



MAINTENANCE TO DIVORCED MUSLIM WOMEN IN INDIA: A CRITICAL ANALYSIS

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Abstract-- This paper deals with the concept of maintenance to Muslim women after divorce. The topic has been controversial right from *Shah Bano* case judgement. This judgment allowed maintenance to Muslim women even after *iddat* period. Muslim Woman (Protection of Rights on Divorce) Act, 1986 was passed to nullify this judgement. Thereafter many judicial pronouncements have come which have reinstated the poison of *Shah Bano* case.

The paper commences with introducing the concept of maintenance under Muslim law. Then comes to maintenance to Muslim women after divorce. Conflict arose between Muslim law and section 125 of CrPC as the latter allows the maintenance to divorce after the period of *iddat* till she remarries. Thereafter in subsequent *Daniel latifi* case, the Supreme Court upheld the validity of this Act and reinstated the position settled in *Shah Bano*.

PROLOGUE

The Muslim law imposes a duty on every Muslim to maintain his wife, aged parents and children. The obligation of a Muslim to maintain members other than his wife arises only if the claimant has no means or property out of which he or she can maintain himself or herself. Under the Muslim law, maintenance is called 'nafqah' and it comprehends food, raiment and lodging.¹ Hedaya defines maintenance as all those things which are necessary for the support of life. Maintenance is the right of the wife to be provided at the husband's expense, and on a scale suitable to his means, with food, clothing, housing, medical expenses, etc., and includes even the expenditure met on servants, which on the social status of wife cannot be dispensed with".²

MAINTENANCE TO MUSLIM WOMEN AFTER DIVORCE

Under the *Shariah*, a wife cannot be compelled to cook and stitch her clothes; it is the husband who has to provide her with a servant for that work. The husband is also bound to provide her with a separate house or a separate portion of a house with a separate entrance or exit. If the wife resides at her parent's house for a valid reason, her right of maintenance is not affected. It is obligatory on the part of the husband to maintain his wife, behave with her on equitable terms and take proper care of the wife.

Her right of maintenance is absolute. Her right remains unprejudiced even if she has property or income of her own and the husband is poor. In addition to the legal obligation to maintain, there may be stipulations in the marriage contract which may render the husband liable to make a special allowance to the wife. Such allowances are called *kharch-i-pandan*, *guzara*, *mewakhor*, etc.³ The husband is bound to maintain if she fulfills the following conditions: (i) She has attained puberty, i.e., an age at which she can render to the husband for his conjugal rights; (ii) She places and offers to place herself in his power so as to allow free access to herself

¹Baillie, Neil B.E., *A Digest of Moohummudan Law*, 441.

²Qureshi, M.A., *Muslim Law of Marriage, Divorce and Maintenance*, 297.

³Tybji, F.B., *Muslim Law* 298.



at all lawful times and obeys all his lawful commands. It is to be noted that a Muslim wife is not entitled to maintenance in certain conditions. These conditions are: (i) If she abandons the conjugal domicile without any valid cause; (ii) If she refuses access to her husband without any valid cause; (iii) If she is disobedient to his reasonable commands; (iv) If she refuses to live with her husband without any lawful excuse; (v) If she has been imprisoned; (vi) If she has eloped with somebody; (vii) If she is a minor on which account marriage cannot be consummated. (viii) If she deserts her husband voluntarily and does not perform her marital duties, and (ix) If she makes an agreement of desertion on the second marriage of her husband.

The wife's right to maintenance ceases on the death of her husband, as in this condition her right of inheritance supervenes. The widow is, therefore, not entitled to maintenance during the *Iddat* of death. But under Muslim Law, a divorce wife is entitled to be maintained by her former husband during the period of *Iddat*.⁴

After divorce the wife is entitled to maintenance during the period of *Iddat*. . Under section 488 of the Criminal Procedure Code 1898 , there was already provision for the maintenance to wife. But when an order was made for the maintenance of a wife, the husband divorced his wife and order ceased to operate on the expiry of the period of *iddat*. The result was that a Muslim male could defeat an order made against him under section 488 by divorcing his wife immediately after the order was made.

