the party against whom the preliminary order is passed fails to appear to lead evidence in support of his denial the Magistrate has to enter into the second stage contemplated in Section 138 and enquire about the existence of the public right alleged by taking evidence in the matter as in a summons case. Section 137(3} places an embargo upon a person against whom a preliminary order is passed and who fails to lead evidence in support of his denial and that embargo is against his giving any evidence in the enquiry under Section 138 in support of the denial of the public right. After such inquiry the Magistrate can under Section 138(2} on being satisfied that the order is reasonable and proper either make the order absolute without modification or, as the case may be, with modification. If the Magistrate is not so satisfied the proceedings will have to be dropped. These are the limits set out by Sections 137 and 138.[46] In a case where the person against whom the complaint is made up a claim of private right to reside at the place his

43. 2011 Cri Lj 4140 {Ker).

44. *Anand*
Kisbo
re v.

45.

Pavit

46. *Pavitbran Madukkani* v. *Konjukocbu.* 1982 Cri LJ 103,

eviction without hearing him under Section 137 and without conducting inquiry under Section 138 will be bad in law.[47]

28.19 Procedure where he appears to show cause

Procedure where he appears to show cause

Section 138 provides as follows:

138. (1) If the person against whom an order under Section 133 is made appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons case.

(a) If the Magistrate is satisfied that the order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or, as the case may be, with such modification.

(3) If the Magistrate is not so satisfied, no further proceedings shall be taken in the case.

It is clear from the provisions of sub-section (1} that if a person appears and show cause against the conditional order the Magistrate can make the order absolute under sub-section (2) only after taking evidence in the matter as in a summons case. The provision is mandatory.[48] It is imperative under Section 138 for the Magistrate to take evidence in the matter and therefore he cannot just dispose of the matter without taking any evidence. His inspection of the site will not be of any use.[49]

Though it is permissible for the Magistrate, after making the preliminary order, to make the order absolute when the party does not appear and show cause, *[see,* S. 136] but when he appears and shows cause, it is obligatory on the Magistrate, to record evidence and then after having satisfied that the order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, to make the order absolute with or without modification, as the case may be.[50]

It is not permissible to adduce evidence by way of affidavits in proceedings under Section 133, and the Magistrate is bound to record evidence in the same manner as is recorded in a summons case.[51]

47.
48.
Sta te
49.
Sta te
50.
51.
Ba nia

According to Section 354(6), every order under sub-section (2) of Section 138 shall contain the point or points for determination, the decision thereon and the reasons for the decision.

28.20 Power of Magistrate to direct local investigation and examination of an expert

The Magistrate may for the purposes of an inquiry under Section 137 or Section 138:

(a) direct a local investigation to be made by such person as he thinks fit,- or

(b) summon and examine an expert. [S. 139]

Local investigation does not merely mean one's own observation of the things but even ascertainment of facts by recording the statements of certain witnesses.[52]

Where the Magistrate directs a local investigation by any person under the above Section 133, the Magistrate may

(a) furnish such person with such written instructions as may seem necessary for his guidance;

(b) declare by whom the whole or any part of the necessary expenses of the local investigation shall be paid. [S. 140(1)]

The report of such person may be read as evidence in the case. [S. 140(2)]

Where the Magistrate summons and examines an expert under Section 139, the Magistrate may direct by whom the costs of such summoning and examination shall be paid. [S. 140(3)]

28.21 Procedure on order being made absolute and consequences of disobedience

Section 141 provides as follows:

141. (1) When an order has been made absolute under Section 136 or Section 138, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he wall be liable to the penalty provided by Section 188 of the Indian Penal Code (45 of i860).

Procedure on order being made absolute and consequences of disobedience

(z) If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other movable property of such person within or without such Magistrate's local jurisdiction and if such other property is without such jurisdiction, the order shall authorise its attachment and sale

52. *Amur Singh* v. *State of U.P.,* 1980 Cri Lj 1350, 1352 (All).

when endorsed by the Magistrate within whose local jurisdiction the property to be attached is found.

(3} No suit shall lie in respect of anything done in good faith under this section.

Though a conditional order under Section 133 cannot be questioned by a civil suit according to Section 133(2), there is no bar to file a civil suit to establish one's rights which might have been affected by the absolute order passed under Section 13 8.[53]

It has been held that the order passed by a court cannot be reviewed by itself.[54] [55] [56]

28.22 Injunction pending inquiry

Section 142 provides as follows:

Injunction pending inquiry

142. (1} If a Magistrate making an order under Section 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter.

(2) In default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury.

{3) No suit shall lie in respect of anything done in good faith by a Magistrate under this section.

This section is obviously controlled in its effect by Section 133.

The Magistrate can pass an interim order under Section 142(1) at any stage of the inquiry, whether the inquiry is one under Section 133 or Section 137 or Section 138. But he must satisfy himself that the conditions set out in Section 142(1) are fulfilled. Accordingly, an order under Section 142(1) could be passed only if the Magistrate considers that there is an imminent danger or inquiry of a serious kind to the public.[55] [56]

Though the section does not provide for notice before an injunction is issued, it is implied that the power to issue injunction should be exercised only after affording an opportunity to the person affected to be heard on the matter M

In a case where a building was demolished as a result of an illegal order passed without obtaining even a police report, the Rajasthan High Court said that when there was urgency within the meaning of Section 142 the passing of orders without giving notice or conducting any inquiry as contemplated by Sections 138, 139 and 140 must be regarded as improper.[57]

53. ***Chuni ball*** v. ***Ram Kishen Saba,*** ILR
54. ***Sashibbusan Tripathy*** v. ***State,*** 1985 Cri Lj
55. ***T.N. Sudhakaran*** v, ***E.M. George,*** 1973 Cri
56. ***Chamunny*** v. ***State of Kerala,*** 1979 KLT
57. *Shyam Sunder* v. *State of Rajasthan,* 199S

Magistrate may prohibit repetition or continuance of public nuisance **28.23**

A District Magistrate or Sub-Divisional Magistrate, or any other Executive Magistrate empowered by the State Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the IPC or any special or local law. [S. 143]

The order under the above section *i.e.* Section 143 can be passed only if the matter has been adjudicated by a competent court.[58] The disobedience of this order has been made punishable under Section 291 IPC.

PART V
Urgent Cases of Nuisance or Apprehended Danger

Power to issue orders in such cases

Section 144 provides as follows: 28.24

Power to issue order in urgent cases of nuisance or apprehended danger

144. (1) In cases where, in the opinion of a District Magistrate, a SubDivisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by Section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

{2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against w'hom the order is directed, be passed ex parte.

(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

{4) No order under this section shall remain in force for more than two months from the making thereof:

Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate w-ould have, but for such order, expired, as it may specify in the said notification.

58.

Jo

{5} Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section, by himself or any Magistrate subordinate to him or by his predecessor-m-office.

(6) The State Government may, either on its own motion or on the application of any person aggrieved, rescind or alter any order made by it under the proviso to sub-section (4).

{7) Where an application under sub-section (5) or sub-section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader and showing cause against the order; and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reasons for so doing.

This is a well-known and frequently used section. It confers an omnibus power on senior Magistrates to issue orders in urgent cases of nuisance or apprehended danger. The wide range of situations in which Magistrates may resort to this power in the public interest will be apparent from a reading of sub-section (i).[59] The section confers powers to issue an order absolute at once in urgent cases of nuisance or apprehended danger. Such orders may be made by specified classes of Magistrates when in their opinion there is sufficient ground for proceeding under the section and immediate prevention or speedy remedy is desirable. It requires the Magistrate to issue the *order in writing* setting forth the material facts of the case and the order is to be served in the manner provided by Section 134.

The order may direct
(A) any person to abstain from a certain act, or

(B) to take certain order with respect to certain property in his possession or under his management.

The grounds for making the order are that, in the opinion of the Magistrate, such direction

(a) is likely to prevent, or

(b) tends to prevent,

(/} obstruction;

(ii) annoyance; or

{in) injury, to any person lawfully employed; or *{iv)* danger to human life, health or safety; or

{v) a disturbance of the public tranquillity; or (tn) a riot; or *{vii)* an affray.

Stated briefly the section provides for the making of an order which is either (A) prohibitory, or (B) mandatory as shown above.[60]

59.
60.

The gist of action under Section 144 is the urgency of the situation, its efficacy is the likelihood of being able to prevent some harmful occurrences.[61] As it is possible to act absolutely and even ex parte it is obvious that the emergency must be sudden and the consequence sufficiently grave. Without it the exercise of power would have no justification. Ordinarily an order under Section 144 should not be made without affording an opportunity to the person against whom it is proposed to be made, to show cause against the same and if no notice is issued the Magistrate should record his reasons to show that the occasion is considered to be one of emergency, failing which the order made ex parte cannot be sustained. The order should not be bald but should contain at least some reasons to show that the Magistrate has applied his mind and was satisfied about the existence of factors necessary for action under Section 144.[62] It is not an ordinary power flowing from administration but a power used in a judicial manner and which can stand further judicial scrutiny in the need for the exercise of the power, in its efficacy and in the extent of its application. There is no general proposition that an order under Section 144 cannot be passed without taking evidence.[63] The section is directed against those who attempt to prevent the exercise of legal rights by others or imperil the public safety and health. Ordinarily the order would be directed against a person found acting or likely to act in a particular way. A general order, however, may be necessary when the number of persons is so large that distinction between them and the general public cannot be made without the risks mentioned in the section. A general order is thus justified but if the action is too general the order may be questioned by appropriate remedies for which there is ample provision in the law.[64]

The authority of the Magistrates exercising powers under Section 144 is neither absolute nor supreme but subject to supervision and revision by the higher courts and therefore the Magistrates in order to act legally and with propriety, must indicate with reasonable fullness the materials on which they conclude that there was some emergency justifying their actions, so that the higher courts may check and brake them and put them back on rails when they go off.[63]

discussion regarding the principles upon which the jurisdiction under S. 144 is to be exercised, see, *Mobd. Gulam Abbas* v. *Mohd. Ibrahim,* (1978) 1 SCC 226, 227: 1978 SCC (Cri) rod, 107: 1978 Cri LJ 496.

61. See, observations in *Jagdishwaranand* v. *Police Gommr.,* 1983 Cri LJ 1872 (Cal).

62. *B. LingaMurthy* v. *B. Hussain Sabeb,* 1979 Cri Lj 1147, 1149 (AP); see also, *Gopalfi Prasad* v. *State of Sikkim,* 1981 Cri Lj 60, 63 (Sikk).

63. *Jagrupa Kumari* v. *Chotay Ndrain Singh,* (1936) 37 Cri LJ 95, 97 (Pat); *Madbu Limaye* v, *Sub-Divisional Magistrate, Monghyr,* (1970) 3 SCC 746: 1971 Cri Lj 1720, 1730.

64. *Madhu Limaye* v. *Sub-Divisional Magistrate, Monghyr,* (1970) 3 SCC 746: 1971 Cri LJ 1720, 1731. S

65. *Gopalfi Prasad* v. *State of Sikkim,* 1981 Cri LJ 60, 62 (Sikk); see also, S.S. *Venkataramana* v. *Emperor,* (1918) 19 Cri LJ 56 (Mad).

The provisions of Section 144 must be construed in the light of the provisions of the Constitution in clauses *{%)* to (6) of Article 19 and when so construed, the conclusion would be inevitable that the obstruction, annoyance or injury or any other danger or disturbance sought to be prevented "must" as indicated by the Supreme Court in the *Madhu Limaye case*[66], "assume sufficiently grave proportions to bring the matter within the interests of public order" or general public or any other matter specified in clauses (2) to *{6)* of Article 19;[67]

A ban on sale of State organised lottery in Delhi was held valid by the Delhi High Court. The court reasoned that the State organised lottery is a subject which falls within Entry 40 of List I of the VII Schedule of the Constitution and a law with regard thereto is in the exclusive domain of Parliament. The ban in question has been imposed in exercise of the administrative power conferred on the authority under Section 144 of the Code as the activity comes within its field of operation.[68]

An order issued under Section 144 is essentially an executive order passed in performance of an executive function where no *Us* as to any rights between rival parties is adjudicated but merely an order preserving peace is made and as such it will be amenable to writ jurisdiction either under Article 32 or under Article 226 of the Constitution if it violates or infringes any fundamental right.[69] [70] [71] *

The words "abstain from a certain act" in sub-section {1} do not empower the Magistrate to order a person to do particular acts, and the Magistrate cannot assume such power even in the garb of making a negative order.[70] [71] An order under Section 144 must be of a temporary character, which means that it must not be irrevocable in its nature or partake of the character of a perpetual injunction.[73]

In the case of a dispute as to the possession of any property coming under this section, the proper course for the Magistrate is to ascertain which party is in the wrong and is interfering with the exercise of the legal right of the other party. Thereafter the Magistrate should direct that party to abstain from a certain act or take certain order with respect to the property in his possession if the Magistrate considers that such

66. *Madhu Limaye*
67.
68. *A kbit Bkartiy*
69. ***Gulam***
70. ***Rama nlal Bhogil***
71. ***M.E.*** v. ***Kanyir***

direction is likely to prevent or tends to prevent danger to human life etc. as spelled out in Section 144.[72]

Regarding the nature and use of the power given under Section 144, the Supreme Court has observed:

> The entire basis of action under Section 144 is provided by the urgency of the situation and the power thereunder is intended to be availed of for preventing disorders, obstructions and annoyances with a view to secure the public weal by maintaining public peace and tranquillity... [For this purpose] it may become necessary for the Executive Magistrate to override temporarily private rights and in a given situation the power must extend to restraining individuals from doing acts perfectly lawful in themselves, for, it is obvious that when there is a conflict between the public interest and private rights the former must prevail. It is further well settled that the section does not confer any power on the Executive Magistrate to adjudicate or decide disputes of civil nature or questions of title to properties or entitlements to rights hut at the same time in cases where such disputes or titles or entitlements to rights have already been adjudicated and have become the subject-matter of judicial pronouncements and decrees of civil courts of competent jurisdiction then in the exercise of his power under Section 144 he must have due regard to such established rights and subject of course to the paramount consideration of maintenance of public peace and tranquillity the exercise of power must be in aid of those rights and against those who interfere with the lawful exercise thereof and even in cases where there are no declared or established rights the power should not be exercised in a manner that would give material advantage to one party to the dispute over the other but in a fair manner ordinarily in defence of legal rights, if there be such and the lawful exercise thereof rather than in suppressing them. In other words, the Magistrate's action should be directed against the wrong-doer rather than the wronged. Furthermore, it would not be a proper exercise of discretion on the part of the Executive Magistrate to interfere with the lawful exercise of the right by a party on a consideration that those who threaten to interfere constitute a large majority and it would be more convenient for the administration to impose restrictions which would affect only a minor section of the community rather than prevent a larger section more vociferous and militant.[73]

The Supreme Court has had occasion to reiterate the importance of Section 144 in *RamUla Maidan Incident, re*[74]. The court said that Section 144 enumerates the principles and declares the situations where exercise of rights recognised by law, by one or few, may, conflict with other rights of the public or tend to endanger public peace, tranquility and for harmony. The orders passed under Section 144 are attempted to serve larger public interest and purpose under the provisions of the Code.

;2. *Bifay Kumar Dahnia* v. *Sanwarmal Jalal,* 1988 Cri Lj 712 (Gau).
73. *Gulam Abbas* v. *State of U.P.,* {1982) 1 SCO 71: 1982 SCC (Cri) 82, 115-16: 1981 Cri Lj 1835. /4. {203.2} 5 SCC 1: (2012} z SCC {Cri) 241: 2012 Cri LJ 3516.

The executive direction contained in the "Important Announcement" issued by the State Government, insofar as it held out to the members of the public the threat that a curfew-breaker for the mere breach of the curfew order would be liable to be shot at, was held by the Gujarat High Court as ultra vires the executive powers of the State Government and also ultra vires Section 144 of the Code, Section 188 IPC and Articles 20 and 21 of the Constitution and was, therefore void and of no effect whatsoever.

On a perusal of Sections 144(1), {2), (3) and (4) along with the proviso will make it crystal clear that the period of 60 days has to be calculated from the date on which the prohibitory order has been passed at the time of initiation of the proceeding.[75] [76]

Under Section 144(5) and (7) any Magistrate may rescind or alter his own order or an order passed by his predecessor or of any Magistrate subordinate to him. This is a salutary provision so that the party, who has not been heard by the Magistrate while passing an ex parte order under Section 144(2) and who feels aggrieved, can either approach the same Magistrate or a Magistrate to whom the Magistrate passing the order is subordinate. But that does not mean that by reason of this provision the revisional jurisdiction of superior courts he. of the High Court and of Court of Session, is taken away.[75] [76] [77] Where the order under Section 144 purports to affect the future rights of the parties, the High Court may, in an appropriate case, set aside the order even though it was time expired or had spent its force.[78]

Is the High Court (or the Court of Session) competent to go into the propriety of the State Government's order extending the duration of the order passed by a Magistrate under the proviso to Section 144(4)? No doubt the High Court's revisional powers are wide. But this specific question does not seem to have been decided so far.[79]

Amendment by way of insertion of Section 144-A in the Code by Section 16 of Amending Act 25 of 2005, and insertion of new Section 153- AA in IPC by Section 44(a) of Act 25 of 2005 will come into force from a date to be notified. Enforcement of Section 144-A will be of very much importance inasmuch as it enhances the security proceedings. It can now be possible to prohibit a person or group of persons who indulge in display of aggressiveness by show of arms. The District Magistrate can ban

75. . .
76. *Mania*
77. *D, Appar ao* v. *C. Simha*
78. *Binde shwar*
79. *Sea,*

such activities and the period of validity of such notice, initially for three months could be extended upon six months by the Court. These powers of the State Government can be delegated to the District Magistrate. New Section 153-AAIPC makes it an offence to carry arms in any procession.[80 81]

Part VI

Disputes as to Immovable Property

28.25 Preventive measures in respect of disputes as to immovable property

Since disputes over land and water, crops and other produce of land and rights of user in respect of immovable property often result in breach of the peace, violence and bloodshed, this part containing as 145 to 148 arms the magistracy with powers to intervene at an incipient stage of the dispute and compel the disputants to have recourse to legal remedies. Experience over the years has proved the usefulness of these provisions in the Code.®[1]

All the powers conferred by these sections vest in the Executive Magistrates. However it has been provided by Section 478 that "if the Legislative Assembly of a State by a resolution so permits, the State Government may, after consultation with the High Court, by notification, direct that references in Sections 145 and 147 to an Executive Magistrate shall be construed as references to a judicial Magistrate of the First Class". Thus the effect of Section 478 would be that the State Government, with

80 81

80. *Ins. by Code of Criminal Procedure*

carrying of arms in any p

o
r

a
n

o
r
d
e
r

m
a
d
e

u
n
d
e
r

t

d

o
r

o
r
d
e
r

m
a
d
e

b
y

t
h
e

D

81. *See*, 41st Report, p. *61*, para. IZ.I.

the concurrence of the State Assembly and after consultation with the High Court, can transfer the functions under the sections from Executive Magistrates to judicial Magistrates of the First Class.

28.26 Preventive measures in respect of land or water disputes

In this connection Section 145 provides as follows:

Procedure where dispute concerning land or water is likely to cause breach of peace

145. (1) Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this section, the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

{3) A copy of the order shall be served in the manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

{4) The Magistrate shall then, without reference to the merits or the claims of any of the parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks necessary, and, if possible, decide whether any and which of the parties was, at the date of the order made by him under sub-section (1), in possession of the subject of dispute:

Provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information w-as received by the Magistrate, or after that date and before the date of his order under subsection {1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub-section (z).

{5} Nothing in this section shall preclude any party so required to attend, or any other person interested, from showung that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.

(6) *(a)* If the Magistrate decides that one of the parties was, or should under the proviso to sub-section (4) be treated as being, in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

{b) The order made under this sub-section shall be served and published in the manner laid down in sub-section {3}.

