

## ROLE OF JUDICIARY IN MAINTENANCE TO DIVORCED MUSLIM WOMEN

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### *Abstract*

Indian Judiciary is playing a vital role for the betterment of Muslim Women in India. We have special provision regarding maintenance in criminal procedural law. Study to comparative provisions for maintenance of women in different societies. A woman is not able to maintain herself after divorce, by virtue of many land mark decision, which has develop the system of maintenance. It is important to manage equality before Law for Women in society.

**Keywords:** Religious, Society, Indian Judiciary, Maintenance, Muslim Women, Land Mark Decisions.

### PROLOGUE

India has been for centuries a multi-religious and multi-ethnic society and yet it has the distinction of maintaining unity in such diversities. The social relationship of people in India is governed by one's own personal law. Muslims in India, like other religious groups such as Hindus, Christian and Parsis have a separate personal law of their own covering matters pertaining to marriage, divorce, maintenance, inheritance and custody of children. The law relating to maintenance governing the religious minorities of Muslims is dealt here. There is ample place for interpretation, and expansions of the Quranic legislation. The Messenger of Allah Himself encouraged his companions to use their intellect to resolve the problems within the ambit of Quran and Sunnah. However the situation becomes complicated in a multi-religious country like India where not the whole body of Muslim law but only a portion of it is applied to Muslims.

This is in sharp conflict with the norms of behaviour regulated by rules that regard a man as a free moral agent. In these circumstances the role of the judges becomes very crucial, however, the judiciary is facing a difficult task in the matters of application of Muslim Law because of absence of a single codified form in that arena. The present paper is therefore, an attempt to scrutinize the cases involving the maintenance rights of divorced Muslims women in India by the apex court.

### JUDICIAL RESPONSE TO THE MAINTENANCE TO DIVORCED MUSLIM WOMEN

Section 125 (1) of Cr.P.C. of 1973, includes a divorced wife provided she has not remarried. This definition of wife includes "A woman who has been divorced by or has obtained divorce from her husband and has not remarried".The Supreme Court in Bai Tahira v. Ali Hussain Fissali<sup>1</sup> in 1979 brought to the force the question of changing the law applicable to Muslims in India so as to

<sup>1</sup> Bai Tahira v. Ali Hussain Fissali, A.I.R. 1979 SC, 362 at p. 365.

conform to the present day notions of right and wrong. In the opinion of the Supreme Court it enjoins upon the magistrate to find out whether, "customary or the personal law payment" is adequate to maintain the divorced wife in the circumstances existing in a particular case. Justice Krishna Iyer thus observed: "The payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of the maintenance rate but cannot annihilate the rate unless it is a reasonable substitute. The legal sanctity of the payment is certified by the fulfilment of the social obligation not by a ritual exercise rooted in custom."

The Supreme Court declared that a divorced woman shall enjoy the two sets of rights, statutory and Personal Law at the same time. Regarding applicability of sec. 127(3)(b) Justice Iyer observed :

No construction which leads to frustration of the statutory project can secure validation of the court is to pay true homage to the construction. The only just construction of the section is that parliament intended, divorcees should not derive a double benefit. If the first payment by way of Mehr ordained by custom has reasonable relation to the object and is a capitalized substitute for the order of section 125, not mathematically but fairly, then sec. 127(3) (b) sub-serves the goal and relieves the obligator not pro rata but wholly. The purpose of the payment under any customary or personal law must be to obviate destitution of the divorcee and to provide her with where she is unable to maintain herself. The whole scheme of sec.127(3) (b) is manifestly to recognize the substitute maintenance arrangement by lump sum payment organized by the laws of the parties. There must be a rational relation between the sum so paid and potential as provision for maintenance to interpret otherwise is to stultify the project law is dynamic and its meaning cannot be pedantic but purposeful.

On the question of cancellation and modification of maintenance order passed under section 125 the Supreme Court held that:

No husband can claim under section 127(3) (b) abolition from this obligation under sec. 125 towards a divorced wife except on proof of payment of the sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance. In short the purpose of sec. 127(3) (b) is simply thus that a wife cannot be allowed double, benefit, one of the customary or personal law payment and the other of the payment under sec.125. But if the former is inadequate the court has power to award maintenance under sec.125.