MAINTENANCE OF DIVORCED WIFE UNDER SECTION 125 CRIMINAL PROCEDURE CODE 1973

Section 125 of Criminal Procedure Code 1973 empowers the Magistrate to order maintenance in favour of women. A "Wife" includes a divorced wife for the purpose of Section 125. Hence, any women who has been divorced or has obtained divorced from her husband and has not remarried can seek a maintenance order against her former husband, if she is unable to maintain herself and her husband has failed to maintain her despite having sufficient means to do so. On such an application by the wife, the Magistrate can order the husband to pay a monthly allowance (maximum up to Rs. 5000). If he fails to comply with the order of the Magistrate, the Magistrate can issue a warrant for levying the amount fixed in the order. If he still continues to evade the order and the amount remains unpaid in full or part, the Magistrate can sentence him to imprisonment up to one month or till due payment is made, whichever is earlier. Under Section 127(3) the Magistrate shall also cancel the order has been passed gets remarried, (ii) where she was divorced by the husband and if 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 or (iii) where she had obtained divorced from the husband and if she had voluntarily surrendered her right of maintenance after her divorce.

The Supreme Court did recognise the right of Muslim divorce woman in *Bai Tahira v. Ali Husain Fidalli* ⁵ and *Fuzlumbi v. Khader Vali*⁶. The Court therein took the view that the divorced Muslim woman is entitled to apply for maintenance under Section 125 of the

⁴ *Supra* 2 at 299.

⁵ AIR 1979 SC 362.

⁶ AIR 1980 SC 1730.

Code. The Supreme Court re-emphasized the stand in *Mohd. Ahmad Khan v. Shah Bano*.⁷, when a scrupulous rich husband sought to escape the application of Section 125 on the ground that provision of maintenance to a divorced wife beyond the *iddat* period was contrary to Muslim law. The Apex held that a Muslim husband is liable to provide maintenance to a divorced wife who is unable to maintain herself. The Court also held that dower is unable to maintain herself. The Court further held that the fact that deferred dower (*mahr*) is payable at the time of dissolution of marriage cannot justify the conclusion that it is payable on divorce. Hence *mahr* is not the amount, which is mentioned under Section 127(3) (b). This judgment led to a large scale protests by Muslim throughout the country and it was regarded as interference into the Personal Law of the Muslims. The intense controversy led to the passing of the Muslim Women (Protection of Rights on Divorce) Act 1986. It held that Section 125 of Cr. P.C., 1973 applies to all irrespective of the religion practiced by the person and section 125 overrides the persona law if there is any conflict between the two. To this extent the judicial pronouncement is instrumental. The court also held that "It would be incorrect and unjust to extend the rule of maintenance under Muslim Law to the cases in which the divorced wife is unable to maintain herself, so if the divorced wife is able to maintain herself, the husband's liability ceases with the expiration of the period of *Iddat*, but if she is unable to maintain herself after the period of *Iddat*, she is entitled to have recourse to Section 125 of Cr. P.C."⁸. So with the help of this judgment, the Apex Court has set a new law applicable in the case of Muslim divorced lady that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of Cr. P. C. after the expiry of period of *Iddat* also, as long as she does not remarry.

THE MUSLIM WOMAN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986

The law has been specially enacted to have application only to a divorced woman belonging to Muslim community. The phrase divorced woman is defined under section 2(a) as "to mean a Muslim woman who was married according to Muslim law, and has been divorced by, or has obtained divorce from, her husband in accordance with Muslim law". Thus it excludes the married woman and children from the application of the Act. Under Section 2(b) *iddat* is defined as the period in respect to divorced Muslim woman as; (i) three menstrual courses after the date of divorce, if she is subject to menstruation, (ii) three lunar months after her divorce, if she is not subject to menstruation; and (iii) if she is *enceinte* at the time of her divorce, the period between the divorce and the delivery of her child or the termination of pregnancy, whichever is earlier. Under section 2(c) a Magistrate means a Magistrate in the first class exercising jurisdiction under the Code Criminal Procedure 1973 in the area where the divorced women resides.

