

**SECTION 362 CRPC: AN EMBARGO ON THE ORDER OF  
MAINTENANCE UNDER SECTION 125 OR NOT?**

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**Abstract:**

This paper deals with section 362 of Code of Criminal Procedure, 1973, its scope and application, alteration or review of judgment under it and whether the order of maintenance under sec.125 can be reviewed by the court by the virtue of this section or not. Section 125 of the Cr.P.C. provides that the Magistrate of 1<sup>st</sup> class has power to pass an order supervising for the payment of a monthly allowance for maintenance of wives, children and parents of any person having sufficient means to provide the same; while on the other hand, section 362 of Cr.P.C provides a bar on the authority of the court to alter or review a judgment except for the clerical or arithmetical error and the section 362 must be read subject to the provision of section 393. It also has been held in one of the earlier cases that a judgment orally dictated in open court can be completely changed before it is signed and sealed provided that notice is given to all the parties concerned in the suit. The section of 125 of Cr.P.C. serves a social purpose and it is a measure of social justice for the protection of deserted wife and the court will look into all the circumstances while providing the amount of maintenance. The purview of revision against the order under section 125 has increased, and the higher courts are accepting the revision applications under section 397 for providing appropriate reliefs.

**KEYWORDS:** Maintenance, Appeal, Order, Review, Magistrate, Embargo, Judgment, Disposal, Court, Family Court, Proceeding, Code of Criminal Procedure (Cr.P.C.).

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## 1. Introduction:

It is embodied under section.362 Cr.P.C that once a judgment or final order disposing of a case has been signed, no court can alter or review it except to correct a clerical or arithmetical error. The rule is therefore that if a judgment or a final order is once signed, no court can revise or alter it even if any illegality is discovered. Such illegality or omission may, however, be brought to the notice of the High Court or Court of Session in its revisional jurisdiction for necessary action. It is embodied in the section 362 of the Criminal Code that “no court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error”.<sup>2</sup> Section 362 of the amended Cr.P.C. has done away with the special provisions regarding High Court and has made the section applicable to all the courts irrespective of their jurisdiction.<sup>3</sup> When it comes to the question that what is considered as judgment and what not and, what are the forms and contents of judgment is provided under section 353 of Cr.P.C. and the language and contents of the judgment is provided under section 354 of Cr.P.C. An order under section 146 to one under section 147[under Chapter X (D) - Disputes as to immovable property] is in the nature of the judgment and a magistrate cannot alter an order under it and an order rejecting an appeal for non-compliance with section 382 is not ‘judgment’, within section 362 and it can be reheard; a complaint made under section 340 can also be reviewed or altered. There are also certain orders which are not affected by section 362 which includes subsequent order of retrial which was omitted when setting aside a conviction; subsequent order for costs under section 148(3), and furthermore, this section is controlled by section 398 and a district (chief judicial) magistrate may make further enquiry himself into a case dismissed by himself.<sup>4</sup> Section 362 exempts all courts from altering or reviewing its judgment when once it has signed it and no criminal court has any power to add, alter or review its judgment after it is signed.

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<sup>2</sup> The Code of Criminal Procedure, 1973, sec.362, Act No. 2 of 1974, Act of Parliament, 1974 (1974)

<sup>3</sup> State Of Orissa Vs. Ram Chander Agarwala, 1979 SCR (1)1114

<sup>4</sup> PRABHAS C. SARKAR; SARKAR ON CRIMINAL PROCEDURE, 1072-7396<sup>th</sup> ed.1996)

However, a judgment pronounced but not signed can be reviewed. In Allahabad, a judgment signed but not sealed was reviewed. In proper cases the judge can review the sentence pronounced so long as the warrant is not signed.<sup>5</sup>

## 2. Scope of Section 362:

As it is embodied in sec. 362 of Cr.P.C. no court, when it has signed its judgment or final order disposing a case, shall alter or review the same except to correct a clerical or arithmetical error. The finality in sec. 362 is only in relation to the court which announces the judgment. The cardinal principle is that when a matter has been finally disposed of by a court, such court is functus officio in respect to that matter, and in the absence of direct statutory provision permitting alteration or review; cannot entertain a fresh prayer for the same relief.<sup>6</sup>

Only an error of substantial nature can be reviewed in a review petition. When a plea of defence is taken and if the court is satisfied that it is probable and there is basis for the same and if the benefit is to given to the accused, then the legality of the conviction in itself is involved .The question of self-defense being both of law and fact; therefore, in a review petition, such a question can be examined if the court is satisfied.<sup>7</sup> Two types of errors are provided under section 362 named as clerical error and arithmetical error; a clerical error is a mistake in writing or typing and an arithmetical error is a mistake of calculation, occasioned by an accidental slip or omission of the court. Omissions of consequential orders may be permissible in certain cases; but demanding judicial consideration is outside the section.