The Supreme Court further reiterated its theory of "inadequacy of the payment" in *Fazlunbi v. Kadervali* case<sup>2</sup> again Justice V.R.Krishna Iyer himself and on behalf of O.Chinappa Reddy and A.P. Sen, observed:

We are, therefore, inclined to the view that even by harmonizing payments under personal and customary law with the obligations under sec.125 to 127 of the Cr. P.C. the conclusion is clear that the sum paid at the time of divorce must be reasonable and not an illusory amount and will release the quondam husband from the continuing liability, only if the sum paid is realistically sufficient to maintain the ex-wife and salvage her from destitution which is the anathema of the law.<sup>3</sup>

The Supreme Court judgment in *Zohra Khatoon v. Mohd. Ibrahim*<sup>4</sup> is very significant one. Zohra Khatoon obtained a decree of dissolution of marriage on the basis of her own fault but later she

<sup>2</sup> AIR 1980, SC. 1730

<sup>3</sup> Id., at p. 1738

<sup>4</sup> A.I.R. 1981 S.C. 1243

filed a suit for maintenance. The Magistrate ordered payment by way of maintenance of Rs.100/- per month. On appeal by the husband the Lucknow Bench of the Allahabad High Court altered the judgment of the special magistrate and fixed Rs.60/- per month by way of maintenance for the minor child. The claim of the wife was rejected on the ground that sec.125 (1) was inapplicable because:

- (i) That the wife had obtained only a decree of dissolution of marriage and not a divorce, under the law applicable to Muslims.
- (ii) That the expression “from the husband” as used in the explanation divorce by voluntary action of the husband.
- (iii) That the marriage was dissolved by the court and not by the husband.

Zohra Khatoon appealed to the Supreme Court which reversed the decision of the High Court and approved the order of the magistrate for the following reasons:

- (i) That a woman who has obtained a divorce from the husband through the process of law would be treated a wife as per sec. 125(1)(b) of the code.
- (ii) That sec. 127(3)(b) does provide for cancellation of maintenance on payment of customary or personal law amount if a woman has been divorced but the said clause does not contemplate cancellation of maintenance order where a woman obtains divorce from her husband through the process of law or under the provisions of the Dissolution of Muslim Marriage Act of 1939.<sup>5</sup>

The above view of the Supreme Court has created some doubts regarding the application of section 125(1)(b), 127(3)(b) and 127(3) (c) of the code, in the cases of Khula.<sup>6</sup> The section 127 (3)(b) protects the Muslim Personal Law and is applicable to all the modes of divorce among Muslim or determining the period of maintenance of a divorced woman Sec.127(3) (c) does not protect the woman, in which divorce has been obtained through the process of law but deals with Khula cases.

Thus, the Supreme Court insisted that the benefit of extended definition of wife would be given to the Muslim women even who have obtained divorce through law, Justice Murtaza Fazal Ali observed:

Clause (b) of explanation to Sec. 125(1) envisages all the three modes of divorce whether a wife is divorced unilaterally by the husband or where she obtains divorce. She continues to be a wife for the purpose of getting maintenance under sec. 125 of the Cr.P.C. of 1973. This means the benefit of the extended definition of wife would be given to the Muslim women who have obtained divorce through the process of law.<sup>7</sup>

The Supreme Court in the case of Siraj Mohd. Khan v. Hafizunisa Yasin Khan<sup>8</sup> held that if husband is unable to discharge his marital obligations, this would amount to both legal and mental cruelty which would be a just ground as contemplated by the second proviso to sec.

<sup>5</sup> Id., at pp. 1249-50

<sup>6</sup> In a Khula, wife obtains a divorce from her husband against a consideration or by relinquishes some of her rights.

<sup>7</sup> Since this conclusion clashes with the express provision of the Muslim Law according to which a divorced woman has right to maintenance till the expiry of Iddat period only, during which she is not allowed to remarry, a need is felt for a further protection clause in the Code.

<sup>8</sup> A.I.R. 1981, S.C. 1972

125(3) for the wife's refusal to live with her husband and she would be entitled to maintenance from her husband according to his means.

The Supreme Court in *M.A. Khan v. Shah Bano Begum*<sup>9</sup> has held that although the limit of the Muslim husband's liability to provide for maintenance to the divorced wife is limited to the period of Iddat, it does not contemplate or countenance the situation envisaged by Section 125 of the Cr. P.C. of 1973. The Court held that it would be incorrect and unjust to extend the above principle of Muslim law to cases in which the divorced wife is unable to maintain herself. The Court, therefore, came to the conclusion that 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 the Code of Criminal Procedure.