Payment of *mahr* and maintenance - Section 3 of the Act provide for maintenance, payment of *mahr* and return of properties belong to the divorced woman. Payment of maintenance Clause (a) stipulates for a reasonable and fair provision and maintenance for the wife during the period of *iddat* by her husband. The clause uses the words by her 'former husband'. It has been over-looked that during the period of *iddat* he is not a former husband; he is the present

⁷ AIR 1985 SC 945.

⁸ *Id* at 950.



husband, and that is why he is required to maintain her - that is the basis of maintenance, the fundamentalists too concede. Payment of *Mahr* Clause (c) stipulates for the payment of the remaining amount of dower, whether prompt or deferred. The deferred dower has to be paid, as that is the stipulation of every marriage contract, and the prompt dower, or any remaining portion of it has to be paid, in case it has not been paid soon after the marriage. Return of properties Clause (d) lays down that all the properties given to the Muslim wife before or at the time of marriage or after the marriage by her relatives, or the relatives of her husband or his friends should be paid to her. Under Section 3(2) where a reasonable and fair provision and maintenance or the amount of *mahr* or divorced women on her divorce, she or anyone duly authorized to a divorced women on her divorce, she or any one duly authorized by her behalf, make an application to the Magistrate for an order for payment of such provision and maintenance, *mahr* or dower, or the delivery of properties, as the case may be.

Under Section 3(3) where an application has been made under sub Section (2) by a divorced woman, the Magistrate may, if he is satisfied that (a) her husband having sufficient means has failed or neglected to make or pay her within the *iddat* period a reasonable and fair provision and maintenance for her and the children, or (b) the amount equal to the sum or dower has not been paid or that the properties referred to in clause(d) of sub Section (1) have not been delivered to her, make an order within one month of the date of filing of application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced women as he may determine fit and proper having regard to the need of the divorced women, the standard of life enjoyed by her during her marriage, and the means of her former husband and as the case may be, for the payment of such *mahr* or dower or the delivery of such properties referred to in clause (d) of sub Section (1) to the divorced women. Under Section 3(4), if any person against whom an order has been made under Section 3(3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or dower due in the manner provided for levying fine under the Code of Criminal Procedure, 1973, and may sentence such person for the whole or any amount remaining unpaid after execution of the warrant, to imprisonment for a term which may extend to one year or until payment, is made. In case, obligations stipulated under clauses (a), (c) and (d) are not fulfilled, the same have been made enforceable by an application in the Magistrate's Court. The Magistrate is required to pass an order ordinarily within a month of the presentation of the application by the wife. The order if not complied with, the Magistrate is empowered to realize the same from the husband as if it is a fine. The husband can also be sentenced to a term of imprisonment which may extend to one year or until payment is sooner made.

Claim by divorced women - Section 4 of the Act imposes an obligation on certain relations other than the husband to maintain a divorced unmarried Muslim woman who has no means to maintain herself. These relations "are those who would be entitled to inherit her property in the event she dies. Children and parents of the divorced woman are imposed with preferential obligation to maintain the divorced woman. Section 4(2) of the Act lays down that if a divorced woman fails to get maintenance from her relatives as specified in Sub-section (1) or there are no such relatives in existence, then the Magistrate can order payment of maintenance to her from any *State Wakf Board* established under Section 9 of the Wakf Act, 1954 or under any other law, functioning in the area in which the woman resides. An illusory provision in the



form of Section 5 has been incorporated in the Act whereby an option by the Muslim male and divorced wife can bring the jurisdiction under the Code of Criminal Procedure.