(7} When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purposes of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale- proceeds thereof, as he thinks fit.

(9} The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under Section 107.

The object of this section is to provide a speedy remedy for the prevention of breaches of the peace arising out of disputes relating to immovable property. The Code contemplates a determination of this question without any reference to the merits of the respective claims of the disputing parties as to the right to possess the subject of dispute. The question of possession, moreover, has to be determined with reference to a specified point of time, namely the date of the initial order, or in the case of forcible dispossession, the date within two months next preceding the date on winch the report of a police officer or other information regarding the dispute was received by the Magistrate.[82]

The existence of a civil suit can be no bar in law to the initiation of a proceeding under Section 145.[83] The Supreme Court has declared that a concluded order under Section 145 made by a competent court would not be defeated simply because the unsuccessful party has approached the civil court. The order deals only with factum of possession. It is subject to the decision of civil court which can give a finding different from that which the Magistrate has reached.[84]

The jurisdiction of the Magistrate under Sections 145 and 146 to maintain peace will prevail over the orders of the civil court except where /} the determination of rights by the civil court has become final, or *it)* the

82. ***See,*** the observations in ***Tara Pada Biswas*** v. ***Nurul Haq Mia,*** (3905} 2 Cri Lj 679, 684: ILR (1906)

32. Cal 1093, 1099-1100; see also, ***Devi Prasad*** v. ***Sheodal Rai,*** (1907) ***6*** Cri Lj 35Z: ILR {1907) 30 All 43, 42; ***Paqir***

83.***Shamrati Kuer*** v. ***Janki Saran Singh,*** 1981 Cri LJ 978, 980 (Pat); ***Dominic*** v. ***Slate,*** 1987 Cri Lj

84. ***Jhummamai*** v. ***State of M.P.,*** (1988} 4 SCC 452: 3988 SCC (Cri) 974: 1989 Cri Lj 82.

civil court has appointed a receiver vide Section 146(2}, The requirements of peace are paramount, the orders of the civil court notwithstanding.[83]

When a suit in respect of law involving question of possession is pending in the civil court and the court has passed interim injunction restraining interference with the possession, initiation of parallel criminal proceedings under Section 145 and 146 would not be justified.[85] [86]

In order to take preventive action under Section 145 two essential conditions must be satisfied: *i)* there must be dispute relating to land or other objects mentioned in sub-section (i); and *ii)* the dispute is likely to cause a breach of peace.[85] * [87] If there is no dispute there is no obligation on the part of the court to pass orders under Section 145.[88] The Executive Magistrate exercising jurisdiction under this section must be satisfied about these grounds either from a police report or from *other information* which might include an application by the party dispossessed.[89] The term "satisfied" is of considerable expansiveness which means free from anxiety, doubt, perplexity, suspense or uncertainty. While passing a preliminary order under sub-section (1) all that is necessary is that the Magistrate must be satisfied that there is a dispute in regard to the objects mentioned in Section 145 and that the dispute Is likely to endanger the peace.[90] The "satisfaction" of the Magistrate must be clear and unambiguous. Nothing short of that can give him jurisdiction under Section 145.[91] Sub-section {1) requires that while making the preliminary order in writing the Magistrate shall state "the grounds of his being so satisfied". However it has been held that where the Magistrate has expressed his satisfaction on the basis of the facts set out in the application or the police report before him, it would mean that those facts were prima facie sufficient and were the reasons

85. ***Ashrafi Lai*** v. ***Labb Singh,*** 1981 Cri Lj 1172., 1176 (Del); ***see also,*** observations in ***Iqbal Singh v. State of Haryana,*** 1985 Cri LJ 1757 (P&H); ***Jagdish*** v. S.D.M., ***Panipat,*** 1987 Cri LJ 1198 (P&H) distinguishing ***Ram Sumer Puri Mahant*** v. ***State***

$6. *Gram Panchayat, Garh Sarnai* v. *Panipat,* 1987 Cri LJ 1326 (P&H); *Kara Sumer*

Puri Mahant v. ***State ofU.P.,*** {1985) 1 SCC 427: 19S5 SCC (Cri) 98: 1985 Cri LJ 752; ***Udmi Ram*** v. ***Dharam Singh,*** 1989 Cri LJ 1522 (Raj); ***Keshavrao*** v. ***Radheshyam,*** 1991 Cri LJ 283 (MP);

87. ***Pandurang Govind, re,*** ILR (1900) 24 Bom 527, 531; ***Krishna Kamini*** v, ***AbdulJubbar,*** ILR (1903) 30 Cal 155, 200 (FB); S.M. ***Yakub*** v. T.N. ***Basu,*** (1949) 50 Cri LJ 299: ILR (1948) 27 Pat

S 88. ***Mangilalw Bangmal,*** 1988 Cri LJ 1905 (MP).

89. ***R.H. Bbutani*** v. ***Mani J, Desai,*** 1969 Cri LJ 13, 17: AIR 1968 SC 1444; ***Raja La! Singh*** v. ***Ra?n Prasad,*** 1975 Cri LJ 1268, 1271 (Pat); ***Moti*** v. ***State,*** 1976 Cri LJ 1956, 1957 (HP); ***Kauleshari*** v. ***Binda Pandey,*** 1976 Cri LJ 649 (Pat); ***Shamrati Kuer*** v. ***Janki***

90. ***Paqir Chand*** v. ***Bhana Ram,*** {1957} 58 Cri LJ 1450: AIR 1957 Punj 303; ***Madho Singh*** v. ***Ladan,*** 1974 Cri LJ 1164, 1165

91. R.N. ***Lotlikar***v. C. ***Figueiredo,*** 1974 Cri LJ 715, 716 (Goa JCC); ***Laxman*** v. ***Bahimkhan,*** 1976 Cri LJ 1492, 1498 (Bom);

leading to his satisfaction.[92] The order in writing passed by Magistrate under sub-section (i) must be clear, precise and full so as to give complete idea of the case to the parties concerned. This preliminary order is considered so basic that a failure to draw it up has been held by several High Courts to vitiate all the subsequent proceedings.[93] In a case involving dispute over stoppage of water for irrigation from common well the final order passed on a notice drawn up under Section 145(f) by Mandal Revenue Officer rather than by the Mandal Executive Magistrate that too without mentioning the date and time for the appearance was held not proper. The A.R High Court also opined that the proceedings should have been initiated under Section 147 rather than under Section 145.[94] The preliminary order can be modified at any stage if the Magistrate is satisfied that he has gone wrong in certain respects or that no emergency exists.[95]

At the completion of the inquiry under sub-section {4) the Magistrate is required to decide whether any, and if so which, of the parties was, at the date of the order made by him under sub-section {1), in actual possession of the property which is the subject of dispute. If, however, it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate or after that date and before the date of his order under sub-section (1), he may treat such party as if it had been in possession on the date of the order under sub-section (1). Here, the word "dispossessed", means and includes to be out of possession, ousted, ejected, removed from the premises or excluded. Even a person having a right to possession cannot dispossess another by taking the law into his hands and making a forcible entry otherwise than in due course of law.[96]

The words "forcibly and wrongfully" qualifying the word "dispossessed" in the proviso to Section 145(4) cannot be given a restricted meaning of dispossession accompanied by the use of criminal force as defined in Section 350 IPC. To constitute forcible possession, even the use of misrepresentation and improper threats would make the dispossession "forcible and wrongful".[97] However, a contention that as the dispossession of the petitioner was continuing and it amounted to a continuing wrong and,

92. *R.H. Bhutani* v. *Mam J. Desai*, 1969 Cri LJ 13, 17: AIR 1968 SC 1444; *Gurdeu Singh* v. *State of*
Punjab, 1975 Cri LJ 1434, 1435 (P&H); ***Amarnath*** v. ***K.***
joginder Singh, 1976 Cri LJ 39L **395** (HP); Sri ***Chand*** v.
93.***Matburalal*** v. ***Bbanwarlal,*** (1979) 4 SCC 665, 670: 1980 SCC (Cri) 9, 15: 1980 Cri LJ 1, 6*;* see
also, ***Gabrial Thankayyan*** v. ***Narayanan Nadar,*** 1977 Cri LJ
94.*Edla Anjaiah* v. *Purumalla Mallesham,* 1998 Cri LJ 750 (AP).
95.***K.K. Nair*** v, ***Kunhi Mohammed Haft.*** 1971 Cri LJ 218, 219 (Ker).
96. *Tarulata Devi* v. *Nikhil Bandbu Mishra,* 1982 Cri LJ 1665, 1667 (Gau).
97.*P,K. Antia* v. *Shridhar Sadashiv,* 1982 Cri LJ 1463 (Bom).

therefore, the proviso to Section 145(4} must be deemed to be satisfied, cannot be accepted by the court.[1]

The inquiry under sub-section (4) is limited to the question of actual possession on the relevant date and is not concerned with the claims and merits of the parties in regard to the *right to possess* the subject of dispute.[2] The Magistrate making the inquiry is required to *peruse* the statements put in by the parties in response to the order made under sub-section (1), and to hear the parties and receive the evidence produced by the parties.[3 4 5] It has been held that for deciding the question of possession it is evidence rather than affidavit that has to be relied upon by the court.[4 5] An order which does not consider these matters is *ex facie* improper as not complying with the mandatory provisions of Section 145(4)2 It is the duty of the trial court to make every effort to follow the mandatory provisions laid down under Section 145. It has been observed that the procedures laid down in Section 145 should be very carefully followed and that if they are not followed, or overlooked, it must be held that the actions of the trial court are without jurisdiction.[6]

According to Section Z74, in all inquiries under Sections 145 to 148 the Magistrate is required to make a memorandum of the substance of the evidence of each witness in the language of the court. If the Magistrate is unable to make such memorandum himself, he is required, after recording the reason of his inability, to cause such memorandum to be made in writing or from his dictation in open court. Such memorandum is to be signed by the Magistrate and then it forms part of the record. Failing to comply with these requirements of Section 2,74 would vitiate the proceedings.[7]

Considering the effect of sub-section (5) of Section 145, it has been held that where the existence or the apprehension of breach of peace is challenged and evidence is led, the Magistrate must record a finding one way or the other because the very foundation of the jurisdiction of a Magistrate in cases under Section 145 is based on the existence of a dispute giving rise to apprehension of breach of peace. It has been the constant view of the High Courts that as soon as the apprehension of breach of peace ceases to exist or if it never existed, the jurisdiction of the Magistrate to proceed

1. ***R.C. Patuck*** v. ***Fatima A. Kmdasa,*** (1997) 5 SCC 334: 1997 SCC
2. R.H. ***Bbutani*** v. ***Mam J. Desai,*** 1969 Cri LJ 13, ***16:*** AIR 1968 SC 1444; ***Kusum v. Saniya Bai,*** 197j Cri LJ 1135, 1137
3. ***N.A. Ansari*** v. ***Jackiriya,*** 1991 Cri LJ 476 (Mad).
4. ***Indira*** v. ***Vasantha,*** 1991 Cri LJ 179S (Mad).
5. ***Narayan Kntty Menon*** v. ***Sekhara Menon,*** (1964} 2. Cri LJ 682.: AIR 1964 Ker 308, 309; ***Kusum*** V. ***Soniya Bai,*** 1975 Cri LJ 1135,1136-37 (Bom); ***Cbandrakalabai*** v. ***Sharadcbandra,*** 1975 Cri LJ 1294, 1296 (Bom); C.
6. ***D ban bar AH*** v. ***Haripada Saha,*** 197 6 Cri Lj 1924, 1926 (Gau).
7. *Somappa Ningappa* v. *Taluka Executive Magistrate,* 1982 Cri LJ

with the case ceases and the only order he has to pass is to drop the proceedings and to release the property in dispute.[8]

On dropping the proceedings under Section 145(5), the Magistrate does not become *functus officio.* He has the jurisdiction to make any incidental or consequential orders by way of winding up of the proceedings and restore possession of the attached property to the party or persons from whom the possession had been taken over at the time of attachment.[9]

If a person was given possession of land by the court at the conclusion of the proceedings under Section 145 of the Code and if he was again dispossessed by the opposite party it would not be correct to say that the party dispossessed has got no remedy to seek enforcement of the order of the court and that his only remedy is to file a suit in a summary way *(i.e.* under the Specific Relief Act) or to make a complaint against the opposite party under Section 188 IPC. The court has got inherent power to effectuate and implement its own order, in order to prevent a recalcitrant party from defying the orders and to see that the majesty of law is maintained.[10 *]

In a case the appellant was put in possession of the house with the help of police in execution of eviction proceedings. However, one of the respondent resisted this by filing a title suit. And in pursuance of a firing incident the SDM under Section 144 restrained both the parties from entering the house. However, later put the appellants in possession of the property. The respondent then filed a petition under Section 145. However, it was dismissed. Then he moved the High Court under Section 482 to quash the order. High Court set aside SDM's order. On appeal, the Supreme Court put the appellant in possession as it was in pursuance of the decree of eviction that they were given possession and it had become final as none challenged that order.[15]

It may be noted here that according to Section 354(6) every final order made under Section 145 is required to contain the point or points for determination, the decision thereon *and the reasons for the decision.*

However, once a preliminary order drawn by the Magistrate under Section 145(1) sets out the reasons for holding that a breach of the peace exists, it is not necessary to have such a finding again at the time w'hen the final order is passed, nor is there any provision in the Code requiring such a finding in the final order.[12 *]

8. *Sankatha Singh* v. *Rahmat Ullah,* 1973 Cri Lj 1091, 1093 (All); *Gujarat* v. *Collector Singh,* 1975 Cri LJ 102.6, 1044 (All) (FB); *Sarjoo* v. *Babadin,* 1975 Cri Lj 1562, 1563 (All); *Thekkethodlka*

9. *Wajid Mirza* v. *Mohd. All Ahmed.* 1982 Cri Lj 890, 894 (AP).

10. *Misri* v. *Nazir Hussain,* 1976 Cri Lj 924, 925 (J&K).

31. *Raid Raman Prasad* v. *State of Bihar,* (1993) 2 SCC 3: 1993 SCC (Cri) 489.

12. *Rajpati* v. *Bachan,* (1980} 4 SCC 116: 1980 SCC (Cri) 927, 929: 1980 Cri Lj 1276; see also. *Ram* v. *Banwari Lai,* 1967 Cri Lj 1051 (Punj).

It has been held that an order under Section 145 is not interlocutory whereas the one under Section 146 is and hence such an order under Section 146 can be revised,[13]

28.27

Power to attach subject of dispute and to appoint receiver

Attachment of disputed property and appointment of receiver

In this connection Section 146 provides as follows:

> 146. (1) If the Magistrate at any time after making the order under subsection (x) of Section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in Section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof:
>
> Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute.
>
> (2) When the Magistrate attaches the subject of dispute, he may, if no receiver in relation to such subject of dispute has been appointed by any Civil Court, make such arrangements as he considers proper for looking after the property or if he thinks fit, appoint a receiver thereof, who shall have, subject to the control of the Magistrate, all the powers of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908):
>
> Provided that in the event of a receiver being subsequently appointed in relation to the subject of dispute by any civil court, the Magistrate—
>
> *(a)* shall order the receiver appointed by him to hand over the possession of the subject of dispute to the receiver appointed by the Civil Court and shall thereafter discharge the receiver appointed by him;
>
> *(b)* may make such other incidental or consequential orders as may be just.

After a preliminary order has been made under Section 145(1}, three contingencies have been contemplated in which an order of attachment under this section can be passed:

- *(i)* when the Magistrate is satisfied that the case is one of emergency; or
- *(ii)* if the Magistrate after inquiry holds that none of the parties was then in such possession as is referred to in Section 145; or
- *(Hi)* if the Magistrate is unable to satisfy himself as to which of the parties was in such possession on the appropriate date

13. *Indrapuri Primary Coop. Housing Society v. Bhabani Gogoi,* 1991 Cri LJ 1765 (Gan).

It is open to the Magistrate while initiating a proceeding under Section 145 to attach the subject matter in dispute without hearing the other side.[54] The purpose of Section 145 being to prevent a breach of peace, attachment can be straightaway ordered in case of emergency without notice to the opposite party.[14] [15] However, the Magistrate cannot appoint a receiver without passing an order attaching the property under Section 146.[16]

It is true that the satisfaction of the Magistrate that action under Section 145(1) is called for, must necessarily precede the finding that the case is of emergent nature requiring attachment of property. However, from this, it does not necessarily follow that the satisfaction of the Magistrate under Section 145(1) and the finding of emergency cannot be recorded in the said sequence in a composite order.[17] [18]

For considerable time, the High Courts while interpreting Sections 145 and 146 were divided over the issue as to whether the Magistrate's jurisdiction under Section 145 comes to an end on attachment of the disputed property under Section 146(1) on the ground of emergency. In *Mathuralal* v. *Bhanwarlat*[s], the Supreme Court has set at rest the controversy. According to the Supreme Court, Sections 145 and 146 together constitute a scheme, and Section 146 is to be read only in the context of Section 145. Therefore, except for the reason that there is no dispute likely to cause a breach of the peace and as provided by Section 145(5), [a] proceeding initiated by a preliminary order under Section 145(1) must run its full course. Now, in a case of emergency, a Magistrate may attach the property, at any time after making the preliminary order. This is the first of the situations provided in Section 146(1) in which an attachment may be effected. There Is no express stipulation in Section 146 that the jurisdiction of the Magistrate ends with the attachment. Nor is it implied. Far from it. The obligation to proceed with the inquiry as prescribed by Section 145(4) is against any such implication. Suppose a Magistrate draws up a preliminary order under Section 145(1) and immediately follows it up with an attachment under Section 146(1), the whole exercise of stating the grounds of his satisfaction and calling upon the parties to appear before him and submit their written statements becomes futile if he is to have no further jurisdiction in the matter.

14. ***Gaya Singh*** v. ***Donum Singh, 1979*** Cri LJ it 10, 1113 (Pat) (FB); ***Ashrafi Lai*** v. ***Labh Singh,*** 1981 Cri Lj 1172, 117S (Del).
15. *Tulsi Devi* v. *Bhagai Ram,* 1983 Cri Lj 72. 74 (HP); see also, *Sheo Mangal Choudbary* v. *State of* ***Bihar,*** 1992 Cri Lj 34 (Pat); ***Ganpat Singh*** v. ***State,*** 1995 Cri LJ ***616*** (Raj).
16. ***Kisun Yadav*** v. ***Asharfi Yadav,*** 1991 Cri Lj 160 (Pat).
17. *Nichhattar Siftgb* v. *Gurinder Singh,* 1983 Cri LJ 718, 720 (P&H); see also, *M.A. Rahaman* v. *State* ***of A.R.,*** 1981 Cri LJ 1291 (AP); but ***see*** somewhat different view in ***Mahendra Tiwary*** v. ***Lai Pari Devi,*** 1982 Cri LJ 17, 18 {Pat}; ***K. Mavunni*** v. ***State of Kerala,*** 1982 Cri LJ 468 (Ker). [18]

18. (1979) 4 SCC 665: 19So SCC (Cri) 9: 1980 Cri LJ 1.

And yet he cannot make an order of attachment under Section 146(1) on the ground of emergency without first making a preliminary order in the manner prescribed by Section i45(i)d[9] There is no reason why a construction which will lead to such inevitable contradictions should be adopted.[19] [20] It is therefore wrong to hold that the Magistrate's jurisdiction ends as soon as an attachment is made on the ground of emergency. It should also be noted that the first of the situations in which an attachment may be effected under Section 146 has to be "at any time after making the order (preliminary order) under Section 145(1)", while the two other situations have, necessarily, to be at the final stage of the proceeding initiated by the preliminary order under Section 145(1).^ [22]

28.27.1 *Security proceedings*

In *Ashok Kumar* v. *State of Uttarakhand*[19] [20] [21] [22], the court has held that Sections 145 and 146 of the Code constitute a scheme for resolution of disputes threatening peace. Section 146 cannot be separated from Section 145. The Supreme Court's observations are illustrative of the import of these provisions:[23]

> The ingredients necessary for passing an order under Section 145(1) of the Code would not automatically attract for the attachment of the property. Under Section 146, a Magistrate has to satisfy himself as to whether emergency exists before he passes an order of attachment. A case of emergency, as contemplated under Section 146 of the Code, has to be distinguished from a mere case of apprehension of a breach of the peace. The Magistrate, before passing an order under Section 146, must explain the circumstances why he thinks it to be a case of emergency. In other words, to infer a situation of emergency, there must be material on record before the Magistrate when the submission of the parties is hied, documents produced or evidence adduced.