## 3. Sec. 125: Scope and Application:

Sec. 125 of Cr.P.C. provides for maintenance to the wife, children and parents. The court after the invocation of sec. 125, may order the respondent, that is the husband, to maintain the wife who is unable to maintain herself; and the court, will further, look into various circumstances while awarding the amount of maintenance. Emphasis has been laid in all cases on the “inability to maintain” because the primary object of the section is to prevent starvation and vagrancy.

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<sup>5</sup> Abdul Rahman Vs. Emperor (1927) 29 BOMLR 813

<sup>6</sup> PRABHAS C. SARKAR ; SARKAR ON CRIMINAL PROCEDURE , 1071 -72 (6<sup>th</sup> ed. 1996)

<sup>7</sup> Ms. Savita Kumari v. Union of India, (1993) Cri LJ 1590 (SC)

According to the M.P. High Court, the word “may” shows that the husband is not bound to maintain the wife in all circumstances, and the wife has no absolute right to maintenance.<sup>8</sup> The proceedings under the section 125 of Cr.P.C. are of a summary nature. Once where it has been held by civil court of competent jurisdiction that a wife is not entitled to maintenance; the criminal court under section 125, cannot sit in appeal over the said decision; this also has been contemplated by the by sec.127 (2) of the Cr.P.C- cancellation of order passed under section 125, after the decision of the civil court. The power to order maintenance has been vested in judicial magistrate of first class and it also includes metropolitan magistrates, as the functions of them are also of judicial character. The order for the maintenance shall contain the points for determination, the decision thereon and the reasons for such decision.

It was laid down in the case of *Vikas vs. State of U.P* that the interim maintenance can be provided to the wife during proceedings of the case.

The purpose of sec. 125 of Cr.P.C. is to achieve a social purpose in a society.<sup>9</sup>

The aim of this section is the welfare of the wife by providing her with food, shelter after the separation with her husband.

### 3.1 Object and Interpretation of Section 125 OF CrPC:

Articles 15(3) and 39 respectively of our Indian Constitution were enacted to protect the weaker sections like women and children and it serves as a secular safeguard irrespective of the personal laws of the parties. The object behind section 125 is to compel a man to perform the moral obligation which he owes to the society in respect of his wife, parents and children so that they are not left beggared and destitute on the scrap-heap of society and thereby driven to a life of immorality, vagrancy and crime for their subsistence. This provision serves a social purpose, so, it should be given broader perception; the main object of this section is to prevent destitution on public grounds and vagrancy.

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<sup>8</sup> *Manubhai v. Sukhdeo*, 1990 Cr LJ 646 (M.P.)

<sup>9</sup> *K. Vimal v. K. Veeraswamy* 1991 SCC (2) 375

Section 125 prescribes a summary procedure; the findings are not final and when substantial issues of civil law are raised, the remedy lies only in civil courts. This section is also neither related with or violates the personal laws nor offends against Art. 14 and 15 of the Indian Constitution. Sec.125 is also fully consistent with art.15 (3) of the Constitution.

When the question arises to its applicability to Muslim personal laws: section 7 of the Muslim Women's (Protection of Rights on Divorce) Act, 1986 is a transitional provision and it applies to the application by a divorced woman under section 125 and section 127 of the Cr.P.C. respectively. If the application by a divorced woman under sections 125 and 127 of the Cr.P.C. is pending on the commencement of the Act, then such an application is required to be disposed of under the provisions of the 1986 Act. As section 7 is an overriding provision, the provision of sec.125 of Cr.P.C. is not applicable to such pending application and that application has to be disposed of in accordance with provisions of the Act (Protection of Rights on Divorce Act, 1986).