The Muslim Woman (Protection of Rights on Divorce) Act, 1986 reflects hasty drafting and fails to embody accurately the principles of Muslim law. It is quite ironical that the Act has been named, the Muslim Woman (Protection of Rights on Divorce) Act, while it takes away whatever right have been guaranteed to Muslim divorcees, by the holy Quran. It fails to provide a realistic and practical alternative solution to Section 125, to alleviate the hardships of divorced Muslim woman. The Code on plain reading looks ambiguous and reflects lack of draftsman skill. It vaguely mentions 'provision and maintenance' together without defining in any way the word provision. The Act requires that after the period of 'iddat' the divorcee would be looked after by her parents and other relatives who are likely to inherit from her. She thus gets a right under the code to claim maintenance from her parents and relatives before a court of law. Where is the need for a woman to claim maintenance if she possess properties worth for succession. When a divorced woman has no relatives or any one of them has not enough means the Act also provides that the Magistrate can order maintenance to be paid by the *State Wakf Board*. Seen in the ambit of the constitution of *Wakf Board's* the divorced woman is treated more like a destitute beggar.

POSITION POST ENACTMENT OF THE MUSLIM WOMAN (PROTECTION OF RIGHTS ON DIVORCE) ACT 1986

In *Danial Latifi v. Union of India*,⁹ upholding the constitutional validity of the 1986 Act, the Apex Court held that reasonable and fair provision 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 marries. The Court further held that right to a reasonable and fair provision 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. Reasonable and fair provision would be worked out with reference to the needs of the divorced women, the means of the husband and the standard of life enjoyed during subsistence of marriage. The provisions of this Act do not offend Articles 14, 15 and 21 of the Constitution of India. The court went on to interpret the Act that a construction that results in making an Act *ultra vires* has to be discarded and one that upholds the validity of the Act preferred. This decision took middle path by reviving the position in *Shah Bano* case and simultaneously upholding the Act of 1986, which itself had come as a reaction to the decision of *Shah Bano* case.

In *Iqbal Bano v. State of UP*,¹⁰ The Supreme court held that the Muslim Women Act, 1986 applies only to divorced Muslim women and the view that no Muslim can maintain a petition under section 125 Cr PC after the enactment of the Muslim Women Act, 1986 , is not tenable. In *Shabana Bano v. Imran Khan*,¹¹ the Supreme Court held that appellant's petition under Section 125 of the CrPC would be maintainable before the Family Court as long as appellant does not remarry. The amount of maintenance to be awarded under Section 125 of the Cr.P.C.

⁹ (2001)7 SCC740.

¹⁰ (2007)6 SCC785

¹¹ (2010)1 SCC 666.



cannot be restricted for the *iddat* period only. Cumulative reading of the relevant portions of judgments of this Court in *Danial Latifi* and *Iqbal Bano* make it crystal clear that a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry.

This was once again reiterated in the recent judgment in *Shabana Bano v. Imran Khan*¹² that after the expiry of *iddat*, a divorced Muslim woman can seek maintenance under S.125 Cr PC as long as she doesn't re-marry. Hence, the position as laid down in the Daniel Latifi case is the settled position and has not undergone any change.

EPILOGUE

The *Shah Bano* case treated Muslim women at par with other Indian women by allowing her maintenance under section 125 Cr PC, which raised the eyebrows of fundamentalists. Thereby to appease those fundamentalist, Rajiv Gandhi Government passed this regressive piece of legislation i.e. Muslim Woman (Protection of Rights on Divorce) Act 1986. This Act prescribed more guidelines for the application of maintenance. *Danial Latifi* decision has not settled the controversy. It has created confusion by declaring the Act Constitutional though it discriminates against Muslim women. But this decision has also interpreted the Act of 1986 in favour of Muslim women.

We see from judicial pronouncements that judiciary is giving relief to Muslim women. But one bold step is again desired in favour of Muslim women by repealing this thirty three year old regressive statute. In the present scenario, when the Apex Court has declared *Triple Talaq* as unconstitutional thereby empowering Muslim women, one bold decision is awaited and desired in this direction.

The Muslim women had feared that the 1986 Act had taken away their right to maintenance beyond the *iddat* period. But these court judgments have given them hope. The Muslim leaders are not likely to protest against these judgments as they did in the *Shah Bano* case and even if they do, they will not get the kind of response from Muslims as they did in the mid-1980s.

¹² AIR 2010 SC 305