

MAINTENANCE RIGHT OF MUSLIM WIFE: A CRITICAL ANALYSIS

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ABSTRACT

Under Muslim law, the right of a wife to be maintained by her husband is unlimited. A Muslim husband is bound to preserve his wife for an authorized matrimony, even if there is no concord in this regard. A Muslim husband is not bound to maintain the wife of an annulled or unbalanced marriage, except when the marriage is irregular in the absence of witnesses. Muslim law does not distinguish any responsibility on the part of a husband to keep up a wife whom he had divorced. This study tries to explore the maintenance rights of Muslim women.

KEY WORDS: MAINTENANCE, RIGHT, MUSLIM, WIFE.

INTRODUCTION

Family relations in India are governing by religious personal laws different religious communities namely Hindu, Muslim, Christian, Parsi and Jew have their own personal laws. They are governed by their personal religious laws in matters of marriage, divorce, succession, maintenance, guardianship and adoption. In most of the areas of these laws, women have been discriminated. ¹The law of maintenance has been biased against women under all personal laws in India. This branch of law is also on off blast of male dominated social system in which all property and even the person of female belongs to male head of the family. The females have been totally dependent on the male member of the family just because that they have no autonomous personality and they own no property.²

In India Muslim family scheme is based on patriarchal family system, in which a woman is completely exempted from the care for her maintenance and even is not obligatory to spend her wealth for maintain either herself or her children and so trouble is placed upon husband. A Muslim women besides her (Mahr) dower and movable property, have a share in wealth belong to her husband in the event of divorce, she has a right to monetary settlement in the shape of single transaction by her husband and she also receives unpaid dower amount and retain her rights of legacy with reference to her parents property including the light to receive maintenance during waiting period.

¹ Dr. Vinay Kapoor, *Perspective on Indian Personal Laws Status of Women*(Ist ed, 2013).

² Ibid. 195.

In the Islamic law, a man is bound to maintain his wife irrespective of his and her means. If the husband is not capable to maintain his wife then her relatives, and if relatives incapable to maintain then wakf is bound to maintain her.³

Definition of Maintenance

The Arabic equivalent of maintenance Nafqah which literally means, "What a person spends over his family" in its legal sense, maintenance signifies and includes three things;

[I] Food

[II] Clothing

[III] Lodging.

FATAWA - I - ALAMGIRI says maintenance comprehends Food, clothing and loading, though in common parlance it is limited to the first.

HEDAYA :- All those things which are necessary to the support of life such as food, clothes and lodging, many confines it solely to food.⁴

The Muslim laws of maintenance many are discussed from the point of view of person entitled to maintenance such person are:-

- i) The wife
- ii) The children
- iii) The parents and grand parents
- iv) The other relation

The wife :-

The Muslim Husband's obligation to maintain his wife arises in the following tow circumstances:-

- a) On account of position arising out of a legitimate marriage.
- b) On account of a pre-nuptial union entered into between the parties to the marriage.⁵

The Muslim law of maintenance differs from the law of maintenance Right of Muslim partner to claim maintenance:-

1. Under Muslim personal law
2. Under section 125 of the code of criminal procedure.

According to Muslim law a wife is entitled to maintenance only during iddat. However under section 125 of the code of criminal procedure, 1973 and under section 4 of the Muslim woman (Protection of Rights on divorce) Act 1986 a woman can assert maintenance even after the expiry of iddat period.⁶

³ Tanzeem Fatima, *Islamic Law and Judiciary* 9, 100 (Deep and Deep Publication, New Delhi, 1st edn, 2001).

⁴ AQIL Ahmed, *Mohamadan Law*, 232 (Central Law Agency, Allahabad, 16th edn. 2006).

⁵ Paras Diwan, *Muslim Law in Modern India 147* (Allahabad Law Agency, Faridabad, 6th edn. 2011).

⁶ Dr. S.C Tripathi and Vibha Arora, *Law Relating to women and Children 300* (Central Law Publication, Allahabad, 6th edn, 2015).

Husband duties towards wife

The Quran and Sunnat of Prophet (P.B.U.H.) have command kindness to woman; it is the husband's duty to consort with his wife in a fair and in kind manner. It is also a fact that a woman in pre-Islamic society generally suffered exposed discrimination in all spheres of life. They were exploited, used and tortured by males in many ways and entirely denied equality in all spheres of life. The Holy Quran which is undoubtedly, the words of 'Allah' ordered an essential change and made the two sexes equal in all respects of actions joined by bond of coordination and if dispute arises and the person give divorce to his wife than with compassion as well as with maintenance upto the period of iddat or till she remarries. Besides other one of the Surah of Quran, i.e. Surah Nissa, particularly lays down principles, structural particulars and operative rules, for the control and regulation of the relationship of man and woman. It is also noted that Islamic law has its basis in 'Divine Revelation' and room for human making is actually very slight in the world of human activity.' The question of maintenance of woman during the continuation of marriage, and after the termination of marriage either by divorce or death is presently engaging the attention all concerned.

