

MARRIAGE AGREEMENTS UNDER MUSLIM LAW - A WEAPON IN THE HANDS OF MUSLIM WOMEN

Abstract

The nature of Muslim marriage is contractual in form. Since it is a contractual form of marriage, the parties to the marriage are allowed to make certain agreements and conditions before or at the time of marriage or even after marriage for regulating their marital relations. The agreement should be legal and should not be contrary to the provisions of Muslim law. Such agreements are valid and enforceable. In this paper the various ways in which, a Muslim wife can protect herself to strengthen her marital relationship is discussed. She can come out of an unhappy marital tie and for her financial support especially after dissolution of marriage, such as not to restrain her from going out either for study or for doing job, to live separately and claim maintenance whenever her husband ill-treats her or takes a second wife or keeps a concubine, or for payment of maintenance even after dissolution of marriage, demand for delegation of the power of pronouncing *talaq* (*Talaq-i-Tafweez*) etc. Thus the marriage agreements will act as a weapon in the hands of a Muslim women.

Introduction

MUSLIM MARRIAGE is a contractual form of marriage. Upon completion of proposal and acceptance, a valid contract of marriage comes into existence, provided the other formalities are also fulfilled. Since it is a contractual form of marriage, the parties to the marriage are allowed to make certain agreements and conditions before, or at the time of marriage or even after marriage for regulating their marital relations. The parties have to observe the terms which they had settled. But all the terms, conditions or agreements should be legal. It should not violate any law, be against public policy and should not be contrary to the provisions of Muslim law.

The matrimonial conditions under Muslim law are very helpful and useful to the Muslim women to protect themselves from an uncertainty in marital life and they support them after dissolution of marriage and even during marriage. Because the unilateral power of pronouncing *talaq* for dissolution of marriage is vested only with a Muslim husband. This kind of power is not available to a Muslim wife unless delegated to her. So there is a necessity to enter into such an agreements by Muslim wives which support them in many ways.

Agreements

Where the parties are not competent, the agreement may be made on their behalf, by their respective guardians. Such agreements are binding, although the husband and wife are not parties to it. If the agreements contain conditions which

are against the principles of Islam or are unreasonable, the agreement is illegal. An illegal agreement does not affect the validity of marriage, but the condition itself is void and inoperative. Such agreements cannot be enforced because they contain un-Islamic conditions.

Examples of illegal agreements:

- i) That the wife shall not claim maintenance from her husband.
- ii) That husband and wife shall have no mutual rights of inheritance.
- iii) That husband and wife would be free to live separately in future without any reasonable cause.¹
- iv) The agreement which bound the husband to live with the wife at her father's house was invalid and cannot constitute a defence to a suit for restitution of conjugal rights.²
- v) Condition that husband was to live with wife in her father's house and breach of it would give wife, a right to divorce him, such condition is illegal.³
- vi) Under Shia law, if the condition is that the wife was not entitled to any maintenance at the time when the second marriage of husband took place as she has left the house of her own accord and was living with her parents.⁴
- vii) Under Shia law, if a condition is that the wife shall not be entitled to any dower, such condition is illegal.⁵

Some of the legal conditions are:—

1. There may be an agreement that the wife would be entitled to divorce on the happening of certain contingencies.⁶
2. There may be a legal condition that the wife shall have the right to leave the husband's house in case of ill-treatment or dis-agreement.⁷
3. The wife may be allowed to live in a house of her parents' choice.
4. There may be an agreement that the wife would be entitled to fixed or separate maintenance in certain circumstances.⁸
5. The condition that the husband shall not be absent from the conjugal home beyond a specified period.

1 *Banne Sabeel v. Abida Begum*, AIR 1922 Oudh 251 cited in R.K. Sinha, *Muslim Law* 59(5th edn. Central Law Agency, Allahabad 2003).

2 *Khatun Bibi v. Rajjab*, AIR 1926 All 615 cited in Nishi Purohit, *The Principles of Mohammedan Law* 142(2nd edn. Orient Publishing Company, Allahabad 1998).

3 *Imam Ali Patwari v. Arfat-un-nissa*, AIR 1914 Cal 369 cited in Nishi Purohit, *The Principles of Mohammedan Law* 142(2nd edn. Orient Publishing Company, Allahabad, 1998).

4 *Mahmud Ali v. Ghulam Fatima*, AIR 1935 Lah 902, cited in Nishi Purohit, *ibid*.