As mentioned above, Section 146(1) contemplates of three contingencies whereby an order of attachment of the subject matter of the dispute may be made. The abovementioned second and third contingencies can possibly arise only after the Magistrate has completed the enquiry as contemplated by Section 145(4), and here the Magistrate may pass an order of attachment until a competent court has determined as to which of the

19. *Sangam Kumar* v. *SDM, Robertsganj*, 1998
20. ***Ibid***, 16 [SCC (Cri)]. ***See also***, the observations of the Supreme Court in ***Chandu Naik*** v. ***Sitaram B. Naik,*** (1978) ***1*** SCC 210, 213: 1978 SCC (Cri) r00, 104: 1978 Cri
21. ***Mathuralal*** v. ***Bhamvarlal,*** (1979} 4 SCC 665: 1980 SCC
22. (20x3) 3 SCC 366: (2013) 3 SCC (Cri) 177.
23. ***Ibid,*** 181.

parties is entitled to possess the subject matter of the dispute. Therefore in such cases the proceeding under Section 145 must necessarily have been concluded. Whereas in the case of the first contingency an order of attachment may be made at any time after a proceeding under Section 145 is drawn up and before an order under Section 145(6) is made. Therefore, the proceeding is still alive after an order of attachment in the case of emergency is made and the Magistrate does not become *functus officio* after passing such an order.[24] In fact there is no bar for the SDM to pass a fresh attachment order if its earlier order of attachment was withdrawn under some circumstances.[25-27]

The Supreme Court has in *Skanti Kumar Panda* v. *Shakuntla Devi*[26], summed up the position of law with regard to the temporary nature of a criminal court's order under Sections 145 and 146:

> For the purpose of legal proceedings initiated before a competent court subsequent to the order of an Executive Magistrate under Section 145/146 of the Code of Criminal Procedure, the law as to the effect of the order of the Magistrate may be summarized as under:
>
> (1) The word 'competent court' as used in sub-section (i) of Section 146 of the Code do not necessarily mean a civil court only. A competent court is one which has the jurisdictional competence to determine the question of title of the rights of the parties with regard to the entitlement as to possession over the property forming subject-matter of proceedings before the Executive Magistrate:
>
> (2) A party unsuccessful in an order under Section 145(1) would initiate proceeding in a competent court to establish its entitlement to possession over the disputed property against the successful party. Ordinarily a relief of recovery of possession would be appropriate to be sought for. In legal proceedings initiated before a competent court consequent upon attachment under Section 146(1) of the Code it is not necessary to seek relief of recovery of possession. As the property is held *custo- dia legis* by the Magistrate for and on behalf of the party who would ultimately succeed from the court, it would suffice if only determination of the rights with regard to the entitlement to the possession is sought for. Such a suit shall not be bad for not asking for the relief of possession.[27]

The court added that the competent court does have jurisdiction to make interim order including an order of ad interim injunction inconsistent with the order of the Executive Magistrate.[28]

24. ***Anil*** v. ***Nagendra Chandra,*** 1981 Cri Lj 399, 400 (Cal); ***Ashrafi Lai*** v. ***Labh Singh,*** 1981 Cri Lj 1172, 1178 (Del)
25. ***Budhi*** v. ***Gyana,*** 1996 Cri Lj ***616*** (Raj).
26. (2004) 1 SCC 438: 2004 SCC (Cri) 320: 2004 Cri Lj 1249.
27. ***Shanti Kumar Panda*** v. ***Shakuntla Devi,*** (2004) 1 SCC 438: 2004 SCC (Cri)
28. *Ibid.*

It has been held that a decision of the civil court will be no consequence to the proceedings initiated under Sections 145 and 146.[29] They operate at different levels.[30]

The Supreme Court has laid down that if a civil proceeding is pending no criminal court should initiate proceedings under Section 145. It has been pointed out that multiplicity of litigation is not in the interest of the parties nor should public time be allowed to be wasted over meaningless litigation.[31]

The existence of disputes mentioned in Sections 145 and 146 is determinative of the invocation of the Magistrate's power for making preliminary and attachment order.[32] In other words, if there was no dispute or if the dispute has been resolved by the civil court no order could be made under Section 146.

Composite order can be made.—The court can order a composite order of attachment of disputed property under Section 146(1) while passing the preliminary order under Section 145(1) provided the following circumstances obtained:

(a) The order under Section 145(1) would be separately drawn than the order under Section 146(1)

{b) That the order under Section 145(1) must precede order under Section 146(1)

(c) It must be borne out from both the orders that they satisfy separately the existence of the conditions for drawing such orders under the two sections.[33]

When the Magistrate attaches the subject of dispute, the property becomes *custodia legis* and, therefore, provision has been made in Section 146 of the Code that the Magistrate may, after he has attached the property, make such arrangement as is necessary and proper for looking after the property or if he thinks fit to appoint a receiver thereof.[34] If a receiver is subsequently appointed by him to hand over the property to the receiver appointed by any civil court, the Magistrate shall order the receiver appointed by him to hand over the property to the receiver appointed by the civil court, and may then make such incidental and consequential orders as would be considered just and proper.

29. Shisbn v. ***State of***
30. *Brajamohan Nath v. Kesi*
31. ***Ram Sumer Puri Mahant*** v. ***State ofU.P.,***
32. *Ra*m *Krishan Dass* v. *Rameshwar Dass,* 1988 Cri LJ 291 (
33. *AsgaraliShab* v. *State of*
34. *Mohd. Muslehuddin* v.

An order of attachment under Section 146(1) and appointment of a receiver in respect of the subject of dispute is an order of moment and it substantially and directly affects the rights of the parties; therefore such an order cannot be considered as an interlocutory order, and a revision petition against such an order can be entertained.[55]

It has been made clear by the Allahabad High Court that the powers under Sections 145, 146 etc. if exercised improperly by the Magistrate they could be corrected by way of revision to the Sessions Court. And again, these orders could be challenged by invoking Section 482 in the High Court.[35 36]

Preventive measures in respect of disputes concerning right of use of land or water

28.28

Section 147 provides as follows:

Dispute concerning right of use of land or water

147. (1) Whenever an Executive Magistrate is satisfied from the report of a police officer or upon other information, that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water within his local jurisdiction, whether such right be claimed as an easement or otherwise, he shall make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court in person or by pleader on a specified date and time and to put in written statements of their respective claims.

Explanation.—The expression "land or w'ater" has the meaning given to it in sub-section *{%)* of Section 145.

(2} The Magistrate shall then peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence, if any, as he thinks necessary and, if possible, decide whether such right exists; and the provisions of Section 145 shall, so far as may be, apply in the case of such inquiry.

(3) If it appears to such Magistrate that such rights exist, he may make an order prohibiting any interference with the exercise of such right, including, in a proper case, an order for the removal of any obstruction in the exercise of any such right:

Provided that no such order shall be made where the right is exercisable at ail times of the year, unless such right has been exercised within three months next before the receipt under sub-section (1) of the report of a police officer or other information leading to the institution of the inquiry, or where the right is exercisable only at particular seasons or on particular occasions, unless the [35 36]

35. ***Rupa Jena*** v. ***Tapai Swain,*** 1983 Cr£ LJ 1331, 1334 (Ori); see also, *Abd ul Jabb ar Kha*

36. *Ramesb Chandra Saxena* v. *Addl. S.J., Aligarh,* 199[n] Cri LJ 3794-

right has been exercised during the last of such seasons or on the last of such occasions before such receipt.

{4) When in any proceedings commenced under sub-section (i) of Section 145 the Magistrate finds that the dispute is as regards an alleged right of user of land or water, he may, after recording his reasons, continue with the proceedings as if they had been commenced under sub-section (1);

and when in any proceedings commenced under sub-section (1) the Magistrate finds that the dispute should be dealt with under Section 145, he may, after recording his reasons, continue with the proceedings as if they had been commenced under sub-section (1} of Section 145.

Disputes concerning the rights of user of land or water are potentially as dangerous as those relating to the possession of land or water. And as such disputes are fraught with danger to public peace, the Code by Section 147 provides preventive measures for their control.

Though the land belongs to one party and as such that party is having the right to possess the same, the court can still declare the right of user of the land in a particular manner by another party on satisfactory proof of such user.[37] [38] [39]

The procedure at the inquiry in such cases is the same as that provided by Section 145. Therefore the points applicable in respect of cases under Section 145 are *mutatis mutandis* applicable in respect of Section 147.

It may be noted that an order under Section 147 is without jurisdiction if it is made in the absence of any finding required by proviso to Section 147(3) that the right of user was exercised within three months of the receipt of information or police report in cases of rights exercisable at all times of the year or was exercised at the last particular occasion or season in case of periodically recurring rights.[38] [39]

It has been held that the Magistrate has power to pass interim orders under Section i47-[3']

It may be noted that according to Section 354(6), every final order made under Section 147 is required to contain the point or points for determination, the decision thereon and the reasons for the decision.

28.29 Provision for local inquiry

In this connection Section 148 provides as follows:

Local inquiry

148. (1) Whenever a local inquiry is necessary for the purposes of Section 145, Section 146, or Section 147, a District Magistrate or Sub-divisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may

37. *Ghana Bhoi* v.
38.

Bis

39.

furnish him with such written instructions as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid.

(2.) The report of the person so deputed may be read as evidence in the case.

{3} When any costs have been incurred by any party to a proceeding under Section 145, Section 146 or Section 147, the Magistrate passing a decision may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion and such costs may include any expenses incurred in respect of witnesses and of pleaders' fees, which the Court may consider reasonable.

It has been classified that Section 148 only enables the District Magistrates or SDMs to depute a Magistrate for inquiry. In fact there is no right for the parties to insist for an inquiry.[40]

Irregularities which vitiate proceedings under this chapter **28.30**

If any Magistrate, not being empowered by law in this behalf, does any of the following things:

(/) demands security to keep the peace;

(ii) demands security for good behaviour;

(iii) discharges a person lawfully bound to be of good behaviour;

(iv) cancels a bound to keep the peace;

(v) makes an order under Section 133 as to a local nuisance;

(;vi) prohibits, under Section 143, the repetition or continuance of a public nuisance;

(ini) makes an order under Section 144 or under Sections 145 to 148, his proceedings shall be void, *[see,* clauses *(c), (d),* (e}, *(f),* (/), *(i)* and (/), S. 461]

40. *Soorajmal* v. *State of Rajasthan,* 1998 Cri Lj 1515 (Raj).

Chapter 29

Proceedings for Maintenance of Wives, Children and Parents

29. Objects and scope of the chapter

Sections 125 to 128 provide for a speedy, effective, and rather inexpensive remedy against persons who neglect or refuse to maintain their dependant wives, children and parents. Though the subject-matter of these provisions is civil in nature, the primary justification for their inclusion in the Criminal Procedure Code, 1973 (CrPC) is that a remedy more speedy and economical than that available in civil courts is provided for by these sections for the benefit of needy persons mentioned therein. It may also be said that these provisions are aimed at preventing starvation and vagrancy leading to the commission of crime.[1] By providing a simple, speedy but limited relief, the provisions seek to ensure that the neglected wife, children and parents are not left beggared and destituted on the scrap heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence.[2]

The provisions contained in Sections 125 to 128 are applicable to all persons belonging to all religions and have no relationship with the personal law of the parties.[3] It may also be noted that as the exercise of

1. ***See,*** 41st Report, p. 303, para. 36.1. ***See also,*** observations of the Supreme Court in ***Bhagwan Dutt*** v. ***Kamla Devi,*** {1975) 2 SCC 386'. 1975 SCC (Cri) 563, 567: 1975 Cri Lj 40; ***S. Sethurathinam Piliai*** v. ***Barbara.*** {1971) 3 SCC 923: 1972 SCC (Cri} 171, 172; ***Y. Narayana*** v. Y. ***Kondatah,*** 1976 Cri LJ 1240,

2. ***Bhagtvan Dutt*** v. ***Kamla Devi,*** (1975) 2 SCC 386: 1975 SCC (Cri) 563, 567: 1975 Cri

3. ***Na?iak Chandra*** v. ***Chandra Ktshore Aggarwal,*** (1969) 3 SCC 802: 1970 SCC (Cri) 127, 129-30: 1970 Cri LJ 522.

the powers to grant maintenance is of a judicial character, only judicial Magistrates of the First Class have been empowered to deal with such matters of maintenance. Sections 12.5 to 128 prescribe a self-contained speedy procedure for compelling a man to maintain his wife, children and parents. Though the relief given under this chapter is essentially of a civil nature, the findings of the Magistrate are not final and the parties can legitimately agitate their rights in a civil court even after the order of the Magistrate.[4 5]

Consequent upon the reaffirmation of this view by the Supreme Court in *Mobd. Ahmed Khan* v. *Shah Bano Begum*,* Parliament enacted the Muslim Women (Protection of Rights on Divorce} Act, 1986. The divorced Muslim wife's claims can now be determined under this Act. It is however possible for the Muslim spouses to opt to be governed by Sections 125 to 128 of the Code by virtue of a provision in the present Act.

Some High Courts have taken the view that the abovesaid Act does not take away the Muslim wife's right to maintenance under Section 125 of the Code.[6]

The Supreme Court has now clarified that the Muslim Women (Protection of Rights on Divorce) Act, 1986 requires the Muslim husband to make provision for the future maintenance of the divorced Muslim wife. The court ruled in *Danial Latifi* v. *Union of India*[7] thus:

> A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period by terms of Section 3(i)(tf} of the Act.[8]

As regards the validity of orders passed under the provisions in the CrPC after the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 the Orissa High Court[9] and the Bombay High Court[10] have opined that in the absence of a provision in the Act of 1986 prohibiting the enforceability of the order, such order granting maintenance to [4 5 6 7 8 9 10]

4. ***Nand Lai Misra*** v. ***Kanbaiya Lai Misra,*** i960 Cri LJ 1246, 1249: AIR i960 SC 882.
5. {1985} 2 SCC 556: 1985 SCC (Cri) 245: 1985 Cri Lj 875.
6. See, for example *Ali* v. *Sufaira,* (1988) 2 KLT 94; *Arab Ahemadhia Abdulla* v. *Arab Bail Mohmuna Saiyadbhai,* AIR 1988 Guj 141; *Abdul Kkader* v. *Razia Begum,* 1991 Cri Lj 247 (Kara); *Hazi Abdul Khaleque* v. *Samsun Nehar,* 1991 Cri LJ 1843 (Gau); also see, *WSk. Nasiruddin* v. *Dulari Bibi,* 1991 Cri LJ 2039 (Ori); *Mumtazben jusabbbai Sipahi* v. *Mahebubkhan Usmankhan,* 1999 Cri LJ 888 (Guj); but see also, *Abdul Gafoor Kunju* v. *Pathumma Beevi,* {1989) r KLT 337; *Hazran* v, *Abdul Rehman,* 1989 Cri LJ 1519 (P&H); ALA. *Hameed* v. *Arif Jan,* 1990 Cri LJ 96 (AP); *Qazi Mohammed Hanifv. Mumtaz Begum,* 1990 Cri Lj 171 (Bom); *Usman Khan Bahamani* v. *Fathimunnisa Begum,* 1990 Cri LJ 1364 (FB) (AP); *Abdul Rashid* v.
7. (2001) 7 SCC 740: (2007) 3 SCC (Cri) 266.
8. ***Ibid,*** 765 (SCC).
9. *Shamshad Begum v. Mohd. Noor Ahemad Khan,* 2001 Cri LJ 2396 (Ori).
10. ***Kamal Uddin*** v. ***Raisa Begum,*** 2001 Cri LJ 4410 (Bom).

the divorced Muslim woman would be operative. The Supreme Court has also ruled that the Magistrate retains jurisdiction under Section 125 even after the enactment of the 1986 Act.[n]

The succeeding paragraphs of this chapter consider the persons who are entitled to claim maintenance, the circumstances in which the maintenance is awardable, the jurisdiction of the Magistrates to entertain petitions for maintenance, the procedure to be followed in the proceeding before the Magistrates, the quantum of the allowance in the proceeding before the Magistrates, the quantum of the allowance and the mode of its payment, procedure for the enforcement of maintenance orders, and the alteration or cancellation of such orders due to changed circumstances.

29.2

Order for maintenance of wives, children and parents

The main provision regarding grant of maintenance
This is contained in Section 125 which runs as follows:

125. (r) If any person having sufficient means neglects or refuses to maintain— *(a)* his wife, unable to maintain herself, or

lb) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate [11] [12] [13][* * *], as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause *(b)* to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means:

[A][Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under the sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.]

Explanation.—For the purposes of this Chapter,— [11] [12] [13]

11. *Kbatoon Nisa* v. *State ofU.P.*, Civil Appeal No. 4789 of 1994, decided on
12. The words "not exceeding five hundred rupees in the whole" *omitted* by Act 50 of zoor, S. *2{i){a}.*
13. *Ins.* by Act 50 of 2001, S. 2

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

[H][(z} Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.]

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's [14] [15] [16] [17] [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refused to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.—If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an [A][allowance for the maintenance or the interim maintenance and expenses of proceeding as the case may be,] from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

{5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

29.3 Persons entitled to claim maintenance

Under the circumstances mentioned in para. 29.4, a person is required by Section 125(1) to pay maintenance to the following persons:

(a) His wife: The term "wife" appearing in Section 125(1) means only a legally wedded wife.[14] [15] [16] [17] In the absence of a legal and valid marriage, the

14. *Subs,* by Act 50 of 2001, S. *z(ii).*

15. *Subs,* for "allowance" by Act 50 of 2001, S. *2{Hi).*

16. *Ibid.*

17. See, *Savitaben Somabhai Bbatiya* v. *State of Gujarat,*

mere fact that the parties had lived together as husband and wife to the knowledge of the public or otherwise could not confer on the woman status of a "wife". The fact of the parties having lived together as husband and wife for a long time would be relevant to raise only a presumption in law of their being husband and wife.[ls] However such a presumption is rebuttable on the proof of the invalidity of the marriage. The consideration of the other provisions of Section 125 would strengthen the above view. *Firstly,* the section while specifically providing for both legitimate and illegitimate children, it restricts the Magistrate's power to make an order for maintenance in favour of "wife" only and does not extend it in favour of any other woman though not legally and validly married but living "as wife". *Secondly,* Explanation *(b)* to Section 125(1} expressly includes in the term "wife" also a divorced woman. A divorced woman cannot exist unless initially she was a legally wedded wife. This specific inclusion of a divorced woman in the term "wife" would clearly show that the term "wife" would only mean legally wedded wife.[18] [19]

The Supreme Court affirmed this ruling on appeal saying that the legal validity of a marriage would be determined by the personal laws applicable to the parties.[20] It has been held by the Supreme Court that it is for the husband to prove that his first marriage was valid to sustain his plea that his second marriage was invalid.[21] In *Rajathi* v. C. *Ganesan*[22], the Supreme Court opined that it may be difficult in certain cases to prove the second marriage and therefore court need not look into the marriage laws for granting maintenance in cases where the husband is allegedly living with another "woman".

In yet another case the Supreme Court ruled that the finding of the court in a case under Section 494 IPC (bigamy) that the woman who was alleging to be the wife of the appellant had failed to establish her marriage with the appellant-husband or his alleged second marriage with another woman could result in the denial of her claim for maintenance.[22] [23]

The Supreme Court has had an occasion to deal with the plea of the husband that he was compelled to marry the woman without observing the usual rituals and therefore the woman was not his legally-wedded wife

(Cri) 7S7.