In India Muslim family system is based on patriarchal family system, in which women is completely exempted from the concern for her maintenance, and even is not required to spend her wealth for maintaining either herself or her children and so burden is placed upon husband. A Muslim woman besides her (Mahr) dower and movable property has a share in wealth belonging to her husband. In the event of divorce, she has a right to financial resolution in the shape of single transaction by her husband.

Maintenance of wife during the subsistence of Marriage:-

It is incumbent on a husband to preserve his wife, whether she is Muslim or kitabiyyah, poor or rich enjoyed or enjoyed, young or old. However, if the wife is too young for conjugal intercourse, she has no right to maintenance from her husband, whether she is in his house or with her parents.

This broad and wide responsibility is restricted only in cases where she is not respectful and does not allow the husband free access at all lawful time. If the husband has not paid the prompt part of dower or she refuses to live with her husband because of his cruelty, the husband is bound to maintain her.

The wife loses her right to maintenance in the following circumstances.

- 1.) She is a minor unable of consummation.
- 2.) Refuses free access to the husband at all reasonable time.
- 3.) Is disobedient
- 4.) Refuses to live with him in the marital home, without an excuse.
- 5.) If she has eloped with somebody.⁷

⁷ V.P. Bhartiya, *Muslim law*, 182-183 (Eastern Book company Lucknow, 5th edn, 2009)

Maintenance arising on account of agreement:-

Under Muslim law, wife is entered to recover, maintenance from her husband on the origin of an agreement made between the spouse and or their guardian. Under Muslim law, certain ante nuptial and post nuptial agreement made between the parties are suitable and enforceable.

Maintenance After Dissolution of Marriage:-

A divorced Muslim woman may assert her maintenance in either of the following laws:-

- I) under Muslim personal law
- II) Criminal produce code 1973
- III) The Muslim women (Protection of rights on divorce) Act, 1986

Under Muslim Personal Law

Though the Quran clearly provides that “for the divorced women let there be a provision in compassion this is an obligation to those who are mindful of God”, Muslim law in India provides a divorced woman can claim maintenance only for the duration of her iddat. If the marriage was dissolve due to the death of the husband, the wife is not entitled to any maintenance even during the iddat." Nevertheless, all schools agree the wife is entitled to maintenance till release in case she is pregnant even though the irrevocable divorce was pronounced.

Where the divorce is pronounced in her absence, the wife is permitted for maintenance from the immediate she received notice of her divorce. She has to file a civil suit against her ex-husband for the maintenance. Muslim law does not lay down any minimum or maximum amount to be the wife during the iddat.

Now the maintenance of a divorced Muslim woman governs by The Muslim Women (Protection of Rights on Divorce) Act, 1986.⁸

Maintenance of wife under the Criminal Procedure Code, 1973

The Muslim wife's right to maintenance is determined not only under her personal law but also under the Cr P.C. Therefore, the refusal of the wife to perform her conjugal obligation towards husband and her claim maintenance are to be examining not only under Muslim personal law but also under the Criminal Procedure Code. Claim of a wife for the maintenance under this Act is an independent legal right and is not affected by her personal law.

A Muslim wife, who lives separately due to her husband's second marriage, is entitled to claim maintenance payment under the provisions of the Criminal Procedure Code, 1973. But at the same time a Muslim husband has legal right to contract a second marriage. Apparently, there appears to be a conflict between the Muslim personal law and the provisions of the

⁸ S.K. Raghuvanshi, *Muslim Law*, 123 (New Ea Publications, Faridabad) 1st edn, 2014).

Criminal Procedure Code on the point of wife's claim of maintenance whose husband has contracted a second marriage. However Supreme Court has made it clear on this point and ruled that irrespective of a Muslim husband's right contract a second marriage, his first wife would be entitled to claim maintenance. The court observed that the 'explanation has to be construed from the point view of the injury to matrimonial rights of the wife and not with respect to the husband's right to marry again.⁹

Under sec 125 of the code of criminal procedure 1973, the term wife includes a divorced wife and has not remarried. Under the Muslim law, the husband is liable to maintain his divorced wife till the period of iddat only and his liability to maintain his divorced wife terminate after this period. But under the criminal produce code, 1973 a divorced wife is permitted to be maintained by her for me husband by her former husband beyond the period of iddat provide she remains unmarried. But a divorced wife's light to maintenance is subject to see 127 (3) of the Act. Under section 127 (3) the order will be cancelled if:-

- (a) She has remarried
- (b) She has received the lum sum due to her on divorce under the customary or personal law; and
- (c) She has willingly surrendered her right to maintenance after obtaining the divorce.