### 3.2 Jurisdiction of Civil and Criminal Courts:

Where the right to maintenance is conferred by both laws, i.e. by this section as well as the general law of the parties, it can be enforced not only under this section but also by a civil suit. A right under this section does not survive the death of the defendant but a right under the personal law may be enforced also against the estate of the deceased, it is not affected by Hindu Adoptions and Maintenance Act in any manner; right of a Hindu wife for maintenance under section 125 is not excluded by sections 4 and 18 of Hindu Adoptions and Maintenance Act. It is also not overridden by the Lunacy Act, furthermore, refusal to order maintenance under section 125 is no bar to a civil suit for it and the decision in such a suit is binding on the criminal court.

### 3.3 Agreement no bar:

The existence of an agreement to pay maintenance enforceable by a civil suit is no bar to an application under section 125; no decree of the civil court can bar the jurisdiction of the criminal court. The existence of a previous order for alimony does not oust the jurisdiction to order maintenance under section 125. A Magistrate can pass an order for maintenance when a decree

for maintenance cannot be executed on account of insolvency proceedings initiated by a husband.<sup>10</sup>

### 3.4 Petition after divorce:

A mere order of permanent alimony or maintenance does not oust or take away the jurisdiction of the Magistrate under section 125; such an order is not equivalent to maintenance. There is no direction contained in this section that an order cannot be made, if there is a decree of civil court for maintenance.<sup>11</sup>

### 4. Bar under Sec. 362 not applicable to larder passed under Sec. 125 of Cr.P.C:

In one of the recent cases; Sanjeev Kapoor vs. Chandana Kapoor and Ors. orders passed Cr.P.C. for maintenance are not hit by the embargo entailed in sec. 362 which bars criminal courts from altering their orders.

It was also pointed out in the judgment that sec.125 contains the phrase from “time to time”, and that the same phrase holds a specific meaning so as to indicate that under sec. 125, the Supreme Court held that the power of magistrate to alter its magistrate may exercise jurisdiction under this section, from time to time. The court further said that a closer look on the section 125 Cr.P.C. itself indicates that the court after passing the judgment or final order in the proceeding under this section does not become functus officio. It was also pointed out in this judgment that an express power for cancellation of orders under section 125 is also granted to the Magistrate under section 125(5).

The Court made note of the wording and phrasing of sec.362 in the abovementioned case, leaves room for exceptional cases by containing the words “save as otherwise provided by this code”; further sec. 127(2) of the code empowers the magistrate to cancel or alter any order passed under sec. 125 and it was held by the Hon’ble Supreme Court that a Magistrate who passes on settlement between the parties under this section has the power to recall or set aside the Order if terms of the same are violated, and section 362 of Cr.P.C. does not act as a bar on the same.

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<sup>10</sup> Mohammad Ali and Ors. Vs. Emperor AIR 1934 All 81

<sup>11</sup> Kuldeep Kumar Vs. Chanderkanta, 1984 Cri LJ 550 (Del)

## 5. Conclusion:

The provision of section 125 of the Cr.P.C. is available for interim maintenance which simply means that an order may be passed by the magistrate directing the husband to pay the monthly allowances to the wife during the pendency of an application in the court of law. It was held in the case of *Vikas vs. State of Uttar Pradesh*, that a magistrate can alter the amount of the maintenance to be paid, if he thinks that there is a change in the circumstances of the individual who has been paying or either receiving the amount of maintenance. This section serves a social purpose as the motive behind this section is the welfare of the wife by providing her with basic amenities such as shelter, food after her separation which is necessary for her survival and well-being.<sup>12</sup> The jurisdiction of the Magistrate is preventive and not remedial and certainly not punitive. The scope is limited and orders passed by the court as under section 127(2) provides that they are subject to any final adjudication by a civil court regarding status and civil rights. The object of this section (section 125) is to prevent destitution on public grounds and it only provides a speedy remedy against starvation of a deserted wife or child or indigent parents. This section is a summary procedure which does not cover entirely the same grounds as the civil liability of a husband or father or son under his personal law to maintain his wife or child or parents; and when there are any substantial issues of civil law raised, the remedy lies only in civil courts.

Sec. 125 of Cr.P.C. serves a social purpose and an approach towards “social justice adjudication” must be adopted, as opposed to mere “adversarial approach”.

The court observed that sec. 125(5) and sec. 127 would amount to the exceptions provided in section 362. Therefore, an order of maintenance is not barred from being altered or reviewed by the magistrate.

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<sup>12</sup> K. Vimal v. K. Veeraswamy, (1991) 2 SCC 375