18. ***See,*** discussions in ***Anupama Pradban*** v. ***Sultan Pradhan,*** 1951 Cri LJ 32.16 (Ori).
19. ***Yamunabai*** v. ***Anantrao,*** 1983 Cri LJ 259, 264-6; (Bom) (FB); see also, ***Savilhramma*** v, ***Ramanarasimhaiab,*** (1963) 1 Cri LJ 151, 133 (Mys); ***Bansidbar*** v. ***Cbhabi Chatterjee,*** 1967 Cri Lj 1176, 1178: AIR 1967 Pat 277; ***Laksbmi Ambalam*** v. ***AndiammaL*** (1938) 39 Cri Lj 228: AIR 1938 Mad 66; ***Raman Pillai Vasudevan Nair*** v. ***Subbadra Amnia,*** 1989 Cri Lj 1274 (Ker).
20. *Yamunabai Anantrao Adbau* v. *Anantrao Shivram Adhau,* (1988) 1 SCC 530: 1988 SCC (Cri) 182: 1988 Cri Lj 793; **see**, discussions in ***Kumari Bat*** v. ***Anandram,*** 1998 Cri LJ 4100 (MP).
21. ***Vitnala {K.)*** v. ***Veeraswamy (K.},*** (1991) 2 SCC 375: 1991 SCC (Cri) 442.
22. (1999) 6 SCC 3261 1999 SCC (Cri) 1118: 1999 Cri Lj 3668.
23. ***Samir Mandal*** v. ***State of Bihar,*** (2001) 10 SCC 50: 2002 SCC (Cri) 1115.

for the purposes of granting maintenance. The court rejected his plea saying that the proceedings under Section 125 do not determine the status and that the remedy lies in civil court.[24] [25]

The Supreme Court's observations are illustrative:

> ...in our view from the evidence which is led if the Magistrate is prima facie satisfied with regard to the performance of marriage in proceedings under Section 125 CrPC which are of a summary nature, strict proof of performance of essential rites is not required. Either of the parties aggrieved by the order of maintenance under Section 125 CrPC can approach the civil court for declaration of status as the order passed under Section 125 does not finally determine the rights and obligations of parties.

A marriage solemnised by exchange of garlands was held invalid.[26]

In some cases it has been held that a strict proof of legal marriage is not necessary and that the parties were living together as husband and wife would be sufficient for the woman to claim maintenance under Section 125.[27]

[29] [30] This view seems to be preferable inasmuch as the purpose of granting maintenance is prevention of destitution. This gets support from the Supreme Court decision in *Rameshchandra Rampratapji Daga* v. *Ramesbwari Rameshchandra Daga*[11]. In this case after the second marriage {celebrated without getting a decree of divorce from the first marriage) the parties lived as husband and wife for a long period. In such a situation, the granting of maintenance to the wife under Section 25, Hindu Marriage Act, 1955 dehors the invalidity of the second marriage was upheld by the Supreme Court. The reasoning seems to be relevant to cases under Section 125 of the Code.

It is interesting to note the development of a new approach to granting maintenance in the context of Prevention of Domestic Violence Act, 2005. The Supreme Court in *D. Velusamy* v. D. *RatchaiammaF*[9] ruled that a woman who was in a marriage-like relationship, though not a legally- wedded wife under Section 125 could claim maintenance under the protection against Domestic Violence Act.

In *Cbanmnniya* v. *Virendra Kumar Singh Kushwaha*[30] the court examined its precedents regarding acceptance of marriage-like relationship and the conflicting opinion in *Yamunabai Anantrao Adhav* v. *Anantrao* [24] [25] [26] [27] * [29] [30]

24. *Dwarika Prasad Satpathy* v. *Bidyut Prava Dixit,* (1999) 7 SCO
25. ***Ibid,*** 682.
26. ***Naresb Chandra*** v. ***Reshma Bai,*** 1992 Cri Lj 579 (MP).
27. ***Sandamini Devi*** v. ***Bhagirathi Raj,*** 19S2 Cri LJ 539 (Ori); ***Boh Narayan Paw ye*** v. ***Siddheswan Morang,*** 1981 Cri Lj 674 (Gau); see aiso, ***Anupama Pradhan*** v. ***Sultan Pradhan,*** 1991
2S. *See,* the discussion in *Rameshchandra Rampratapji Daga* v. *Ramesbwari Rameshchandra*
29. (zoxoj 10 SCC 469: (201 r) 1 SCC (Cri) 59: 2011 Cri LJ
30. (2011) 1 SCC 141: (2011) 2 SCC (Cri) 666; ***zou*** Cri Lj 96.

Shivram Adhav[35] laying down that "wife" should be legally wedded, and referred the conflict to a larger Bench. However, the court decided that Prevention of Domestic Violence Act should be applicable to a woman seeking maintenance under Section 125. The court reasoned thus:

> 36, Further, Section 20 of the Act allows the Magistrate to direct the respondent to pay monetary relief to the aggrieved person, who is the harassed woman, for expenses incurred and losses suffered by her, which may include, but is not limited to, maintenance under Section 12.5 CrPC. [S. 2.0(1)(d)]
>
> 37. Section 22 of the Act confers upon the Magistrate, the power to award compensation to the aggrieved person, in addition to other reliefs granted under the Act. In terms of Section *z6* of the Act, these reliefs mentioned above can be sought in any legal proceedings, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent. ...
>
> 39. *We* are thus of the opinion that if the abovementioned monetary relief and compensation can be awarded in cases of live-in relationship under the Act of 2.005, "hey should also be allowed in a proceeding under Section 12,5 CrPC. It seems to us that the same view is confirmed by Section 26 of the said Act, 2005."

The Supreme Court granted relief under the Act of 2005 even to a woman who left the matrimonial home on 4 July 2005 before the Act came into force on 26 October 2006.[31 32 33]

The wife may be of any age—minor or major. Although the Child Marriage Restraint Act, 1929 as amended by Act 2 of 1978 makes it punishable to contract a marriage with a minor girl *t.e.* a girl below 18 years of age, yet the validity of such a marriage is not affected by the contravention of the Child Marriage Restraint Act. Therefore even a minor wife being a legally wedded "wife" is entitled to claim maintenance under Section 125.

The Explanation *(b)* to Section 125(1) provides that for the purposes of this chapter "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. By this extended definition of "wife", the right to claim maintenance is made available also to a divorced wife. This was considered necessary in view of the peculiar personal laws applicable to some of the communities in India. According to these laws the husband can at any time divorce his wife at his will. The extension of the word "wife" to cover even a divorced wife is intended to prevent the unscrupulous husbands frustrating the legitimate maintenance claims of their wives by just divorcing them under the above- said personal laws. The Explanation *(b)* above is aimed at securing social justice to women in our [31 32 33 34]

31. (1988} r SCC 530: 1988 SCC (Cri) 182: 1988 Cri LJ
32. *Chanmuniya* v. *Viren dr a Kumar Singh Kushwaha,* (2011) 1 SCC 141: (2011) 2 SCC (Cri.) 666: 2011 Cri LJ
33. *V.D. Bhanot* v. *Savita Bhanoti* {2012) 3 SCC 183:
34. joint Committee Report, p. xiii.

Section 125 applies both to women who have been divorced before or after the new Code came into force. Under that section a present right has been conferred in relation to a past event and it will not make the section retrospective. Apart from that the section is both remedial and beneficial in character and in such circumstances it is the duty of the judge to construe it in such a manner as to suppress the mischief and advance the remedy. Therefore it has been held that, under Section 125(1), even a woman divorced before 1 April 1974 *(i.e.* the date of coming into force of this Code) could claim maintenance, provided the other conditions are satisfied.[31]

According to the principles of Mohammedan Law, a divorced wife has a right to claim maintenance from her husband only up to the expiry of the period of *iddat* and not beyond that period. However these principles were not held relevant while considering the provisions of Section 125. According to this view the meaning of the word "wife" as found in the Explanation to Section 125(1) indicated that a divorced Mohammedan woman could bring action under Section 125 claiming maintenance from her ex-husband so long as she did not marry even if the period falls beyond the period of *iddatd*[6] It was held that the Explanation *(b)* to Section 125(1) did not make any distinction between *khula* divorce and talaq divorce.[37] [38] In view of the Explanation, Muslim woman who had obtained a decree of divorce under the Dissolution of Muslim Marriages Act, 1939 could also claim maintenance under Section 125(1) [36].[35]

However, as explained earlier consequent upon the decision in *Mohd. Ahmed Khan* v. *Shah Bano Begum*[39], Parliament enacted Muslim Women (Protection of Rights on Divorce) Act, 1986 making Muslim Law applicable in the case of divorced Muslim women. Still some High Courts hold the view that Sections 125 to 128 are applicable to Muslim women.[40] [41]

It is interesting to note that the Supreme Court has now extended this protection to the divorced Muslim women by ruling that provision including maintenance extending beyond the *iddat* period must be made by the husband within the *iddat* period by terms of Section 3(1)[A]) of the Act of 1986 **4**[1] **35** **3**[6] 37 3[8] 39 4[0] 4[1]

35. *K. Raza Khan* v, *Mumtaz Khatoon,* 1976 Cri L] 905, 907-08 (AP); *Mohd. Haneef w Anisa Khatoon, 1976* Cri Lj 52,0, 5x1 (All); *Mohd. Khan* v, *Mahrunnisa,* 1977 Cri LJ 9x3 {Kant}; *Tejinder Kam* v. *Balbir Singh,* 1978 Cri LJ 604,
36. *U.H. Khan* v. *Mababoobunnisa,* 1976 Cri LJ 395, 596 (Kant); *Khurshid Khan* v. *Husnabanu,* 1976 Cri LJ
37. *Khurshid Khan* v. *Husnabanu,* 1976 Cri LJ 1584, 1585
38. *Zohara Khatoon* v. *Mohd. Ibrahim,* (1981) x SCC 509: 1981 SCC (Cri) 517: 1981 Cri Lj **754**
39. (1985) x SCC 556: 1985 SCC (Cri) Z45: 1985 Cri IJ 875.
40. *See supra,* note 6.
41. *See supra,* note 7.

It has been held that a Muslim wife is entitled to maintenance under Section 125 till divorce by her husband is communicated to her.[42] In a case where the husband arguing that there was a divorce effected by him and his wife's case should be dealt with under the Muslim Women (Protection of Rights on Divorce) Act, 1986 the Calcutta High Court found that his plea for divorce was already rejected and it was not a changed circumstance as divorce plea was made after the maintenance order was made.[43] In yet another case the Madras High Court opined that valid dissolution of Muslim marriage requires that there should be an attempt of reconciliation between husband and wife by two mediators—one chosen by wife from her family and other chosen by husband from his side. Since there was no evidence of this procedure in the present case, the court ruled that there was no divorce and as such the Muslim wife was held entitled to maintenance.[44]

A wife who became a divorcee by mutual consent by executing a document would fall within the scope of the inclusive definition of "wife" given in Explanation *[b)* to Section i25(i}.[45] It has been ruled by the Kerala High Court that woman who surrendered all her rights on divorce prior to the enactment of the Code of 1973 could not surrender the right to get maintenance conferred on her by the Code of 1973.[46] The Bombay High Court has also opined that a divorce deed enabling the husband to avoid payment of maintenance cannot stand in the way of granting maintenance to the wife.[47]

The status of wife has to be seen on the date when the application under Section 125 is hied. If she retains that status the application is maintainable and if she loses that status, the application is not maintainable as on the date it is filed.[48]

{b} His legitimate or illegitimate child: If the child is minor it is immaterial whether it is married or not. For the purposes of this chapter, Explanation *(a* to Section 125(1) defines minor as meaning "a person who, under the provisions of the Indian Majority Act, 1875, is deemed not to have attained his majority". The child may be male or female. A minor married girl may be entitled to claim maintenance from her husband or

42. *hntiyaz Ahmad* v. *Shamim Bano,* 1998 Cri LJ 2343 (All).
43. *Omar Ali* v. *Aspia Bihi.* 1998 Cri Lj 752 (Cal).
44. *Saleem Basha* v. *Mumtaz Begam,* 1998 Cri LJ 4782 (Mad).
45. *Padmanahhan* v. *Bhargavi Sarojmi,* 1981 Cri LJ 826 (Ker); see also, *Valsata* v. *Surendran,* 1979 KLT 160; *K. Shanmukhan* v. G. *Sarojint,* 1981 Cri LJ 830, 833 (Ker); *Ra?ijit Kaur* v. *Pavittar Singh,* 1992 Cri Lj 262 (P&H); *Deba Prasad Patei* v. *Sabitarani Palei,* 1994 Cri LJ 1168 (Ori); *toydel Kumar Biswas* v. *Maduri Biswas,* 1994 Cri LJ 3342 (Cal); *Gurmit Kaur* v. *Surjit Singh,* (1996} 1 SCC 39;
46. *Ravindran Nair* v, *Sakunthala Amnia,* 1978 Cri Lj 1049
47. See, *Kaushalyabai Dinkar Mule v. Dinkar Mahadeorao.*
48. *Ramesh Chandra* v. *Beena Saxena,* 1982 Cri LJ 1426, 1428

her father (or may be from both) provided the other necessary conditions are satisfied. However, the proviso to Section 12,5(1) provides that if the husband of a minor married female child is not possessed of sufficient means the father of such female child will be required to make allowance for the maintenance of such female child until she attains her majority.

A Muslim father's obligation like that of a Hindu father, to maintain his minor children as contained in Section 125 is absolute and is not at all affected by Section 3(1)(£>), Muslim Women (Protection of Rights on Divorce) Act, *1986.*[49 50 5152]

(c) *His legitimate or illegitimate abnormal child who has attained majority:* Where such child is by reason of any physical or mental abnormality or injury unable to maintain itself. However a married daughter is not entitled to maintenance under Section 125 if she has attained majority. In such cases the responsibility of maintaining her is that of the husband and not of the father.

{d} His father or mother; It is not quite clear from the section whether "father or mother" will also mean "adoptive father or mother" or "stepfather or stepmother". According to Section 3(20}, General Clauses Act, 1897, the word "father" shall include an "adoptive father"; and though the term "mother" has not been similarly defined, it has been held that the term "mother" includes "adoptive mother".However, it has also been held that having regard to the object and intention of Section 125, the term "mother" will have to be given its natural meaning, and that it would not include a "step mother".[35] This view has since been reiterated by the Andhra Pradesh High Court.[32] The Supreme Court opined that a childless stepmother may claim maintenance from her stepson provided she is a widow or her husband, if living, is also incapable of maintaining her. If she has natural born sons and daughters and her husband is alive, she cannot claim maintenance from her stepson.[53] This decision was followed by the Karnataka High Court in *Ulleppa* v. *Gangabai*[54] despite the stepmother having a daughter by her first marriage, but the daughter was not in a position to maintain her. It is also feared that there might be considerable difficulty in the amount of maintenance awarded to parents [49 50 51 52 53 54]

49. *Noor Saba Khatoon* v. *Mohd. Qitxsim,* (1997) 6 SCC 2.33: 1997 SCC (Cri) 924: 1997 Cri LJ 3972; also see, G.M. *Jeelani v. Shanswar Kulsum,* 1994 Cri LJ 271; *Allabuksh Karim Shaikh* v. *Moorjaban Allabuksh,* 1994 Cri LJ 2826

50. *Bahan v. Parvsdbai,* 1978 Cri LJ 1436, 1440 (Bom).

51. *Ramabai* v. *Dinesh,* 1976 Mah LJ 565 (Bom); but see contra, *Hauaben* v, *Razakbhai,* 1977 Cri LR 381 (Guj);

52. *Ayyagari Suryanaravana Vara Prasad a Rao* v. *Ayyagari Venkatakrishna Veni,* 1989 Cri LJ 673 {Ap}.

53. *Kirtikant D. Vadodaria* v. *State of Gujarat,* (1996) 4 SCC

54. 2003 Cri LJ 2566 (Kant).

apportioning amongst the children in a summary proceeding of this typed[3] However it has been suggested that if there are two or more children, the parents may seek the remedy against any one or more of them.[55] [56] This suggestion found approval in *Mahendra Kumar* v. *Gulabai,* wherein the Bombay High Court ruled[57] that a mother could claim maintenance from either or both of her sons even when her husband is alive.

Though Section 125(1} does not specifically say so, it has been held by the Punjab and Haryana High Court that the liability to provide maintenance to the father or mother is that of the son and not of the daughter.[58] The High Court of Kerala has however taken a different view and has held that a daughter is also liable to maintain her parents who have no ostensible means of livelihood. The reasoning adopted by the Kerala High Court is as follows:

> The expressions used in Section 12,5 are 'any person', 'his father or mother' and 'such person'. These expressions are not defined in the Code. Section *z{y)* of the Code says:
>
> > Words and expressions used herein and not defined but defined in the Penal Code have the meanings respectively assigned to them in that Code.

So we have to refer to Penal Code, i860 (IPC). Section 8 IPC reads:

> 8. *Gender.*—The pronoun "he" and its derivatives are used for any person, whether male or female.

Therefore the expression "his father or mother" occurring in Section 12.5 must be taken to have the meaning "her father or mother".

According to the Kerala High Court, this view is supported by Section 13, General Clauses Act, 1897.[59]

The Kerala High Court's view has been affirmed by the Supreme Court.[60] The court pointed out that apart from any law, the Indian society casts a duty on the children to maintain the parents and this social obligation equally applies to daughter.[61]

In *Vijaya Manohar Arbat* v. *Kashirao Rajaram Sawai*[62], it was held that the respondent was entitled to claim maintenance from the appellant, his married daughter, under Section i25(i}{<i) CrPC. The court observed that there can be no doubt that it is the moral obligation of a son or a daughter to maintain his or her parents. Apart from any law, the Indian society casts such a duty on the children. But, before ordering maintenance in [55] [56] [57] [58] [59] [60] [61] [62]

55. See, 41st Report, p. 304, para. 36.4.
56. joint Committee Report, p. xiv.
57. *Mabendrakumar* v. *Gulabbai,* 2001 Cri Lj zirr (Bom).
58. *Raj Kumari* v. *Yashoda Devi,* 1978 Cri Lj 600-01
59. *M. Areefa Beevi* v. *K.M. Sahib,* 1983 Cri LJ 412, 415-16
60. *Vijaya Manohar Arbat* v. *Kashirao Rajaram Sawai,* (1987} 2 SCC 278: 1987 SCC (Cri) 354:
61. *Ibid.*
62. (1987} 2 SCC 278.

favour of a father or a mother against their married daughter, the court must be satisfied that the daughter has sufficient means of her own independently of the means or income of her husband, and that the father or the mother, as the case may be, is unable to maintain himself or herself.

It may be noted that Section 125(1} does not contemplate that the obligation to maintain an aged, infirm parent who is unable to maintain himself or herself can be enforced only if it is preceded by the fulfilment of the parental obligation to maintain and bring up the children during the childhood of the children.[63 64 65 66 67 68] If a father has more than one son he can seek maintenance from any one of them/[4]

29.4 Essential conditions for granting maintenance

In this connection, the analysis of Section 125 will bring out the following points:

(1} *The person from whom maintenance is claimed, must have sufficient means to maintain the person or persons claiming maintenance [see, S. 125(1)*].—The "means" contemplated in Section 125(1} are not confined only to visible means such as lands and other property or employment. If a person is healthy and able-bodied he must be held to have means to support his wife, children and parents/[5] The courts have gone to the extent of laying down that the husband may be insolvent or a professional beggar or a minor or a monk, but he must support his wife so long as he is able-bodied and can eke out his livelihood/[6]

(2) *Neglect or refusal to maintain.*—The person from whom maintenance is claimed must have neglected or refused to maintain the person or persons entitled to claim maintenance. Neglect or refusal to maintain may be by words or by conduct. It may be express or implied/[7] Burden of proving neglect is on the claimant/[8] Ordinarily "neglect or refusal" may mean something more than mere failure or omission. But where there is a duty to maintain, mere "failure of commission" may amount to neglect or refusal in the circumstances of the case. For example, mere failure to maintain a child who has no will or volition of its own is "neglect or refusal" to [63 64 65 66 67 68]

63. *Pandurang* v. *Baburao,* 19So Cri Lj 2.56, 258 (Bom).