However the decision of the *Shah Bano*' case created a lot of heat throughout the country. The earlier apprehensions of the Muslim community were strengthened and the situations reached to crescendo. This created a country wide crisis. A small section of the Muslims community in addition to majority supported the decision of *Shah Bano* case arguing that in the modern India divorced woman requires financial security as a matter of right. However the majority section of the Muslim community regarded the decision as an unwarranted assault and deliberate interference in the religious affairs as the decision went against the Islamic law. So the Muslims started the countrywide agitation for the protection of the Shariat. These developments lead to the introduction of the Muslim Women (Protection of Rights on Divorce), 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 connected therewith or incidental thereto. The Act provides that a 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 divorce, such reasonable provision and maintenance would be extended 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 the above benefits are not given to her at the time of divorce, she is entitled to apply to 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 empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim law in the proportions in which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relative who have sufficient means to pay the shares of these relatives also. But where a divorced woman has no relative or such relatives or any one of them has not enough means to pay the maintenance or the other relative who have been asked to pay the

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<sup>9</sup> AIR 1985 SC 405

shares of the defaulting relative, the Magistrate would order the State Wakf Board to pay the maintenance ordered by him or the shares of the relative who are unable to pay.<sup>10</sup>

Whether a divorced Muslim woman can institute a suit for maintenance directly against the State Wakf Board? The answer to this question was given by the Supreme Court in *Secretary, T.N. Wakf Board v. Syed Fatima Nachi*.<sup>11</sup> The Court observed that in our considered view, she would instead be entitled to plead and prove such relevant facts in one proceeding as to the inability of her relations to maintain her and directing her claim against the Wakf Board in the first instance. It is however, open for the Wakf Board to controvert that the relations mentioned in the provision have the means to pay maintenance to her. In that event, the Magistrate would perfectly be justified in adding those relative as parties to the litigation in order to determine as towards whom shall be directed his orders for payment of maintenance.

In *Danial Latifi v. Union of India*<sup>12</sup> while upholding the validity of the Act, the Supreme Court concluded as following:-

- (i) 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 in terms of Section 3(1) (a) of the Act.
- (ii) Liability of a Muslim husband to his divorced wife arising under Section 3 (1) (a) of the Act to pay maintenance is not confined to the Iddat period.
- (iii) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the Iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.
- (iv) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India. After the passing of the Act of 1986 there arose a controversy whether Section 125 of Cr. P.C. would be applicable to the case of Muslim wife claiming maintenance from her husband.

In *Iqbal Bano v. State of U.P.*<sup>13</sup> the Supreme Court held that the Muslim Women (Protection of Rights on Divorce) Act, 1986, only applies to divorced woman and not to a woman who is not divorced. Furthermore, proceedings under Section 125 Cr. P.C. are civil in nature. Even if the Court noticed that there was a divorced Muslim woman who had made an application under section 125 of Cr. P.C. of 1973, it was open to the Court to treat the same petition under the Act of 1986, considering the beneficial nature of the legislation, especially since proceedings under Section 125 of Cr.P.C. and claims made under the Muslim Women Act are tried by the same Court. Once again in *Shabana Bano v. Imran Khan*<sup>14</sup> the issue that arose for consideration before

<sup>10</sup> Section 3,4 & 5 of Act of 1986

<sup>11</sup> AIR 1999 SC 2423

<sup>12</sup> (2001) 7 SCC 740

<sup>13</sup> (2007) 6 SCC 785

<sup>14</sup> AIR 2010 SC 305



the Supreme Court was whether a Muslim divorced wife would be entitled to receive the amount of maintenance from her ex-husband under Section 125 of the Cr.P.C. and if yes, through which forum.

The learned Apex Court before delivering the judgment considered Sections 4 and 5 of the Muslim Women Act, 1986 and then Sections 7 and 20 of the Family Courts Act, 1984 which provide for the jurisdiction and overriding effect of this Act, respectively. The Court observed that the bare perusal of Section 20 of the Family Court Act makes it crystal clear that the provisions of this Act shall have overriding effect on all other enactment in force dealing with this issue. Thus it is quite discernible that a Family Court established under the Family Court Act shall exclusively have jurisdiction to adjudicate upon the application filed under Section 125 of Cr.P.C. The Court therefore, held that sec 125 Cr.P.C. would be applicable to a divorced Muslim women for the purpose of claiming maintenance against her husband even after the expiry of Iddat period so long as she does not remarry.

The Court relied upon the judgment delivered in Danial Latifi and another v. Union of India, and further observed that a comparison of these provisions with Section 125, Cr. P.C. will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can support to those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. In the light of the aforesaid discussion the court held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr. P.C. after the expiry of period of Iddat also, as long as she does not remarry.