The maintenance envisage was to be reasonable and not an illusory sum that would keep her in destitution. It was earlier presumed that that if a divorced Muslim woman has expected her dower and maintenance for the period of iddat, she will not be entitled to maintenance. However, courts of law every time ruled that a divorced wife is entitled to maintenance even if she has already received all the amounts due to her under the personal law.¹⁰

Role of judiciary

In the case of Zohara Khatoon vs. Mohd. Ibrahim¹¹

The Supreme Court held that 'wife' under Sections 125-127 includes a divorced wife whether she is divorced by talaq or she obtains a divorce under the Dissolution of Muslim Marriages Act, 1939. The right of maintenance under Section 125 is a separate and independent right.

It was often argued that clause (b) of Section 127(3) indicated mahr or dower and thus if a divorced woman was paid her dower, she was not entitled to an order for maintenance under section 125. The supreme court said that wife in section 125 and 127 includes a wife divorced by talak as well as a wife obtains divorce under the Dissolution of Marriage Act, 1939

⁹ Dr. Rakesh Kumar Singh, *Text book on Muslim Law*, 70 (Universal Law Publishing, 2nd edn, 2015).

¹⁰ Ibid, 124.

¹¹ (1981) Sc 1248.

Mohd. Ahmed khan v Sha Bano (1985)2 SCC 566¹²

The Supreme Court held that a Muslim husband is liable to provide maintenance to a divorced wife who is unable to maintain herself even after expiry of iddat so long as she does not marry.

Maintenance of divorced women under Muslim women (Protection of Rights on Divorce) ACT, 1986¹³

A divorced Muslim wife is at liberty to a reasonable and fair provision and maintenance during the period of iddat. She is not entitled to assert maintenance under the provision of the Code of Criminal procedure, 1973 under both the parties use their option to be governed by the code of criminal procedure, 1973 and an application already pending under the code at the time of the commencement of the Muslim women (Protection Of Right On Divorce) Act, 1986 is to be disposed of by the magistrate in 1986 is to be disposed of by the magistrate in accordance with the provisions of the Act, 1986.

The aim of the passing of this Act is to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters associated therewith or supplementary thereto. The Act provides that Muslim divorced woman shall be entitled for a reasonable and fair provision and maintenance within the period of iddat by her former husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be extensive to a period of two years from the dates of birth of the children. She will also be entitled to mahr or dower and all the properties given to her by, her relatives, friends, husband and husband's relatives. If above twist as are not given to her at the time of divorce, she is entitled to apply the Magistrate for an order directing her former husband to provide for such maintenance, the payment of mahr or dower or the delivery of the properties.

Where a Muslim divorced woman is unable to maintain herself after the period of iddat, the Magistrate is empower to make an order for the payment if maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim law in the extent in which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives also. But where a divorced woman has no relatives or such relatives or any one of them has not sufficient means to pay the maintenance or the other relatives who have been asked to pay the shares of the defaulting relatives, the Magistrate would order the State Waqf Board to pay

¹² (1985) 2 Scc 566.

¹³ Dr. Mufti Samiya Tabasum, *Status of Muslim Women in India*, 241 (Legal Publication, New Delhi, 1st edn. 2013).

the maintenance ordered by him or the shares of the relatives who are unable to pay. in such circumstances, the Magistrate has to record the finding that the; relatives as mentioned in Section 4(2) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 do not have enough means to pay maintenance to her, even if the Wakf Board did not take any plea that there are other relatives who could provide the maintenance to the divorced woman.¹⁴

Application for the Divorce under the 1986 Act

The authority of the Judicial First Class Magistrate under section 3 of the 1986 Act does not fall within any of the categories comprehended by section 7 of the 1986 Act. Even though the jurisdiction of the Magistrate while entertaining a petition under section 3 of the 1986 Act is quasi civil in nature, that jurisdiction will not stand transferred to the family court. That jurisdiction is one specifically conferred on the Magistrate. It is not one coming within Chapter IX of the Code. So, the jurisdiction of the judicial Magistrate under section 3 of the 1986 Act cannot in any way be affected by the establishment of the Family Court.