64. *Hamsa* v. *Abdul Jaleel,* 1999 Cri Lj 2.2,17 (Ker); also see, *Mabendrakitmar* v. *Gtdabbai,* 2001 Cri Lj 2.111 (Bom).

65. *Kandasamy Chetty, re,* (1929} 27 Cri Lj 350, 351: AIR 1926 Mad 346; *Dbani Ram* v. *Ram Dei,* 1955 Cri Lj 768, 760: AIR 1955 A!! 3 20; *Kandasami Moopan* v. *Angammal,* 1960 Cri Lj 109 8: AIR 1960 Mad 348; *Chander Parkash v. Shila Rani,* 1968 Cri LJ 1153, 1155: AIR 1968 Del 174; *Gh. Hassan* v. *Raja Bibi,* 1973 Cri LJ 1019 (j&K); see also, *Durga Singh Lodbi* v. *Prembai,*

66. *Basanta Kumari* v. *Sarat Kumar,* 1982 Cri LJ 485, 486 (Ori); see also, *Tarak Shaw v. Minto Shaw,* 1984 Cri Lj 206 (Cal).

67. *Bhikaji* v. *Maneckji,* (1907) 5 Cri Lj 334, 336 (Bom).

68. *See,* observations in *Dasaratbi Ghosh* v. *Anuradha Ghosh,* 1988 Cri LJ 64

maintain the child*[69] A husband who makes it difficult for the wife to live with him and who fails to maintain her when she lives elsewhere "neglects refuses" to maintain the wife. A husband cannot expect any self-respecting wife, in keeping with modern ideas, to share the conjugal home with a mistress or another wife. Thus the offer of a husband, who has taken a second wife, to maintain the first wife on condition of her living with him cannot be considered to be a bona fide offer and the husband will be considered to have neglected or refused to maintain the (first) wife.[70] [71] [72]

Even where the husband, by virtue of the personal law applicable to him, is entitled to marry a second wife while the first marriage subsists, the first wife may be justified in considering the second marriage itself a ground for living separately and seeking maintenance from the husband.[71] [72]

The second proviso to Section 12.5(3) contemplated making "an order under this section". The use of the expression "section" and not "subsection" only emphasises that the proviso governs not only sub-section (3) but also sub-section (1), since even at the stage of passing maintenance order it is open to the husband to make an offer to maintain his wife on condition of her living with him. Under sub-section (1) the Magistrate has to be satisfied that the husband "neglects or refuses to maintain" his wife. In considering the same, the Magistrate has to apply his mind regarding the rights of the parties and he would be justified in considering whether the wife's refusal to live with her husband was based on just ground or not.[72]

Where it is proved to the satisfaction of the court that a husband is impotent and is unable to discharge his marital obligations, this would amount to both legal and mental cruelty which would undoubtedly be a *just ground* as contemplated by the aforesaid proviso for wife's refusal to live with her husband and the wife would be entitled to maintenance from her husband according to his means.[73]

In view of the Explanation to the second proviso to Section 125(3), the very fact of the husband marrying another woman or keeping a mistress would entitle his wife to refuse to live with the husband and still

69. *Chand Begum* v, *Hyderbaig,* 1972 Cri LJ 1270, 1273 (AP).

70. *Ibid;* see also, *Jadab Chandra* v, *Kausalya,* 1975 Cri LJ 856, 858 (Ori); *Deochand* v.
State of Maharashtra. (1974) 4 SCC 610: 1974 SCO (Cri)
646: 1974 Cri LJ 1089; *Bhanwari Bai* v. *Bberoon Lai,* 1973

71.*Begum Subanu* v. *A.M. Abdul Gafoor,* (1987) 2 SCC 285: 1987 SCC (Cri) 300: 1987 Cri
LJ 980. *See also,* discussions in *Saygo Bai* v. *Chueeru*

72. *A.S.N. Nair* v. *Sulochana,* 1981 Cri LJ 1898, 1904-05 (Ker); see also, *Ghasitu* v. *Durga*
Devi. 1980 Cri LJ 885 (HP); *Banabibi* v. *Sikandarkban*

73. *Sirapnohmedkhan Jamnobamadkhan* v. *Hafizunnisa Yasinkhan,* (1981) 4 SCC 250:
19Si SCC (Cri) 829, 840: 1981 Cri LJ 1430; *Ash ok Kumar*

claim maintenance.[74] The aforesaid Explanation applies with full force in all cases where a husband has contracted marriage with another woman whether before or after his marriage with the woman who claims maintenance under Section 125. The intention of the legislature in enacting the explanation was to preserve the dignity of the woman whose husband is found living-with another woman. Therefore in such cases any. of the wives of the husband who has indulged in polygamy can refuse to live with him and claim maintenance and separate residence.[75]

It has been held that a wife who without sufficient reasons lives separately cannot claim maintenance.[76] But if the wife can show that the husband has another wife or mistress[77] or that she was physically tortured[78] [79] [80] or that she is already divorced entitling her to live separately,[79] [80] her claim for maintenance would not be denied on the ground of living separately.

If second, third or even fourth marriage is permissible under Mohammedan Law, a Mohammedan male may indulge in that luxury. At the most he may not be liable for offence of bigamy. However a Mohammedan wife would surely be entitled to live separately and claim maintenance solely on the ground that the very idea of contracting second marriage by her husband is abhorrent to her mind and therefore the second marriage by her husband causes her mental agony and cruelty. In such a situation husband cannot take shelter under his personal law and claim immunity from paying maintenance to his wife.[80] A wife would be entitled to the grant of separate maintenance on proof of the fact that her husband has taken another wife during the subsistence of their marriage unless, of course, the husband has alleged and proved that he has been providing such separate maintenance for her.[81]

Under the Mohammedan Law, a wife would not be entitled successfully to defend a suit for restitution of conjugal rights on the basis of a simple fact that the husband has another wife. Even if such a defence Is raised,

74. *G. Subhan Basha* v. *Shamshunntsa Begum,* 1980 Cri LJ 576, 377 (AP); see also, *Veeratina* v. *Sumitrabai,* 1991 Cri Lj 774 (Kanr); *Mustafa Shamsuddin Shaikh v. Sbamshad Begum,* 1991 Cri LJ 195a (Bom); *Gangabai* v. *Shnram,* 1991 Cri LJ 2,018 (MP); *Ansuiya Bat* v. *Nawas Lai,* 1991 Cri Lj 2559 (MP); *Dharmishthaben Hasmukhbhai* v.

75. *Ghasi tu* v. *D urga Devi,* 1980 Cri Lj 885, 888 (HP); *Hafijjabt* v. *Abdul Aziz Kadirkha,* 1983 Cri Lj 931, 932

76. *Manubai* v. *Sukhdeo,* 1990 Cri LJ 646 (MP).

77. *Begum Subanu* v. *A.M. Abdul Gafoor,* (1987) z SCC 285: 1987 SCC (Cri) 300: 1987 Cri Lj 980.

78. *Mithlesh Kumari* v. *Bindhawasani,* 1990 Cri LJ 830 (All).

79. *Molyabai* v. *Vishram Singh,* 1992 Cri Lj 69 (MP).

80. *Banabibi* v. *Sikandarkhan Umarkhan,* 1983 Cri Lj 1382, 1383 (Guj); see also, *Begum Subanu* v. A.M. *Abdul Gafoor,*

81. *Aziz Mobd. v, Sayda Begum,* 1981 Cri LJ 267 (J&K) (FB); see also, *Deochand* v. *State of Maharashtra,* (1974) 4 SCC

the suit will be decreed. But the matter is quite different when one has to consider the provisions of Section 125. The Explanation to Section 125(3) makes it abundantly clear that if the husband has contracted a marriage with another woman, that itself would be a just ground for his wife for refusal to live with him. Under these circumstances, the husband would not be entitled to resist the claim for maintenance under Section 125 simply because there is a decree for restitution of conjugal rights in his favour, even though ordinarily a decree for restitution of conjugal rights in favour of the husband would be a bar against the claim of maintenance by the wife.[82] A wife against whom an order of restitution of conjugal rights has been obtained by the husband is required to go back to him. If she does not, she loses the claim for maintenance on the ground of desertion. But if the husband obtains a decree of divorce, the wife cannot return to him and thus her claim for maintenance cannot be denied on the ground of desertion.[83]

If a husband makes an allegation of unchastity against his wife not only in the reply to the petition by the wife for maintenance but also in his statement on oath before the Magistrate, that would amount to cruelty to his wife and would be a sufficient reason for the wife to live separately and to claim maintenance.[84]

While it is true that the burden of proving refusal to live with the husband rests on the husband and the burden of proving sufficient reasons rests on the wife, when both sides adduce evidence and marshall circumstances before the court, the matter has to be decided on an appreciation of evidence and the circumstances and not merely on the basis of burden of proof.[85]

The term "maintenance" means *proper* maintenance and it should not be narrowly interpreted.[86] It has been laid down by the legislation that under Section 127(3)o maintenance should mean, maintenance or interim maintenance.[87]

The Full Bench of the Punjab and Haryana High Court considered the question whether the minors are entitled to claim maintenance from their father even if they are in custody of the mother who is living separate. Having regard to the provisions of Section 125, the court summarised the position of law on the above question as follows:

B2. *Hafijjabi* v. *Abdul Aziz Kadirkha,* 1985 Cri Lj 951, 933-34 (Bom); see also, *Ksmadi Bhavani* v. *Kamadi Lakshmanaswamy,* 1994 Cri LJ 1827 (AP).

83. *Madhusudan Mishra* v. *State of V. f* 198S Cri LJ 1247 {Ail}.

84. *Shakuntla* v. *Rattan Lai,* 1981 Cri LJ 1420, 1421 (HP).

85. *A.S.N. Nairv. Sulocbana,* 1981 Cri LJ 1898, 1905 (Ker).

86. *Burnasasbi Devi* v. *Nagendra Nath,* AIR 1950 Cal 465, 466; *Ramanlal* v. *Sbantaben,* 1968 Cri Lj 1073, 1974: AIR 1968 Guj 171.

87. *See,* the Criminal Procedure Code (Amendment) Act, 2001 (50 of 2001) published in Gazette of India, Extra. Part II, S. 1.

(i) If the child is living with the mother who is its natural guardian, the father is bound to maintain it and it is not open to him to impose a condition that the child must live with him.

(») Even in a case where the father is the natural guardian, but the child is in the custody of the mother, father's obligation to maintain the child subsists and he cannot impose a condition requiring the child to come and live with him in case the child has not attained the age of discretion or is not living with the mother of its free will or volition. *[Hi)* In such a case, in order to escape his liability to pay maintenance allowance, the father must obtain the custody of the child from the proper court, but till the custody is obtained, the child must be maintained wherever it is.

(iv) Father's liability to maintain the child does not cease merely because the child has attained the age of discretion but is living with the mother on account of natural love and affection or attachment with her. Till the father gets the custody of the child, it can successfully claim maintenance.[88]

It was observed by the court:

> In the case of wife, the husband can show that her refusal to live with him was unjustified and can thereby get rid of his liability to maintain her. In the case of a child, however, no such course is open to the father. The Legislature must have been aware of the impracticability of forcing the child to live with the father if the mother was living separately and that is why the husband was only granted the right, to make an offer to maintain to the wife, and not to the child. The only natural inference of this would be that it was intended that the child be maintained wherever it is, as in a large number of cases, it may not be possible for the child to comply with the desire of the father to come and live with him.[89]

The father's very insistence in the proceedings under Section 125 that the child should go back to him is sufficient to constitute neglect or refusal for the purpose of Section 125 of the Code.[90]

(3) *The person claiming maintenance must he unable to maintain himself or herself.*—This provision contained in Section 125(1) appears to be quite reasonable. Having regard to the object behind the provisions contained in Sections 125 to 128, which is mainly to prevent vagrancy, there is no need to compel a person to pay maintenance to another who is possessed of sufficient means.[91] Therefore under Section iz5(i)(a)

88. *Baibir Singh* v. *Hardeep Singh,* 1976 Cri LJ 1136, 1141-42. (P&H) (FB); see also, *Mohd. Yusuf Khan* v. *Zarina,* 1975 Cri LJ 1988, 1990-1991 (Raj); C. *Padmamma* v. C. *Narsi*
89. *Baibir Singh* v, *Hardeep Singh,* 1976 Cri LJ 1136, 1141-4Z
90. C. *Padmamma* v. C. *Narsi Reddy,* 1972, Cri LJ 1647 (AP).
91. See, Joint Committee Report, p. xiii.

maintenance allowance cannot be granted to every wife who is neglected by her husband or whose husband refuses to maintain her, but can be granted only if the wife is unable to maintain herself.[92] Wife need not specifically plead that she is unable to maintain herself.[93] However, in a case where the wife is hale and healthy and is adequately educated to earn for herself but refuses to earn and claims maintenance from her husband, it has been held that she is entitled to claim maintenance but that her refusal to earn under the circumstances would disentitle her to get full amount of maintenance.[94] The words "unable to maintain" only connote absence of means or source to maintain herself. They have nothing to do with her potential earning capacity.[95]

By the phrase "unable to maintain herself', it is not meant that she should be absolute destitute and should first be on the street, should beg and be in tattered clothes and then only she will be entitled to move an application under Section 12,5. A woman, no doubt, has to depend on some of her maternal relations for her maintenance when she leaves her husband's house. She can be maintained for some time by her relations. But that alone will not be sufficient, what is necessary is that she herself should be in a position to maintain herself and that it should not be much below the status which she was used to at the place of her husband.[96]

Where the wife claims maintenance under Section 125, it has been held, she should positively aver in her petition that she is unable to maintain herself in addition to the facts that her husband has sufficient means to maintain her and that he has neglected to maintain her.[97] [98] [99] However, if she fails to mention in her petition about her inability to maintain herself, the petition cannot be thrown out; and the court will have to decide this question having regard to the circumstances of each case on the material placed before it by both the parties.[98] [99] It has been classified that the claim for maintenance cannot be decided on the basis of affidavits filed by the wife."

92. *Manmohan Singh* **v.** *Mahindra Kaur,* **1976 Cri Lj 1664 (All); see also.** *Attar Singh* **v.** *Amit Singh,* **1982. Cri LJ** *211* **(Del);** *K.M.*
93. *Malan* v. *Baburao Yeshwant Jadhav,* 1981 Cri LJ 184 (Kant); *Udaivir Singh* v. *Vinod Kumari,* 1985 Cri LJ 1923 (All).
94. *Abdulmunaf* v. *Salima,* 1979 Cri LJ 172 (Kant).
95. *Vimal* v. *Sukumar Anna,* 1981 Cri LJ 210, 216 (Bom).
96. *Abul Salim* v. *Nafima Begum,* 1980 Cri LJ 232, 233 (All); see also, *Laksbyapati Badhan* v. *Udian Badhanen,* 1982 Cri LJ 1953, 1954 (Ori)i *Rewati Bat* v. *Jayeshwar,* 1991 Cri LJ 40 (MP).
97. *Zubedabi* v. *Abdul Khader,* 1978 Cri LJ 1555 (Kant); see also, *Haunsabai* v.
98. *Banshi Lai* v. *Magni Bat,* 1983 Cri LJ (NOC) 75 (Raj); see also, *Malan* v. *Baburao Yeshwant Jadhav,* 1981 Cri Lj 184 (Kant); *Raibari* v. *Mangaraj,* 1983 Cri Lj 125 (Ori); *Aijaz Ahmad* v. *Sbahjehan Begum,* 1982 Cri LJ 1022 (All); *Udaivir Singh* v. *Vinod*
99. *Shankar Gohane* **v.** *Kalpatia Gohane,* **1998 Cri LJ 4455 (Bom).**

In *Dukbtar Jahan* v. *Mohd. Farooq*[1], the High Court had quashed an order of maintenance passed in favour of a minor child by the Magistrate under Section 125 CrPC in exercise of its powers under Section 482 CrPC. It, however, deemed it fit to grant a certificate to prefer an appeal to the Supreme Court for consideration of a question of law as to whether in an application under Section 482 CrPC the High Court can interfere with concurrent findings rendered by the courts below. Instead of answering the question, the court observed that the proper course for the High Court, even if entitled to interfere with the concurrent findings of the courts below in exercise of its powers under Section 482 CrPC, should have been to sustain the order of maintenance and direct the respondent to seek an appropriate declaration in the Civil Court, after a full-fledged trial, that the child was not born to him and as such he is not legally liable to maintain it. Proceedings under Section 125 CrPC, it reminded, are of a summary nature and are intended to enable destitute wives and children, the latter whether they are legitimate or illegitimate, to get maintenance in a speedy manner.

(4) *Special provision for maintenance of minor married girl.*—A minor married girl unable to maintain herself can claim maintenance from her husband if he, having sufficient means, neglects to maintain her. [see, S. i25(r)(iat)3 However, if the husband is not having sufficient means to maintain her, it has been provided, with a view to meet such a hard case, that she can claim maintenance from her father if he has sufficient means to maintain her. According to the proviso to Section 125 (1) the father, in such a case, can be required to make a reasonable allowance to her till she attains her majority.

(5) *When the maintenance is claimed by wife from her husband, (i) she must not be living in adultery.*—The words "living in adultery" in Section 125(4) have been almost uniformly interpreted as indicating an adulterous course of life as distinguished from a single lapse of virtue.[1 2] A *single* act of adultery would not be enough to disentitle the wife to maintenance. Because, hardships are bound to arise if the wife is totally debarred from the remedy under Section 125 due to a single lapse from virtue. Further, while making this provision it must have been thought that, to deprive her of maintenance for an occasional lapse might force her to lead a sinful life and would give her no chance to redeem herself.[3] The words "living in adultery" have now been consistently held to mean

1. (1987) 1 SCC 62.4.
2. *Tbanikchalam* v. *Dhakshyani,* 1966 Cri Lj 221, 222 {Mad); *Kista Pillai* v. *Amirthammal,* (1938) 39 Cri LJ 951, 952: AIR 1938 Mad 833; *Kanniappan* v. *Akilandammal,* 1954 Cri LJ 516, 517: AIR 1954 Mad 427; *Gopaiadeo* v. *Ratni,* (1929) 30 Cri LJ 403, 404: AIR 1929 Nag 23S; *Pidchand Maganlal, re,*
3. *See,* 41st Report, p. 305, para. 36.8.

an outright adulterous conduct where the wife lives in a quasi-permanent union with the man with whom she is committing adultery.[4 5] It would be wrong to consider mere friendship as amounting to adultery within the meaning of Section 125(4)7

When the husband challenges the claim for maintenance of his wife alleging that the wife is living in adultery, the husband ought to begin the case and prove the allegation of such adulterous life on the part of the wife by letting in evidence of her continued adulterous conduct at or about the time of application and then the wife against whom such a charge is made ought to be given an opportunity to rebut such allegation.[6]

In a case though the husband got divorce on the ground of adultery, since it could not be proved under Section 41, Evidence Act in a proceeding under Section 125 the husband's refusal to give maintenance on the ground of wife's adulterous conduct was not sustained.[7]

(ii) She must not refuse, without just ground, to live with her husband.—It has however been provided by the Explanation to the second proviso to Section 125(3) that 'hf a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him".

The husband contracting a second marriage is in itself a just ground for the wife's refusal to live with him as provided under Section 125(3). A point arises whether this can be considered to be a just ground only at the stage of Section 125(3) or even at the stage of Section 125(1), Subsection (4} of Section 125 governs the case under Section 125(1) also. This sub-section (4) only provides that she would not be entitled to any maintenance if she refused to live with her husband without any sufficient reason. The ground which is a just ground for refusal to live with him under Section 125(3) can certainly be considered to be sufficient reason for the purpose of Section 125(4) of the Code,[8] and consequently for the purpose of Section 125(1).