However in Dudekula Mahboob Saheb v. Dudekula Shehnaz Begum and Ors.<sup>15</sup>, the A.P. High Court followed Iqbal Bano v. State of U.P. where it observed that the Muslim wife had the right to approach to the Court under Section 125 Cr. P.C. for her maintenance unless it is proved that there was divorce between parties and when once the question of Talaq is established, the relevant provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 are applicable to the case. But in Sazid v. State of U.P. and Ors.<sup>16</sup>, the Allahabad High Court followed Shabana Bano v. Imran Khan and held that Section 125 Cr.P.C. is a beneficial piece of legislation, from which the benefits must accrue to the divorced Muslim women. A Muslim woman is entitled to maintenance as long as she does not remarry. The same view was followed by Uttarakhand High Court in Praveen Rao (Smt) v. State of Uttarakhand and Anr<sup>17</sup>, where it was observed by the Court that under Section 3 of the Muslim Women Act, 1986 a Muslim woman cannot be forced to claim maintenance under the 1986 Act only. She is well entitled to claim maintenance under Section 125, Cr.P.C. irrespective of the fact that whether she is divorced or not, provided that she is not remarried.

The question of maintenance of woman during the subsistence of marriage, and after the bond is broken either by divorce or death is presently engaging the attention of all concerned. The Islamic law of maintenance is adapted to the structure of the patriarchal family, in which a woman is absolutely exempted from the care for her maintenance and even is not required to

<sup>15</sup> CrI.P.No.4868 of 2008

<sup>16</sup> Criminal Misc. Writ Petition No.-26498 of 2009

<sup>17</sup> Criminal Revision No. 221 of 2008

spend her wealth for maintaining her children and the burden is placed on husband. A Muslim wife besides her dower and movable property, have a share in the wealth of her parents, and also in the wealth belongs to her husband. In the event of divorce, she has a right to a financial settlement in the shape of a single transaction with her husband, and to receive the unpaid dower amount, and retains her rights in inheritance with references to her parent's property, including the right to receive maintenance during "Iddat" the waiting period. The quantum of maintenance and settlement is to be determined by the peculiar circumstance of the case, and no specific 'sum' is prescribed, and rightly so because of the changing of the circumstances relating to price rise of essential commodities.

Section 125 of Cr.P.C. on the other hand provides uniform law for maintenance. The scope of the provisions was enlarged by stating that the word, 'wife', includes a "divorced wife", also for the purpose of maintenance till her remarriage or death. This modification is claimed to be a milestone towards social welfare legislation and is a step towards social and economical justice to destitute women.

In *Shayra Bano v Union of India*<sup>18</sup> The court held that the meaning of essential religious practices are those based on which the religion finds its base. Only such practices can be protected under Article 25 of the Constitution. This judgment, which held the practice to be unconstitutional, has been widely appreciated throughout the country. This was indeed a success because there were many failures in history in the same matter. This judgment proved that the Constitution is the supreme law of the land and that the law will not bend down against any philosophy or religion. Now, Muslim men cannot abandon their wives by ending the marital relationship according to their whims and fancies. The court ensured that Muslim women enjoy the same position in society as women from other religions and also made sure that there will be no discrimination against women.

## CONCLUSION

It is finding in the case law two divergent tendencies, each with support from the Supreme Court. The first, which may be called the 'pragmatic' or "empirical approach" and the second is 'formal' or "fictional approach". Both the approaches are well acquainted and familiar with the 'multi-religious' nature of Indian society the opinion of apex court on the issue of choice of law however is not uniform. In some cases it has opined that a divorced Muslim woman can move to the Court for maintenance under the provisions of Muslim Woman (protection of Rights on divorce) Act 1986 but at the same time it has created a right of choice in favour of a divorced wife to claim maintenance either under the Act of 1986 or under sec. 125 of Cr. P.C., 1973. In either case however the claim of divorced Muslim woman seems to be paramount. But while doing so the court failed in both the approaches to adopt the "socio-economic theory of Islamic Shariah", which did not leave the woman as destitute. In Islamic Shariah the significant point is that Muslim Husband is duty bound to make an economic settlement in the form of one time transaction in favour of divorced woman and there after the responsibility falls on the relative as prescribed by the Holy Quran, and at last on the Islamic state. If there is no Islamic state then the duty of believers to create a fund for benefit of the destitute and discarded woman.

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<sup>18</sup> (2017) 9 SCC 1