Section 4(1) of the Act provides that where the Magistrate is satisfied that a divorced woman has not remarried and is not able to maintain herself after the Iddat period, he may make an order direct such of her relatives as would be entitled to inherit her property on her death according to Muslim law, to pay reasonable amount to her. Section 4(2) provides that where a divorced woman who is not capable to maintain herself, has no relatives as mentioned above or, where such relatives have no sufficient means to pay maintenance, the Magistrate may, by order direct the State Wakf Board (established under the Wakf Act, 1954 or under any law for the time being in force in the State) to pay such maintenance as determined by him or, as the case may be, to pay the shares of such relatives who are unable to pay at such periods as he may specify in his order.

It is significant to note here that under Muslim Women Act, 1986, the Wakf Board may be legally responsible to maintain a divorced woman only where she has no parents, children or other relatives or, where such persons are not capable to maintain her. Therefore, the normal procedure is that order for maintenance be issued first to the above mentioned persons under section 4(1) and on their being unable to maintain her, ultimately to the Wakf Board under section 4(2). But Supreme Court held in a case that where the situation suggests that relatives mentioned above are unable to maintain the divorced woman, she is entitled to plead and prove in one proceeding, the inability of these relations by directing her claim against Wakf Board in the first instance. The Court observed that she is not required to proceed first against her each relative successively 'in order to obtain negative orders justificatory to the last resort' and then finally to initiate proceeding against Wakf Board.

Constitutionality of section 4(2): Constitutionality of section 4(2) was challenged on the

¹⁴ Aqil Ahmed, *Mohamadan Law*, 240 (Central Law Agency, Allahabad, 16th edn. 2006).

ground that it is violative of Article 26 of the Constitution of India. But Kerala High Court has held that the provisions of section 4(2) of the Muslim Women Act, 1986 direct Wakf Board to pay maintenance to divorced Muslim women, is not violative of Article 26 of the Constitution. The Court observed that Wakf Board is not a 'religious denomination' for purposes of Article 26 of Indian Constitution.

Section 5: Option of section 125 of the Cr. P.C.: This Act does not completely bar the application of sections 125 to 128 of the Cr. P.C., 1973. The Muslim Women Act, 1986 has now made the operation of sections 125-128 of the Cr.P.C. optional in respect of the Muslim women. Section 5 of the Act provides that, on the date of the first examination of the application if the divorced woman and her former husband declare by affidavit or any other declaration in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of sections 125-128 of the Cr. P.C. and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly

Controversial Act of , 1986

The all India Muslim personal law board demanded that shah bano be superseded by legislation, muster public support and managed political patronage. Some lawyers theologians associated with the board drafted a bill passed on their understanding of the customary law husband to pay maintenance to his divorced wife only for about three months, after that the liability to pass on to her would be heirs under the law of inheritance and falling them to the state. The badly drafted bill was marred by poor language and did not reflect the Islamic law on the subject in full.

Constitutionality of Muslim Women Act, 1986

The Supreme Court upheld the constitutional validity of Act in case of **Daniel Latifi v. Union of India**¹⁵

The supreme court held that reasonable and fair provisions and maintenance under section 3(I) (a) is not limited for the iddat period, it extends for the entire life of the divorced wife, until she remarries, the court further held that right to a reasonable and fair provision is referred to in section 3 is a right enforceable and fair provision referred to in section 3 is a right enforceable only against the divorced women's former husband and is in addition to what he is obliged to pay as maintenance.

A divorced woman can move against the relatives who will inherit her properties if she is unmarried to provide maintenance beyond the period of her iddat.

¹⁵ (2001) Sec. 740.

The law codifies what was stated in the Shah Bano case. As per the Olga Tellis and Maneka Gandhi cases, the right to life and personal liberty as provided under Article 21 of Indian constitution includes the right to live with dignity. It seems not to be the intention of parliament to deprive a woman of section 125 of the criminal procedure code by discriminating against her due to her religion and thus, provide maintenance from relatives who will inherit or the wakf board only.

Thus, the Act is valid and constitutional and all the decisions of the high court's to the country were overruled.

In Iqbal Bano v. state of U.P (2007) 6 SCC 785¹⁶ the supreme court held that Muslim Women (Protection of Rights on Divorce) Act, 1986 only applies to divorced women and not to women who is not divorced. Furthermore proceeding under Section 125 of the Code of Criminal Procedure, 1973 are civil in nature.