When the husband denies the parentage of the child he indirectly refers to the unchastity of wife. The accusation of adultery is sufficient cause for refusal on the part of the wife to reside with the husband.[9]

4. *Kasthuri* v. *Ramasamy,* 1979 Cri LJ 741, 745 (Mad).
5. *Mehbubabi v. Nasir Farids* 1977 Cri LJ 391, 393 (Bom).
6. 5.5. *Manickam* v. *Arputba Bhavani Rajam,* 1980 Cri Lj 354, 361 (Mad).
7. *Raja Rao* v. T. *Neelamma,* 1990 Cri Lj 2430 (AP).
8. *Savitri Devi* v. *Jagdtsb Narain,* 1976 Cri LJ 513 (All); see also, *Mohd. Ayyub* v. *Zaibul Nissa,* 1974 Cri Lj 1237,1238 (All); *Mithu Deviv. Siya Cbaudbary,* 1975 Cri Lj 1694, 1695 (Pat); however *see* contra, *Iqbalunnisa Begum* v. *Habib Pasha,* (1961) 2 Cri LJ 604: AIR 1961 AP 445. 446; *Rupcband Mahato* v. *Cbarubala,* 1966 Cri Lj 143: AIR 1966 Cal 83, 84; *Dhart Kaur* v. *Niranjan Singh,* 1960 Cri Lj 1494: AIR 1960 Punj 595, 598. *See,* discussions in *Saygo Bai* v. *Chueeru Bajra?tgi,* (2010) 13 SCC 762: (2011) 2 SCC (Cri) 415.
9. *Mango* v. *Mangtu,* 1976 Cri LJ 93, 94 (HP).

The decision in a suit against the wife for restitution of conjugal rights is equivalent to a decision by a competent civil court that the wife had no sufficient reason for refusing to live with her husband and the criminal court cannot inquire into any allegations of failure or neglect to maintain prior to such decision.[10]

What could be considered as a sufficient reason for the wife's refusal to live with her husband would depend upon the facts and circumstances in each case.

These points have been already discussed earlier in greater detail in the beginning of para. 29.4 under the head "(2.) Neglect or refusal to maintain." That discussion can be appropriately referred to here and the same has not been repeated all over again.

(Hi) She must not be living separately by mutual consent [S. 125(4)].—Clauses (4) and (5) of Section 125 do not apply to a divorcee- wife because the conditions contemplated therein cannot apply to her but can apply only to a wife whose marriage is still subsisting.[11]

A divorced wife cannot be characterised as a wife living separately by mutual consent. She is a person who lives separately from her former husband by virtue of a change in status consequent upon the dissolution of the marriage.[12] It has also been held that in the case of divorce by mutual consent if the wife had relinquished her right to maintenance she cannot later claim maintenance.[13][14][15]

A clear and categorical finding, if given by the competent civil court, cannot be overlooked or ignored or disregarded by the criminal court.[14][15] However, it has been held that merely because the civil court comes to hold while directing divorce that the wife is not entitled to maintenance, it would not deprive her of her right to claim maintenance in a criminal court though the criminal court is required to consider the civil court's decision.Another High Court held that the civil court's finding on a fact on which interim maintenance was rejected by it was not binding on the

10. *Mohd. Siddiq* v. *Zubeda Khatoon,* AIR 1952, All 616(2); *Geeta Kumari v. Shiva Cbaran,* 1975 Cri

11. *Manyumma* v. *Mohd. Ibrahim,* AIR 1978 Ker 231 (FB); see also, *K. Skanmukhan* v. G. *Sarojini,*

12. *Ravindran Nair v. Sakunthala Aram a,* 1978 Cri Lj 1049 (Ker); *Natvarlai Jektsandas* v. *Bai Girja,*
1983 Cri LJ (NOC) 42 (Guj); *Gurmit Singh* v, *Kashmir Kaur,* 1979 Cri Lj (NOC) 99 (P&H); *P, Valsala* v. *Sreedbaran Suren dr an,* 1979 KLT 160;

13. *Shraivan Sakbaram Ubbale v. Sau Durga Sbrawan Ubbale,* 1989 Cri Lj *211* (Bom); *see* contra,
Ravindran Nair v. *Sakuntbala Amma,* 1978 Cri LJ 1049 (Ker); also see,

14. *Harikishan* v. *Shantidevi,* 1989 Cri LJ 439 (Raj).

15. *Deba Prasad Palei* v. *Sabitarani Palei,* 1994 Cri Lj 1168 (Ori).

criminal court.[16] The fact that an applicant is entitled to seek the help of the civil court is no bar to invoke Section 125 for maintenance.[17 * 19]

29.5 Jurisdiction of Magistrates to deal with maintenance proceedings

(1) *Magistrates empowered to deal with such cases.*—As mentioned earlier in para. 29.1, only Judicial Magistrates of the First Class can deal with and decide petitions for maintenance under Sections 125 to 128. No other Magistrate has such jurisdiction. It has been provided by clause (g) of Section 461 that if any Magistrate, not being empowered by law in this behalf, makes an order for maintenance his proceedings shall be void.

(2) *Territorial jurisdiction.*—Proceedings for maintenance under Section 125 may be taken against any person in any district:

(a) where he is; or

(b) where he or his wife resides; or

(c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child. [S. 12.6(1)]

However, wherever Family Courts have been established the jurisdiction to grant maintenance shall be exercised by the Family Courts under Section *7{2.){a}* of the Family Courts Act, 1984.

The alternative forums have been designedly given by Parliament so as to enable a discarded wife or helpless child to get the much-needed and urgent relief in one or the other of the three forums that is convenient to them.[ls]

Often a deserted wife is compelled to live with her relative far away from the place where the husband and -wife last resided together. For her convenience the venue of the proceeding has been made wide enough to include the place where she may be residing on the date of the application for maintenance.[13 19] These provisions appear to have been enacted only to meet the needs and convenience of the wife or child applying for maintenance. Where the applicant is the mother or the father it hardly makes any sense in providing the place of residence of the wife as the venue of the proceedings.

The proceedings under Section 125 are in the nature of civil proceedings, the remedy is a summary one and the person seeking the remedy is ordinarily a helpless person. So the words in Section 126(1) should be liberally construed without doing any violence to the language.[20]

16. *Ashok Nail? Singh* v. *Upasna Panwar,* 1994 Cri Lj 998 (HP).

17. *Chimata Nagarathnamma* v. *Chimaia Nathanaii,* 1991 Cri IS. *K. Mohan* v. *Balakanta Lakshmi,* 19S3 Cri LJ 13x6, 13iS

19.*See,* 41st Report, p. 306, para. 36.10.

20.*jagir Kaur* v. *Jaswant Singh,* {1963) 2 Cri LJ 415, 415: AIR

Since it is in the nature of civil proceedings it has been held that the court can invoke its inherent power for the restoration of a dismissed application for maintenance by the wife.[21]

A proceeding under Section 12.5 can be instituted in any competent court within the district in which the person proceeded against is, or where he or his wife resides or where he last resided with his wife.[22] Some High Courts have, however, interpreted Section 12.6(1) rather too strictly and have held that the proceedings should be instituted in a court which is not only within such district but also one having jurisdiction over the place where the person is or where he or his wife resides or where he last resided with his wife.[23] [24] [25] It appears that the wording of Section 12.6(1) does not seem to justify the addition of any further restriction and the former view seems to be more acceptable.[24] [25] This controversy however has lost much of its ground as the wife can now start proceedings in a court having jurisdiction over the place where she resides at the time of application. High Court in revision cannot interfere with positive finding in favour of marriage and percentage of children but where finding is negative, High Court would entertain revision, re-evaluate evidence since negative findings have evil consequences on life of both the child and woman.[21]

It has also been held that the father/mother can file applications under Section 125 in the court of the area where they reside.[26] They can also file petition at a place where their children reside.[27]

It may also be noted that according to Section 462, no order of the Magistrate shall be set aside merely on the ground that the proceedings in the course of which the order was passed, took place in the wrong district or other local area unless it appears that such error has in fact occasioned a failure of justice.[28]

The expression "resides" means something more than a flying visit and does not include a casual stay in a particular place, and what is required is an intention to stay for a period, the length of the period depending upon the circumstances of each case.[29] Similarly the expression "last resided"

21. *Sk. Alauddin v. Kbadiza Bibi,* 1991 Cri LJ 2.035 (Cal).
22. *Sbantabai* v. *Visbnupant,* (1965} 2 Cri Lj 73, 74: AIR 1965 Bom 107,108; *Balesbwari Devi* v. *Bikram Singh,* 1968 Cri Lj 1296, 1297: AIR 1968 Pat 383, 384; *Balakrisbnan Nair* v. *Sulochana Amma,* {1962} 1 Cri L] 40, 41 (Ker); *Kumutham* v.
23.*Sbakuntala* v. *Tbirumalayya,* (1966) 2 MLJ 326, 327; *Abdul Qayyum* v, *Durdana Begum,* 1974 Cri
24.*See,* 41st Report, p. 306, para. 36.10.
25.See, *Pyla Mutyalamma* v, *Pyla Suri Demttdu,* (2011) 12 SCC 189: (2012} 1 SCC (Cri) 371: 2012 Cri
26. *Canga Sharan Varshney* v. *Sbakuntala Devi,* 1990 Cri LJ 128 (All).
27. *N.B. Bbikshu* v. *State of* A.P., 1993 Cri Lj 3280 (AP).
28. *Ambalal* v. *Dbiben Dahyabhai,* (1963) 1 Cri LJ 594, 595: AIR 1963 Guj 91.
29. *Jagir Kauy* v. *Jaswant Singh,* {1963) 2 Cri Lj 413, 415-16: AIR 1963 SC 1521; *Balakrishna Naidu v. Sakuntala Bai,* (1943) 44 Cri Lj 741, 742-43: AIR 1942 Mad *666; Kbairunnissa*

must mean the place where the person had his last residence, whether permanent or temporary.[30]

The word "is" connotes in the context the presence or existence of the person in the district when the proceedings are taken. It is much wider than the word "resides". What matters is his physical presence at a particular point of time *i.e.* when the application is made.[31]

Procedure

29.6

The procedure to be followed by the Magistrate while conducting proceedings under Section 1x5 has been prescribed by sub-sections (2) and (3) of Section 126. These sub-sections are as given below:

> (2} 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, 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 against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully 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 payment of costs to the opposite party as the Magistrate may think just and proper.
>
> (3) The Court in dealing with applications under Section 125 shall have power to make such order as to costs as may be just.

Section 126(2} is mandatory in form and requires in dear terms that all evidence in such proceedings shall be taken in the presence of the person proceeded against or his pleader. The word "all" with which the subsection opens emphasises the fact that no evidence shall be taken in the absence of such person or his pleader.[32] In this connection it is worth quoting the observations of the Allahabad High Court when it said:

> Thus by insisting on the presence of the husband while the statements of the witnesses are being recorded, an opportunity is indirectly provided to the husband to patch up the differences and to effect a change of heart and restore a life of conjugal happiness by offering to maintain his wife. Not only that it is also possible to envisage a situation where by the

Asbrafunnisa, (1965) 2 Cri LJ 236, 237: AIR 1965 Pat 344; *K. Mohan* v. *Ralakanta Laksbmi,* 1983 Cri Lj 1316, 1319 (Mad); *Darshan Kumari* v. *Surinder Kumar,* 1995 Supp {4} SCC 137: 1996 SCC (Cri) 44.

30. *Jagir Kaur* v. *Jaswant Singh,* (1963} 2 Cri Lj 413, 416: AIR 1963 SC 1521; *Ranidei v.Jhunni Lai,* (1926) 27 Cri LJ 820: AIR 1926 Oudh 268.

31. *Jagir Kaur* v. *Jaswant Singh,* (1963) 2 Cri LJ 413: AIR 1963 SC 1521; *Indubala Devi* v. *Saichit Prosad,* (1939) 40 Cri LJ 598, 599: AIR 1939 Cal 333.

32. *Nand Lai Misra* v. *Kanbatya Lai Misra, i960* Cri LJ 1246, 1249: AIR 1960 SC 882; *Naranappa* v. *Puttamma,* (1962) 1 Cri LJ 787, 788: AIR 1962 Mys 174; *Venkatrao* v. *Rukminthai*

> of either parties in such proceedings, the husband and wife may by mutual consent agree to live separately. Section 488(1) [now Section 125(1)] is not a substantive offence and a break of the family is more often than not avoided by personal persuasion and rethinking rather than by remaining at long distance from each other. In my opinion these two opportunities of reconciliation and separation by consent were looming large in the minds of the Legislature when it insisted on the presence of the husband during the period evidence was taken on behalf of the applicant.[33]

It is only when for good reasons, the personal attendance is dispensed with that the presence of his pleader during the continuance of such proceedings can be deemed to be sufficient compliance with the requirements of Section 126(2) of the Code.[34]

The Magistrate may also proceed to hear and determine the case ex parte if he is satisfied that the husband is wilfully avoiding service or wilfully neglects to attend the court, but, otherwise all evidence in the proceedings must be taken down in the presence of the person proceeded against.[35] The proviso to Section 126(2) does not require that the Magistrate must first record reasons for his satisfaction before he decides to proceed ex parte in the matter. It is enough if such satisfaction *viz.* that the person is wilfully avoiding service or wilfully neglecting to attend the court is writ large on the record and reflected in the final order that is made.[36] In this connection, what amounts to "wilful negligence" on the part of such person in not attending the court is a question of law though it is to be decided on the basis of given facts. Wilful negligence cannot be inferred unless there was deliberate move to absent from court.[37] The service referred to above on the person proceeded against can be effected only in the manner prescribed by Section 62 for service of summons or in any other manner provided by Sections 63 to 67 of the Code.[38] Therefore notice sent by registered post or its publication in the newspapers is not proper service and the defect is not curable.[39]

An ex parte order passed under the proviso to Section 126(2) can be set aside on an application made within three months from the date thereof. Literally read the proviso restricts the limitation of time within which an application must be made, to three months from the date of the order

33. *Rer* Bakshi J in *Met Ram* v. *Ram Kumari,* 1975 Cri LJ 656, 658 (Ail).

34. *Het Ram* v. *Ram Kumari,* 1975 Cri LJ 656, 638 (All); *Vsnkatrao* v. *Rukminibai,* 15K4 Cri LJ 1291:

35. *Het Ram* v. *Ram Kumari,* 1975 Cri LJ 656, 638 (All).

36. *Arunkumar v.Chandanbai,* 1980 Cri Lj 601, 607 (Bom).

37. *Kalika* v. *Jagdei,* 1975 Cri LJ 465, 466 (All).

38. For Ss. 62-67, [S]*se supra,* para. 5.3.

39. *Dhani Ram* v. *State,* 1974 Cri LJ 1234, 1235 (All); see also, *Revappa v. Gurusanthawa,* 1960 Cri LJ 1107, 1108: AIR 1960 Mys 198; *Gurnam Singh* v. *Datto,* (1950) 51 Cri LJ 390, 39[1] 39[l:] AIR 1950 Punj 20. *See also,* discussions in 5. *Bhupinder Singh Makkar* v. *Narinder Kaur,* 1990 Cri LJ 2265 (Del),

itself.[40] However, it has been held that the period of limitation in this connection begins from the date of the knowledge of the ex parte order to the aggrieved party and not from the date of the passing of that order.[41]

The period of limitation referred to in the proviso to Section 126(2) has no application in a case where the Magistrate proceeds to hear the case ex parte without recording his satisfaction as to the deliberate avoidance on the part of the respondent to appear.[42]

Ail the evidence in the proceedings is to be recorded in the manner prescribed for summons cases.[43] If the procedure for recording of evidence in summons cases is to be followed, then the recording of evidence seems to be mandatory even when the opponent in proceedings under Section 125 is avoiding service or is wilfully neglecting to attend the court. Section 296 which permits the court to receive the affidavit of any person whose evidence is of a formal character, cannot obviously apply when under Section 125 questions relating to neglect or cruelty on the part of the respondent, the income of the respondent and the quantum of maintenance to be given to the petitioner, are to be decided.[44]

No period of limitation has been prescribed either under Section 125 or in any other provision of the Code for filing an application for maintenance.[45]

It has been held that while a divorce petition was pending in the civil court the wife need not invoke the provisions in the Code. She could invoke Section 24, Hindu Marriage Act.[46] [47] [48]

It may be noted that the Supreme Court in *Chigurupati Bambasiva Rao* v. *Chigurupati Vijayalaxmi*[47] [48] while declining a decree for divorce ordered continuance of maintenance given to the wife by the lower court under Section 125 of the Code. But in 1978 the Supreme Court in *Ramesh Chander Kaushal* v. *Veena Kaushal*[4S], treated Section 24, Hindu Marriage Act (enabling the court to pass order *pendente lite)* and Section 125 of the

40. *Hyder Khan* v. *Safoora Bee,* 1968 Cri LJ 525, 526: AIR 1968 Mvs 98; *A.S. Goui?tdan* v. *jayammal,* {1950} 51 Cri Lj 455: AIR 1950 Mad

41. *Zohra Begum* v. *Mohd. Ghouse,* 1966 Cri LJ 129, 130: AIR 1966 AP 50-*Joginder Singh* v. *Balkar an Kaur,* 1972 Cri Lj 95, 116 {P&H) (FB); *Dhani Ram* v. *State,* 1974 Cri LJ 1234, 1235 (Ail); *Meejiakshi Ammal* v. *Somasundara Nadar,* 1970 Cri LJ 817, 818: AIR 1970 Mad 242, 243; *Hemendra Nath* v. *Arch ana,* 1971 Cri LJ 817,

42. *Khembai* v. *Kajindar,* 1981 Cri Lj 690 (Kant).

43. *See supra,* para. 21.3(c) for record of evidence in summons cases.

44. *Ramesh* v. *Jaysbreeben,* 1982 Cri LJ 1460, 1462 (Bom); see also, *Shankar Gohane* v, *Kalpana*

45. *Mithu Devi* v. *Siya Ghaudhary,* 1975 Cri Lj 1694, 1695 (Pat); *Golla Seetharamulu* v. *Golla*

46. *G. Ramanathan* v. *Revathy,* 1989 Cri LJ 2037 (Mad).

47. (1997) ii- SCC 84; 1997 SCC (Cri) 1063; *also read* observations in *jasbir Kaur Sehgal* v. *Disit.*

48. (1978) 4 SCC 70: 1978 SCC (Cri) 508.

Code separately. It held that despite an order *pendente Ute* the court could order maintenance under Section 125 of the Code.

In this connection it may be noted that the Supreme Court does not seem to appreciate the purpose of Section 125 and the substantive laws dealing with marriage and divorce. In fact in *Ash ok Kumar Singh* v. *Addl. Session Judge, Varanasi*[49] *the* complaint of the wife was that her husband was impotent and hence incapable of discharging marital obligations. Instead of examining the question in the light of the substantive laws the court applied Section 125 and ordered maintenance to the wife.

It would be proper if the court appreciates the purpose of Section 125 in proper perspective and settle the law.

An order dismissing an application for maintenance on account of default of appearance on the part of the applicant-wife before the recording of evidence has been held to be an administrative order capable of being reviewed or reversed by the Magistrate.[50]

If the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the court, the Magistrate may proceed to hear and determine the case ex parted[1]

An enquiry under Sections 125 to 126 is not a trial nor the result of such inquiry can be considered as a conviction or acquittal. Therefore Section 300 of the Code does not apply and a second application under Section 125 is not barred.[52] It has been held that the second application was maintainable when the first application had been dismissed on the basis of a compromised[3] Though Section 300 is not applicable in respect of proceedings under Sections 125 to 126, it is not intended by the legislature that repeated applications should be moved one after another on the same facts. A second application can be considered with the help of Section 127 dealing with alteration in allowance because it will have ultimately the effect of modifying the original order, once maintenance has been allowed.[54]

29.7 Order of the Magistrate

The Magistrate after scrutinising and weighing the evidence and upon satisfaction of the essential conditions for granting maintenance mentioned in para. 29.4, may order the person proceeded against to make

49. 1991 Cri Lj 2.557 (Ker).