Enforcement of wife's Right of maintenance

Where a wife enforce her right in civil court, the court applies the. rules of Muslim personal law in considering her claim, If her claim is justified under Muslim law, a decree in her favor is passed direct the husband to pay the maintenance allowance to the wife, The amount of maintenance to the wife may be any reasonable sum of money to be determined by the court taking into account the requirements of the wife and be socioeconomic conditions of the husband. Generally, wife is not entitled to claim arrears of maintenance allowance.¹⁴ However, according to all schools of Muslim law; the wife can claim arrears of past maintenance if any maintenance allowance to her was promised by husband under any agreement. Such agreements are generally made to promise a wife to receive a regular pocket-allowance called Kharch-i-pandan or, Mewakhori. (She is entitled to get arrears of maintenance also in a case where maintenance. was ordered by the court but remained unpaid.

Enforcement under Criminal Procedure Code

Where a Muslim wife is in urgent need. She may apply for an order of maintenance under Section 125 of the Criminal Procedure code, 1975. A Magistrate of the first class may then, orders the husband to provide monthly allowance not exceeding five hundred rupees, for the maintenance of his wife. However, successive changes in the amount ordered may be made on proof of the change in circumstances, Moreover. The Magistrate has an authority to cancel or differ his order if the wife has, in the meanwhile, obtained a decree from a civil court. Such stipend is payable from the date of the order, or. If so ordered, from the date of the wife's application. If the husband has been ordered by a Magistrate to pay maintenance allowance to his wife under section 125 of the Criminal Procedure Code and the husband fails to comply the order without sufficient cause. The Magistrate may issue warrant for levying

¹⁶ (2007) 6 Sec. 785.

the amount due in the manner provided for levying fines, and may sentence the husband for non-payment of the maintenance after execution of such warrant. The imprisonment may extend to one month or until payment, whichever is earlier.¹⁷

Inter-relationship between Personal Law and Criminal Procedure Code

As regards the inter-relationship of personal law and the Criminal Procedure Code it is submitted that the legal remedy available to a wife under Section 125 of the Criminal Procedure code is intended only to provide for the being, a quick and immediate relief to a needy and aggrieved wife without going into the question of her entitlement under her personal law. Ultimately the question is to be settled by civil court under personal law. The civil court need not be guided by the provisions Of the Criminal Procedure Code on the contrary the Magistrate should cancel or vary his order in view of the civil court decision.¹⁸

Duration of maintenance

The wife's right to maintenance cease on the death of her husband, for her right of inheritance supervenes. The widow is, therefore, not entitled to maintenance during the iddat of death. But under Muslim law, a divorced wife is entitled to be maintained by her former husband during the period of iddat. If the divorce is not communicated to the wife, she is entitled to maintenance even after the expiry of the period of iddat. Thus she is entitled to maintenance till it is communicates to her. The Muslim authorities also lay down that if the marriage is dissolved on account of wife's apostasy, or for some cause of a criminal nature then she is not entitled to maintenance even during the period of iddat. According to Muslim law on the expiration of the period of iddat, the wife is not entitled to any maintenance under any circumstances. Muslim law does not recognize any obligation on the part of a husband to maintain a wife whom he had divorced. Iddat can be of two types, one on the death of the husband and the other on divorce by the husband. In case of iddat on the death of husband, the wife is not entitled to maintenance unless she is pregnant at the time of the death of the husband and she is entitled to maintenance till her pregnancy is over, on case of iddat on divorce, the wife is entitled to maintenance only 4 luneral months.¹⁹

Conclusion

In pre-Islamic societies women suffered .discrimination in all spheres of life. They were subjected to various types of cruelties. They were exploited, used and tortured by males. The phenomenon of equality between men and women were unheard and unsuitable. However, it was Islam which provided women status in society and status equal to men. The Holy Quran commanded to a radical change in the then existing systems and provided equality to both the sexes and assigned to them different spheres of activity and dominance.

¹⁷ S.K. Raghuvanshi, *Muslim Law*, 122-123 (New Ea Publications, Faridabad) 1st edn, 2014).

¹⁸ R.K. Sinha, *Muslim Law*, 137. (Central Law Agency, 6th edn, 2006).

¹⁹ Aqil Ahmed, *Mohamadan Law*, 236 (Central Law Agency, Allahabad, 16th edn. 2006).

To conclude we can say that Indian judicial system has taken a step further toward a more gender just interpretation of the Muslim personal law. In fact, the various institutions of Indian state do not manifest a perspective on Muslim personal law. The political system is more reluctant to implement a change which may shake stability. Moreover, shifting the perspective from state to community reveals that many differences exist within Muslim community itself e.g. shia sunni division. The law of maintenance seems to be inadequate as they provide maintenance only during iddat period. No provision is there for her survival in other conditions which is quite unjustified.