50. *Prema* v. *Sudhir Kumar,* 19So Cri LJ *So,* 86 (Del); *Sk. Alauddin* v, *Kbadiza Bibi,* 1991 Cri LJ 2035 (Cal).

51- *See,* discussions in *Balan Nair* v. *Bhavant Amma Valsalamma,* 19S7 Cri LJ

52.*Nafees Ara* v. *Asif Saadat Ali*> 1965 Cri LJ 394, 397-98: AIR 1963 AH 143; *Ramwati v. Udai Singh,* 1976 Cri LJ 500

53. *Nathuram* v. *Ramsri,* (1965} 1 Cri Lj 273, 275 (Ail); *Mango* v. *Mangtu,* 1976 Cri Lj 93,

54. *Kamwati* v. *Udai Singh,* 1976 Cri LJ 500, 501-02 (All).

a monthly allowance for the maintenance of the applicant—wife, child, father or mother, at such monthly rate "The upper limit of the amount of maintenance *i.e.* f 500 has now been removed by Parliament vide the Code of Criminal Procedure (Amendment) Act, 2.001" in the whole as such Magistrate thinks fit and to pay the same to such applicant as the Magistrate may from time to time direct, *[see,* S. 125(1)]

The proviso to Section 125(1) further provides that the Magistrate may- order the father of a legitimate or illegitimate minor female child to make such allowance to such applicant-child, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

The word "may" used in Section 125(1) confers a discretion on the court in the enquiry in awarding maintenance, which discretion has to be exercised on sound judicial principles considering the equity of each case. The fixing of the rate of allowance is to be done on the merits of each case and the separate income and means of the person claiming maintenance are relevant circumstances to be taken into account in fixing the rate.[55] In a case where the wfife was claiming maintenance against her husband, the Supreme Court has observed:

> The object of those provisions being to prevent vagrancy and destitution, the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family. The needs and requirements of the wife for such moderate living can be fairly determined, only if her separate income also is taken into account together with the earnings of the husband and his commitments.[56]

Again in awarding maintenance to the wife under Section 125 the court should see that the rate is not such as would tempt the wife to permanently live separately from her husband, or if she is already divorced to remain unmarried at least for long.[57]

The words "in the whole" in Section 125(1) means only one sum of money not exceeding f 500 to be awardable *to each person* claiming maintenance from the person proceeded against; these words should not be understood to mean one sum not exceeding [A] 500 for the maintenance of all the claimants taken together.[58] The quantum of maintenance is left to be decided by the Magistrate as explained below.

55. *Sampoornam* v. *Arjunan,* 1975 Cri Lj 1466, 1467 (Mad); P.T. *Ramankutti* v. *Kalyanikutti.* 1971 Cri LJ 318, 322: AIR 1971 Ker 2,2; *Bbagwart Dutt* v, *Kamla Devi.* (1975} 2 SCC 386: 1975

56. *Per* Sarkaria J in *Bhagwan Dutt* v. *Kamla Devi,* (1975) 2 SCC 386: 1975 SCC (Cri) 563, 569: 1975 Cri LJ 40; see also, *Raibari* v. *Mangara/.* 1983

57. *U.H. Khan* v. *Mababoobunnisa,* 1976 Cri LJ 395, 398 (Kant); *Syed Ahmad* v. *N.P. Taj*

58. M. *Bulteel* v, *R.C. Bulteel,* (1938) 39 Cri LJ 865: AIR 1938 Mad 721; *Prahbavati*

In one case the wife was awarded maintenance under Section 125 CrPC and alimony under the Hindu Marriage Act. Subsequently both were enhanced to ^A 800 each p.m.[59] Husband's prayer to adjust the amounts was granted by the Supreme Court which observed:

> The amount awarded under Section 125 of the CrPC for maintenance was adjustable against the amount awarded in the matrimonial proceedings and was not to be given over and above the same.[60]

The amount of A 500 was being raised by some High Courts.[61] Parliament has amended Section 125(1) by removing the clause "not exceeding five hundred rupees in the whole". This amendment enables the courts to award maintenance depending upon the circumstances of each case.[62]

The question whether a Magistrate before whom an application is made under Section 125 can make an interim order directing the person against whom the application is made under that section to pay reasonable maintenance to the applicant concerned pending disposal of the application, was answered in the affirmative in *Sai/itri* v. *Govind Singh Rawat*[63] The Magistrate has implied power to do so under Section 125.

According to the amended Section 125(2) such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order or if the court so orders, from the date of application.[64] If the husband has behaved badly the Magistrate should award maintenance not from the date of the order but from the date of the application. There ought to be compelling reasons before the wife is deprived of maintenance from the date of the application.[65] The Magistrate has discretion in granting maintenance either from the date of application or from the date of order.[66]

In a case where the wife is claiming maintenance from her husband, even a last minute offer by the husband to take back the wife may be considered by the court; and if found to be genuine and not as one put

Sumatilal, 1954 Cri Lj 1734, 1735-36: AIR 1954 Bom 546 (FB); *Ramesh Chander Kaushal* v. *Veena Kaushal,* (1978) 4 SCC 70: 1978 SCC (Cri) 508.

59. *Sudeep Chaudhary* v. *Radha Chaudhary,* (1997} ri SCC 2.86: 1998 SCC (Cri) 160: 1999 Cri Lj 466.
60. *Ibid;,* 466
61. See, *Ramfood Mina* v. *Jagrati,* 2001 Cri Lj 920 (MP) wherein the M.P. High Court gave retrospective effect to the enhancement of maintenance amount.
62. *See,* the Criminal Procedure Code (Amendment) Act, 2001 (Act 50 of 1001).
63. (1985) 4 SCC 337.
64. See also, *Sau Suman Narayan* v. *Narayan Sitaram,* 1995 Supp (4) SCC 243: 1996 SCC (Cri) 53'
65. *Makhdum Alt v. Nargis Bano,* 1983 Cri LJ m, 114 (Del); *Dharmendra Kumar Gitpta* v. *Chandra Prabha Devi,* 1990 Cri Lj 1884 (All) ruling that reasons tor granting maintenance from date of application should be given. See also, *S. A. Kaiser* v, *Noor Sahan,* 1980 Cri LJ 611, 613 (Cal); *K. Sivaram* v. *K. Mangalamba,* 1990 Cri LJ 1880 (AP) ruling that no reason need be given. Also see, *Raja Ra?n* v, *Addi S.J., Pilibhit,* 1998 Cri LJ 3365 (All),
66. *Sneh Lata* v. *Ajay Kttmar Khannat* 1999 Cri Lj 4209 (Del).

forward merely to ward off the obligation arising in the criminal proceeding, the court may reject the claim of the wife.[67]

According to Section 354(6}, every final order made under Section 125 shall contain the point or points for determination, the decision thereon and the reasons for the decision.

It has been held that an order granting interim maintenance is not an interlocutory order and revision is not barred under Section 397(2} of the Code.[68 69]

An order granting maintenance passed as a result of compromise between the husband and wife would not be a final order in terms of Sections 353 and 354 and therefore the proceedings can be revived in the event of failure of compromise.

It has been observed that husband and wife can compromise for small amount of maintenance.[70]

If the compromise is entered into between the parties without being processed through the court and consequently the application before the court is dismissed, the compromise would not be enforceable through the court for which relief the parties may have cause of action before the civil court. But where the compromise forms a part of the order, it must be taken to be a competent one under Section 125(1} since the compromise is not in derogation of the jurisdiction of the court to pass the order.[71]

Where the order of the Magistrate restoring original petition filed under Section 125 CrPC, dismissed earlier for non-appearance, was challenged as beyond his powers, it was held by the High Court of Delhi that maintenance proceedings contemplated by Chapter IX of the Code could not be equated with other proceedings under Section 125, being benevolent one, should be construed in favour of persons who seek shelter thereunder. The application under Section 125 is neither a police report as contemplated by Section 173, nor a complaint. However, final order under Section 125 must satisfy conditions laid down by Section 354(6}. Since no evidence adduced and stage of passing final order not reached, mere fact that order of Magistrate had effect of consigning petition for maintenance to record room, would not by itself be enough to clothe it with attributes of final order. The order passed by Magistrate was treated administrative in nature rather than judicial and held that he could review or reverse the same.[72]

67.*Rulda Ram* v. *Kala Devi,* 1976 Cri Lj 570 (HP).

68.*Sunil Kumar Sabharwal* v. *Neelam Sabbarwal,* 1991 Cri LJ 2056 (P&H); *Mukhtar Ali* v. *Judge, Family Court,* 1999

69. *Pavittar Singh* v. *Bhupinder Kaur,* 1988 Cri Lj 1624

70.*Kamatbam Venkatamma* v. *Kamatbam Burufu*

71. *Sailesh Padhan* v. *Harabati Padhan,* 1989 Cri LJ 1661,

72. *Prema Jain v. Sudhir Kumar Jain,* 1980 Cri Lj So (Del).

29.8 Enforcement of order of maintenance

In order to facilitate the enforcement of the maintenance order passed under Section 1x5(1), it has been made obligatory by Section 12.8 to supply a copy of the order free of cost to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid.

It has been further provided by Section 128 that such order of maintenance may be enforced by *any Magistrate in any place where* the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due. This Section 128 makes the maintenance order enforceable anywhere in India, even in a place outside the territorial jurisdiction of the Magistrate who passed the order of maintenance.

The main provision which deals with the procedure for enforcement of the order is Section 125(3). A perusal of that section would indicate that if any person ordered to pay a monthly allowance for maintenance under Section 125(1) fails without sufficient cause to comply with the order, the Magistrate has been empowered for every breach of the order to issue a warrant for levying the amount due in the manner for levying fines,[73] and is further empowered to sentence such person for the whole or any part of each month's allowance remaining unpaid *after the execution of the warrant,* to imprisonment for a term which may extend to one month or until payment, if sooner made. It is open to the Magistrate under Section 125(3) to pass the sentence of imprisonment up to one month in respect of default of each month's allowance.[74] It may be pertinent to note that the word "allowance" has been given a wider meaning by the Amendment Act, 2001. It now means "allowance for the maintenance or the interim maintenance and expenses of proceeding". In fact courts have been passing sentences of imprisonment for recovery of arrears of maintenance dispa- rately—one month's imprisonment per one month's arrears, one week's imprisonment per one month's arrears etc.[75]

It has been ruled by the Supreme Court that imprisonment imposed under this section is a mode of enforcement rather than a mode of satisfying the liability. In other words, a person ordered to pay maintenance

73. The procedure for levying fines has been given in Ss. 421-14 and has been discussed in *supra,* para. 27.7. See, *Govind Sabai* v. *Prem Devi,* 1988 Cri LJ 638 (Raj); *Hazi Abdul Kbaleque* v. *Samsun Nehar,* 1991 Cri LJ 1843

74. *Pratap Reddy* v. G. *Vijayalakshmi,* 1981 Cri LJ 2365, 2366 (AP); see also, K.R. *Chawda* v. *State of Bombay,* 1958 Cri LJ 351 (Bom) (FB); *Pokala Brahmaniah* v.

75. *Ram Bilas* v. *Bbagwati Devi,* 1991 Cri LJ 1098 (All); *Jangam Srinivasa Rao* v. *Jangam Rajesivari,* 1990 Cri LJ 2506 (AP); *Pokala Brahmaniah* v. *Pokala Padma,* 1991

may not be absolved of his liability merely because he is sent to jail.[76] [77] [78] [79] [80] This ruling is not likely to solve the attendant problems. The argument that the liability of the husband arising out of an order passed under Section 125 to make payment of maintenance is a continuing one and on account of non-payment there would be a breach of the order and therefore the Magistrate would be entitled to impose sentence on such, a person continuing him in custody until payment is made, was however not accepted by the Supreme Court in *Shahada Kbatoon* v. *Amjad Ali*[77]. After, noting that the power of the Magistrate is limited to one month's imprisonment, the court pointed out that for breach or non-compliance with orders of Magistrate the wife could approach the Magistrate again for similar relief.

Re-emphasising that maintenance payable under Section 125 is a continuing liability as declared by it in *Sbantba* v. R. G. *Sbivananjappa*[78] and *Shahada Kbatoon* v. *Amjad Ali*[79] [80], the Supreme Court in *Poongodi* v. *ThangaveP* said that proviso to Section 125(3} signifies that it is a mode of enforcement rather than mode of liability. It does not in any way creates a bar or affects the entitlement of a claimant to arrears of maintenance. The proviso contemplates the liability to be a levy of a fine and the detention of defaulter in custody would not be available to a claimant who had slept over his right and has not approached the court within a period of one year from the date of entitlement. However, the court added: in such a case the ordinary remedy for recovery of civil nature would be available.

Section 125(3), read with Section 421, empowers the Magistrate to issue a warrant for the levy of the amount of maintenance by attachment and sale of any movable property of the person ordered to pay maintenance under Section 125.[81] Therefore the attachment of the salary of such a person would be considered as in accordance with law. It has been held that future salary of a husband can be attached.[82] It has also been added that the future salary can be attached for realisation of past arrears.[83] However, this view has been rightly dissented from.[84] When a money lender or a bank has got the right to attach the salary of an official to the extent indicated in Section 60, Civil Procedure Code (CPC), in execution of a money decree or maintenance decree, it would be preposterous to say that a wife cannot seek for attachment of her husband's salary for

76. *Kuldip Kaurv. Surinder Singh,* (1989) 1 SCC 405: 1989 SCC (Cri) 171: 1989 Cri Lj 794;

77. {1999} 5 SCC *6~z:* 1999 SCC (Cri) 1029.

78.{2005} 4 SCC 468.

79. (1999) 5 SCC *6~z.*

80. (2013) 10 SCC 618.

81. V.P. *Sh'wannav. Bhadramma,* 1993 Cri LJ 418 (Kant).

82. *Surekha Mrudangia* v. *Ramacbari Mrudangia,* 1990 Cri LJ 639 (On); *Bhagwat Gaikivad* v. *Baburao Gaikwad,* 1994 Cri LJ 2393 (Bom).

83.*Mani* v. *jaykutnari,* 1998 Cri LJ 3708 (Mad).

84.*Mobd. Jahangir Khan* v. *Manoara Bibi.* 1992 Cri Lj 83 (Cal).

recovering the arrear of maintenance granted by the Magistrate. A wife who is entitled to maintenance under Section 12.5 and who is also entitled to recover the arrears under Section 125(3), cannot be placed worse than a money lender. What is available under Section 60 CPC can also be made available under Section 125(3) CrPC for the recovery of arrears of maintenance.[85]

For the enforcement of the order of maintenance under Section 125, the normal rule is, at first, to issue a distress warrant in the manner provided in the Code for levying fines; but this rule need not necessarily be followed in each and every case without considering the attending circumstances of the particular case. In a case where the husband flatly refused point blank to make any payment to the wife in the matter of the huge arrears of maintenance amount and persistently indulged in irresponsible behaviour during the court proceedings, the order sentencing the defaulting husband to imprisonment was held to be justified even though a distress warrant was not issued by the Magistrate in the first instance.[86]

Then, the first proviso to Section 125(3) enacts that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the court to levy such amount within a period of one year from the date on which it became due. Thus the period of limitation is one year. Any arrear falling beyond one year is barred by limitation.[87] However where an application for levy of maintenance is made within the period of one year mentioned in the proviso, but is dismissed for default, another application made subsequently for the same purpose may be granted although such application may have been made after the period of one year mentioned in the first proviso.[88] Therefore, if successive applications for recovery of arrears of maintenance are made within a year of each other no part of the entire claim becomes time-barred.[89]

However, though the property of the defaulter can be attached and sold for the realisation of arrears of maintenance for a maximum period of one year from the date of application, yet the defaulter can be sentenced to imprisonment for recovery of arrears, which may extend beyond this period.[90]

Where the order of maintenance is made in favour of a wife (presumably not a divorced wife) the second proviso to Section 125(3) gives another

85. *Ahmed. Pasha* v. *Wajid Unissa,* 1983 Cri LJ 479, 480 (AP); however *see* the contrary position taken in *Baldevi* v. *Ramnath,* 1955 Cri LJ 62.1 (Raj);

86. *Bbnre* v. *Comatibai,* 1981 Cri LJ 789 (MP).

87. *Jagannatk* v. *Purnamashi,* 1968 Cri LJ 335, 336: AIR 1968 Ori 35; *Lakshman Rao Sakharam*

88. *Kirparam Chhotan Raotv. Kalibai,* 1960 Crj LJ 1093(1): AIR

89. *Shankar Deo v, Savitri Devi,* 1974 Cri LJ 135 (Ali); *Pokala Brabmaniah* v. *Pokala Padma*, 1991 Cri LJ

90. *Iftekhar Htissain* v. *Hameeda Begum,* 1980 Cri LJ 1212., 1213

opportunity to the husband to make a genuine bona fide offer to maintain his wife on condition of her living with him. According to that proviso "if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and make an order under this section nothwithstanding such offer, if he is satisfied that there is just ground for so doing".

If the reasons given by the wife for refusing to live with the husband are not satisfactory, the Magistrate may refuse to execute the order rather than cancel it.[91]

An execution application of maintenance order dismissed for nonappearance can be restored.[92]

As mentioned earlier, in the enforcement of the order of maintenance the sentence of imprisonment can be passed and a warrant of arrest can be issued only if recourse to attachment and sale of property (of the defaulter) fails.[93] Further, it is only consistent with the principles of natural justice that a notice should be issued before the drastic step of issuing a warrant of arrest is taken.[94]

In order to enforce the order, Section 125(3} requires that there must be a failure to comply with the order without sufficient cause.[95] The words "without sufficient cause" should be understood in the light of the Explanation to the second proviso to Section 125(3), an<A tAe Magistrate while executing the order cannot consider those very questions which could be raised or which were decided when the claim for maintenance was upheld and a direction for payment of monthly allowance had been made.[96]

Section 125 is a provision to protect the weaker of the two parties. Therefore, if an order for maintenance has been made against the deserter husband it will operate, until it is modified or cancelled by a higher court or is varied or vacated in terms of Section 125(4) or (5) or Section 127. The order is enforceable and no plea that there has been cohabitation in the interregnum or that there has been a compromise between the parties can hold good as a valid defence.[97]

91. *Jangsm Srinivasa Kao* v. *Jangam Rajeswari,* 1990
92. *Kamla Devi* v. *Mehma Singh,* 1989 Cri Lj 866 (P&H).
93. *Karnail Singh* v. *Gurdial Kany,* 1974 Cri Lj 38, 39 (P&H}; *jagannath* v. *purna?nasbn*
1968 Cri Lj 535, 356: AIR 196S Ori 35: *also see,*
94. *K. Nitbiyanandan* v. *B. Radhamani*, 1980 Cri Lj 1191, 1194
95. *Devaki* v. *D.S. Putran,* 1973 Cri Lj 294, 295 (Mys);
Sadhu Suryanarayana v. *Sadu Laxmi Sundaranvma,*
96. *Gupteshwar Pandey* v. *Ram Peari,* 1971 Cri Lj 774. 777: AIR
97. *Bhupinder Singh* v. *Dal jit Kaur,* O979) *1* SCC 3C2,
354: 1979 SCC (Cri} 302, 503: 1979 Cri LJ19S.

29.9 Domestic violence law

The Supreme Court in *Sarasivathy* v. *Babu* has ruled that the wife whom the husband deserted has to be given compensation of [A]5 lakhs and other reliefs granted by the courts below under Sections 18, 19 and 20(d), Protection of Women from Domestic Violence Act, 2005. The court also pointed out that the High Court was in error in holding that the conduct of the parties prior to the coming into force of the Protection of Women from Domestic Violence Act, 2005 cannot be taken into consideration while passing an order under the Act.

29.10 Cancellation of the order for maintenance

(1) On proof that any wife in whose favour an order under Section 125(1) has been made *i)* is living in adultery, or *H)* that without sufficient reason she refuses to live with her husband, or *iil)* that they are living separately by mutual consent, the Magistrate shall cancel the order of maintenance. [S. 125(5)]

The abovementioned three conditions, namely, "living in adultery", "refusing to live with her husband without sufficient reason", and "living separately by mutual consent", have been elaborately discussed earlier in another context in sub-paras (2) and (5) of para. 29.4. That discussion can well be brought in here for understanding the import of the three conditions mentioned above.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent civil court, any order made under Section 125 should be cancelled, he shall cancel the order for maintenance accordingly. [S. 127(2)]

On the language of Section 127(2) as also on principle and precedent, it would be obligatory for a Magistrate to follow the judgment of a competent civil court, specifically on the point of maintenance, and consequently, to cancel or vary the earlier order of the criminal court under Section 125.[2] [3] The varied order may have prospective effect.[5]

If it is proved that the wife in whose favour an order for maintenance has been passed under Section 125(1), has refused to live with her husband without sufficient reason, then the Magistrate can, according to Section 125(5), cancel the order of maintenance. Therefore if there is a decision of a competent civil court granting decree for restitution of conjugal rights in favour of the husband showing his intention to receive the wife and that decree of restitution of conjugal rights clearly shows that the wife without reasonable excuse has withdrawn from the society of the

1. (1014) 5 SCC 712.
2. *Bhagwant Singh* v. *Surjit Kaur,* 1981 Cri Lj 151, 154
3. *Harikishan* v. *ShanUdsvi..* 1989 Cri LJ 439 (Raj).

husband, then that decree of the civil court clearly makes out a ground under Section 12.7(2.), for cancellation of the order for maintenance.[4]

It may be noted that the word "decision" in Section 127(2) means the determination of a question or controversy and not the reasons or grounds which weigh with the court in arriving at such decision.[5]

(3) Where any order has been made under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that

{a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of such remarriage;

ib) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order

(i) in the case where such sum was paid before such order, from the date on which such order was made,

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof. [S. 127(3)]

It may be noted that no husband can claim under Section 127(3)^ absolution from his obligation to pay maintenance under Section 125 towards a divorced wife except on proof of payment of a sum stipulated by customary or personal law *whose quantum is more or less sufficient to do duty for maintenance allowance.* The payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate that rate unless it is a reasonable substitute.[6]

The sum which, under any customary or personal law applicable to the parties, was payable on such divorce referred to in Section 127(3)^) will not take payments of meagre amounts by way of customary or personal law requirement. The provisions will apply so as to enable cancellation of an order passed under Section 125 only if the sum paid is a reasonable substitute for provision for future maintenance. Such payment may be required by custom or personal law to be paid on divorce; but it will

4. *Harssh Mansukhlal* v. *Hansagauri Ramshanker,* 1982 Cri LJ 2033, 2036 (Guj).

5. *Ranjit Kumar* v. *Swaha Rani.* 1979 Cri Lj 1301, 1303 (Cal).

6. Bai Tctbira v. *Alt Hussain Fidaalli Chothia,* (1979) 2 SCC 316. 321: 1979 SCC (Cri) 475, 478: 1979 Cri Lj 151; *see also,* the forceful judgment in *Fuzlunbi* v. *K. Khader Vali,* (1980) 4

terminate the liability to pay future maintenance only if it is a capitalised substitute for payment of maintenance periodically.[7]

While Section does provide for cancellation of the maintenance order on payment of dower if a woman has been divorced, the said clause does not contemplate cancellation of maintenance where a woman obtains divorce from her husband through a civil court under the provisions of the Act of 1939. In this connection Section clearly provides that where a woman obtains divorce from her husband the amount of maintenance cannot be cancelled until she voluntarily relinquishes or surrenders her rights to the amount of maintenance.[8]

29.11 Alteration *in* allowance

(i) On proof of a change in the circumstances of any person, receiving under Section. 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit.

An application for an increase or decrease of the allowance can be made consequent upon a change in the circumstance of either party at the time of the application for alteration.[9]

It has been held that a court cannot insist upon payment of maintenance as a precondition to hearing his petition under Section 127.[10]

It appears from the language of Section 127(1) above that change of circumstance envisaged by it is a change of pecuniary or other circumstance of the party paying or receiving allowance, which would justify an increase or a decrease of the amount of maintenance originally fixed.[11] The fall in purchasing power of money or the husband's retirement from service etc. have been held to be changes of pecuniary situation.[12]

Whereas under Section 125(2) the legislature has left it to the discretion of the Magistrate to award maintenance either from the date of the

7. *Thiiothama* v. *Kunjappan,* 19S5 Cri IJ 273, 278 (Ker).

8. *Zohara Khatoon v. Mohd. Ibrahim,* (1981) 2 SCO 500: 1981 SCC (Cri) 517, 528: 1981

9. *Meenakshi Ammal* v./. *Balakrishnan,* 1980 Cri LJ izoc, izor (Mad).

10. *A.shok Yeshwant Samant* v. *Suparna Ashok Samant, tp<pi* Cri Lj 766

11. *Gulrozbanu* v. *Kamarali,* 1974 Cri Lj 1438, 1440 (Bom); *N.E. Vasudevan Nairv. Kalyani Amma,* 1970 Cri LJ ir73, 075-76 (Ker); *Chander Parkash* v. *Shda Rani,* 1968 Cri Lj 1155, 1155: AIR 1968 Dei 174; *State v. Jankibai,* 1956 Cri LJ 731: AIR 1956 Bom 432.

Amended S. 127(1) lays down:

127. *Alteration in allowance.*—(1) On proof of a change in the circumstances of any person, receiving, under Section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or

12. *Dhan Raj* v. *Kishni,* 1998 Cri LJ 1312 (Raj); T. *Kausalya* v. T. *Narayana Reddy,* 1998 Cri

application or from the date of the order, no such discretion has been left to him while dealing an application under Section 12.7(1). Therefore, the order of alteration can. be effective from the date of such order and the same cannot be made effective from the date of the application for alteration.[13] It has been held that the enhancement order could be passed by the court which awarded the maintenance and not the execution court.[14]

"It is pertinent to note that under the revised Section 127(1) the Magistrate has discretion to make alteration, as he thinks fit, in the allowance for the rn.aintenan.ee or the interim maintenance as the case may be".

The Amendment Act has widened the meaning of "maintenance" to include "maintenance or interim maintenance" under Section 127(3) (c). Similarly under Section 127(4) monthly allowance has been clarified to include monthly allowance for the maintenance and interim maintenance or any of them. This explanatory meaning is made applicable to Section 128 also.

It is interesting to note that the Amendment Act has prescribed the period of 60 days for the disposal of the claim for monthly allowance vide the third proviso to Section 125. Similar provision has been incorporated in the Hindu Marriage Act, 1955 also.[15 * 17]

(2) Where it appears to the Magistrate that in consequence of any decision of a competent civil court, any order made under Section 125 should be varied, he shall vary the order accordingly. [S. 127(2)] The discretion given to the Magistrate is to be exercised judicially."[16 17]

in a case of alimony to the divorced wife under Section 37 of the Special Marriage Act, 1:954 it has been held by the Supreme Court[1""] that a decree for maintenance or alimony does not abate or get extinguished with the death of the husband in the same way as any other decree (even though not charged on the husband's property) would not get so extinguished. Therefore if the husband has left behind an estate at the time

13. *Bansi Lai* v. *Pushpa Devi,* 1982. Cri Lj TOSI (j&K); see also, *Harlkishan* v, *Shantidevi,* 1989 Cri L] 439 *(R<L)):Joydeb Chakraborty* v. *Bharti Chakravarty,* 1994 Cri Lj 2.2.34 (Ca'i); *Pilli Venkanna* v. *Pilli Nookalamma,* 1998 Cri Lj 192.2. (AP); but *see* contra, *Abdul Hamid* v.
14. *Eswaran* v. *Plchayee,* 1998 Cri Lj 3076 (Mad).
15. *See.,* Gazette of India, Extra. Part II, S. 1.
1.6. *Shiela Ravi* v. *Durga Prasad,* (1965) 1 Cri Lj 2.03: AIR 1965 Pun; 79, 80: see also, *Sudeep Chaudhary* v. *Radha Chaudbary,* (1997} IT. SCC *ZS6:* 1998 SCC (Cri) 160:
17. *Arana Basu Mullick* v. *Dorothea Mitra,* (1983) 3 SCC 522: 1983 SCC (Cri) 739.

the proceedings, and the complicated questions that might arise as to the determination of the persons liable and the extent of their liability after the death of the person ordered to pay maintenance under Section 125, it is doubtful whether the criminal courts would be inclined in such cases to adopt the view taken by the Supreme Court in relation to the execution of a civil decree for maintenance under the Special Marriage Act.

29.12 Civil court to take into account the sum received in pursuance of the order under Section 125

At the time of making any decree for the recovery of any maintenance or dowry by any person to whom a monthly allowance has been ordered to be paid under Section 125, the civil court shall take into account the sum which has been paid to, or recovered by, such person as monthly allowances in pursuance of the said order. [S. 127(4)]

Chapter 30

Miscellaneous Provisions

Object and scope of the chapter **30.1**

The first 29 chapters of this book dealt with the main provisions of the Code topic-wise. For this purpose different provisions of the Code having bearing on a particular topic had often to be brought together in a setting different from that of the Code. This was considered expedient and necessary for a better comprehension of the topics as such, as well as for an understanding of the inter-relation and inter-dependence of the various provisions constituting the Code. However, in this process of regrouping of the sections for the above purposes, certain provisions of the Code, though otherwise useful, remained rather out of focus. The present chapter, which is incidentally the last chapter, draws attention to such provisions and indicates their functions. In a way, the present chapter can be considered as a miscellany. For convenience, these assorted provisions have been grouped in seven parts—Part I deals with some definitions, interpretations and other allied matters. Part II mentions the mode of conferring powers under the Code, Part III provides for certain administrative arrangements, Part IV deals with Rules and Forms, Part V considers provisions relating to disposal of property and documents. Part VI deals with some miscellaneous assorted provisions, and Part VII considers consequences of irregularities of procedure and inherent powers of the High Court.

PART I

Definitions, Interpretations, etc.

Definitions **30.2**

Section z gives definitions of 24 terms and wherever the question of ascertaining the real meaning of any of these terms arises, the meaning given

by the definition in Section 2 shall be considered as the correct meaning unless the context otherwise requires. Some of the definitions given in Section 2 have already been considered for instance, "bailable offence", "cognizable offence", "summons case", "warrant case", etc.[1] The other definitions in Section 2 are as given below:

1. "High Court" means:
   - *(i)* in relation to any State, the High Court for that State;
   - *(ii)* in relation to a Union territory to which the jurisdiction of the High Court for a State has been extended by law, that High Court;
   - *(Hi)* in relation to any other Union territory, the highest court of criminal appeal for that territory other than the Supreme Court of India. [S. *z{e)]*
2. "India" means the territories to which this Code extends. [S. 2{/j]
3. "judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath. [S. zhjj

   The terms "inquiry" and "investigation" have been defined in clauses (g) and *(h)* of Section 2 and were considered earlier in para. 7.3. From these definitions it would be seen that a judicial proceeding would include any "inquiry" or "trial" but it would not cover any "investigation".[2]
4. "Local jurisdiction" in relation to a Court or Magistrate, means the local area within which the Court or Magistrate may exercise all or any of its powers under this Code and such local area may comprise the whole of the State, or any part of the State, as the Srate Government may, by notification specify. [S. 2{/}]
5. "Metropolitan area" means the area declared, or deemed to be declared, under Section 8, to be a metropolitan area. [S, *z(k)*\

   Section 8 has been considered earlier in para. 2.2.
6. "Notification" means a notification published in the Official Gazette. [S. $^{2(}$**77**$^{2)j}$
7. "Offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Section 20, Cattle Trespass Act, 1871 (1 of 1871). [S. *z(n}}*
8. "Place" includes a house, building, tent, vehicle and vessel. [$. 2(p)j
9- "Pleader", when used with reference to any proceeding in any court,

   means a person authorised by or under any law for the time being in force, to practise in such court, and includes any other person appointed with the permission of the court to act in such proceeding. [S, *z(q)]*

1. *See supra,* els. *(a), ic),* (w), *Is),* S. *t}* para. 5.9, 4.3.,
2. *Tung Nath Ojha* v. *Haji Nasiruddin Khan,* 1989 Cri

Anyone who is not an advocate, cannot as of right, force himself into any court and claim to plead for another. Permission may, however, be granted by the court taking the justice of situation and several other factors into consideration for such non-professional representation. This approach accords with the policy of the Code as spelt out in Section *2.{q)P*

In *S. Balasubramanian* v. *Commr. of Police*[3 4], the Madras High Court held that in case the accused has not sought permission from High Court to appoint power of attorney to act on his behalf, his appearance through power of attorney is liable to be dismissed.

10. "Prescribed" means prescribed by rules made under this Code. *[S.z(t)*

11. "Sub-division" means a sub-division of a district. [S. *z{v)}*

In addition to the 24 definitions given in Section 2, the Code imports the definitions of certain terms provided in the Penal Code, i860 (IPC). According to clause (y) of Section 2, words and expressions used herein and not defined but defined in the IPC have the meanings respectively assigned to them in that Code unless the context otherwise requires.

Construction and references

30.3

The Code seeks to bring about separation of the judiciary from the Executive, whereby the functions of the Magistrates under the Code have been allocated between the judicial and Executive Magistrates. It was therefore considered necessary to insert a rule of construction in respect of laws containing references to Magistrates so as to ensure that they also fit in the scheme of separation adopted under the Code.[5] In this connection Section 3 provides as follows:

3. (1} In this Code,—

(a) any reference, without any qualifying words, to a Magistrate, shall he construed, unless the context otherwise requires,—

(i) in relation to an area outside a metropolitan area, as a reference to a Judicial Magistrate;

(«) in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

{h) any reference to a Magistrate of the second class shall, in relation to an area outside a metropolitan area, be construed as a reference to a Judicial Magistrate of the second class, and, in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(c) any reference to a Magistrate of the first class shall,— [3 4 5]

Construction of references

3. *Hariskankar Rastogi* v. *Girdhari Sharma,* {1978) 2 SCC 165: 1978 SCC (Cri) 16%.

170: 1978 Cri Lj 778; *T.C, Mathai* v. *District & Sessions*

4. 2005 Cri LJ 385 (Mad).

5. *See,* joint Committee Report, p. v.

(i) in relation to a metropolitan area, be construed as a reference to a Metropolitan Magistrate exercising jurisdiction in that area;

(ii) in relation to any other area, be construed as a reference to a Judicial Magistrate of the first class exercising jurisdiction in that area;

(d) any reference to the Chief judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Chief Metropolitan Magistrate exercising jurisdiction in that area.

(z) In this Code, unless the context otherwise requires, any reference to the Court of a judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Court of the Metropolitan Magistrate for that area.

(3) Unless the context otherwise requires, any reference in any enactment passed before the commencement of this Code.—

(a) to a Magistrate of the first class, shall be construed as a reference to a Judicial Magistrate of the first class;

{b) to a Magistrate of the second class or of the third class, shall be construed as a reference to a Judicial Magistrate of the second class;

{c) to a Presidency Magistrate or Chief Presidency Magistrate, shall be construed as a reference, respectively, to a Metropolitan Magistrate or the Chief Metropolitan Magistrate;

(d) to any area which is included in a metropolitan area, as a reference to such metropolitan area, and any reference to a Magistrate of the first class or of the second class in relation to such area, shall be construed as a reference to the Metropolitan Magistrate exercising jurisdiction in such area.

(4} Where, under any law, other than this Code, the functions exercisable by a Magistrate relate to matters—

(a) which involve the appreciation or shifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or ***{b)*** **which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate.**

30,4 Existing territorial divisions to be construed as being formed under the Cods

As mentioned earlier in para. z,z, each State, for the purposes of the Code, is territorially divided into divisions, districts and sub-divisions. It has therefore been considered expedient to provide by Section 7(4} that Ahe sessions divisions, districts and sub-divisions existing in a State at the commencement of this Code *[i.e.* on x-4-1974} shall be deemed to have been formed under this section".

Repeal and savings 30,5

In this connection Section 484 provides as follows:

484. (1) The Criminal Procedure Code, 1898, (5 of 1898}, is hereby repealed. *Repeal and savings (z)* Notwithstanding such repeal,—

(a) if, immediately before the date on which this Code comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1898 (5 of 1898), as in force immediately before such commencement, (hereinafter referred to as the Old Code), as if this Code had not come into force:

Provided that every inquiry under Chapter XVIII of the Old Code, which is pending at the commencement of this Code, shall be dealt with and disposed of in accordance with the provisions of this Code;

\b) all notifications published, proclamations issued, powers conferred, forms prescribed, local jurisdictions defined, sentences passed and orders, rules and appointments, not being appointments as Special Magistrates, made under the Old Code and which are in force immediately before the commencement of this Code, shall be deemed, respectively, to have been published, issued, conferred, prescribed, defined, passed or made under the corresponding provisions of this Code;

(c) any sanction accorded or consent given under the Old Code in pursuance of which no proceeding was commenced under that Code, shall be deemed to have been accorded or given under the corresponding provisions of this Code and proceedings may be commenced under this Code in pursuance of such sanction or consent;

{d) the provisions of the Old Code shall continue to apply in relation to every prosecution against a Ruler within the meaning of Article 363 of the Constitution.

(3) Where the period prescribed for an application or other proceeding under the Old Code had expired on or before the commencement of this Code, nothing in this Code shall be construed as enabling any such application to be made or proceeding to be commenced under this Code by reason only of the fact that a longer period therefor is prescribed by this Code or provisions are made in this Code for the extension of time.

The old Criminal Procedure Code, 1898 has been repealed and replaced by the present Criminal Procedure Code, 1973. This new Code has already come into force from 1 April 1974.

Sub-sections (2.) and (3) of Section 484 provide for smooth transition from the old Code to the new Code. Transition problems do crop up and the courts have to interpret and depend upon Section 484 for finding solutions to such problems. In course of time the section obviously will be of no use in the actual working of the Code. In fact the transitory period being almost over, the section has more or less spent its force and utility. Therefore the judicial decisions explaining the scope and ambit of Section 484, though important in their own way, have not been discussed here.

PART II
Mode of Conferring and Withdrawing of Powers

Conferment and withdrawal of powers

30.6 In this connection Sections 32 to 35 provide as follows:

Mode of conferring powers

32. In conferring powers under this Code, the High Court or the State Government, as the case may be, may, by order, empower persons specially by name or in virtue of their offices or classes of officials generally by their official titles.

{2} Every such order shall take effect from the date on which it is communicated to the person so empowered.

Powers of officers

33. Whenever any person holding an office in the service of Government who has been invested by the High Court or the State Government with any powers under this Code throughout any local area is appointed to an equal or higher office of the same nature, within a like local area under the same State Government, he shall, unless the High Court or the State Government, as the case may be, otherwise directs, or has otherwise directed, exercise the same powers in the local area in which he is so appointed,

Withdrawal of powers

34. (3) The High Court or the State Government, as the case may be, may withdraw all or any of the powers conferred by it under this Code on any person or by any officer subordinate to it.

{2} Any powers conferred by the Chief judicial Magistrate or by the District Magistrate may be withdrawn by the respective Magistrate by whom such powers were conferred.

Powers of Judges and Magistra tes exercisable by their successors-in- office

35. (x) Subject to the other provisions of this Code, the powers and duties of a judge or Magistrate may be exercised or performed by his successor-in-office.

(2; When there is any doubt as to who is the successor-in-office of any Additional or Assistant Sessions judge, the Sessions judge shall determine by order in writing the Judge who shall, for the purposes of this Code or of any proceedings no order thereunder, be deemed to be the successor-in-office of such Additional or Assistant Sessions judge.

30.7

(3) When there is any doubt as to who is the successor-in-office of any Magistrate, the Chief Judicial Magistrate, or the District Magistrate, as the case may be, shall determine by order in writing the Magistrate who shall,