5 *Mahbooban Bibi v. Muhammad Ameruddin*, AIR 1929 Pat 207, cited in Nishi Purohit, *id.at* 143.

6 *Sabra Jan v. Abdul Raoof*, AIR 1921 Lah 194, cited in Nishi Purohit, *ibid*.

7 *Banne Sabeel v. Abida Begum*, AIR 1922 Oudh 251d, cited in Nishi Purohit, *ibid*

8 *Mohd. Muin-uddin v. Jamal Fatima*, AIR 1921 All. 152, cited in Nishi Purohit, *ibid*.

6. The condition that the husband shall not contract a second marriage during the continuance of the first marriage.
7. That a husband and wife shall live in a specified place.
8. That the husband shall not prevent the wife from receiving the visits of her relations whenever she likes.
9. That the husband would maintain children from his wife's former husband or that the wife would be entitled to some special allowance by way of maintenance.⁹

In *Mydeen v. Mydeen*,¹⁰ the husband on second marriage, entered into an agreement with his first wife under which he settled certain properties on her for life. Then he divorced her after some time and filed a suit for recovery of the property settled upon her. But the court held the agreement was valid and enforceable.

In *Khwaja Md. v. Hussaini Begum*,¹¹ the father of a minor son and the father of a minor daughter entered into an agreement regarding the payment of certain sum per month to the wife was held to be enforceable.

In *Saifuddin v. Someka*,¹² the husband entered into an agreement with his third wife under which, he asserted that she will have the right to divorce him or live at her father's house in case he brought any of his other two wives to live in the matrimonial home. The court held that such agreement was valid.

Consequences of breach

Breach of an illegal agreement has no effect on the marital rights and duties of the parties because the courts will not take into account, an illegal agreement. The breach of a valid condition in a marriage contract does not necessarily give the wife, the right to have the marriage dissolved, unless such an option is expressly reserved. The result may be that:-

1. She was allowed to live separately and restitution may be refused to the husband;
2. The wife may have the right to divorce herself in an extreme case;
3. Certain rights as to dower may arise;
4. The marriage itself may be dissolved ipso facto.¹³

Marriage agreements

Since a Muslim marriage is a contract, the parties are allowed to make certain agreements and conditions before or at the time of marriage or even after marriage.

⁹ *Yussoof Ali v. Fyzoonissa*, 15 WR 296 cited in Nishi Purohit, *ibid.*,

10 AIR 1951 Mad 992, cited in Nishi Purohit, *id.* at 232.

11 (1910)37 37 IA 152, cited in Nishi Purohit, *ibid.*

12 (1954)59 CWN 139, cited in Nishi Purohit, *ibid.*

¹³ Asaf A.A.Fyze, *Outlines of Muhammadan Law* 129(4th edn. Oxford University Press, New Delhi,1999).

If any condition is illegal, the contract of marriage would be voidable unless consummation of marriage has taken place. But on the other hand, if the marriage is consummated, the marriage would not become nugatory and would be valid and any illegal condition would be void.¹⁴

In a valid marriage, the husband can restrain her movements; *i.e.*, he can prohibit her from going out and appearing in public. But the power of the husband is subject to a contract to the contrary. The marriage agreements confer many other rights and duties other than those arise normally.¹⁵

Maintenance under pre-nuptial agreements

A Muslim wife may validly stipulate that, in case the husband ill-treats her, takes a second wife or keeps a concubine, she will be entitled to live separately and claim certain amount of maintenance (as laid down in the agreement) against her husband. Similarly, an agreement with the second wife that she will live at her parents' house and that he will pay her, certain amount of maintenance is also valid.¹⁶

An agreement under which the wife is allowed maintenance even after divorce is valid.¹⁷ In all these cases, the wife is entitled to claim the amount of maintenance as stipulated in the agreement. Generally, after dissolution of marriage, a Muslim husband is under obligation to maintain his wife only during *iddat* period.¹⁸ Beyond *iddat*¹⁹

14 *Hafizgan v. Saidino*, AIR 1925 Sind 22, cited in Nishi Purohit, *supra* note 3 at 142.

15 Paras Diwan, *Muslim Law in Modern India* 44(7th edn., Allahabad Law Agency, Faridabad, 1997).

16 *Id.* at 131.

17 *Md. Muin-uddin v. Jamal*, 1921 All 125; *Mydeen v. Mydeen*, 1951 Mad 992; cited in Paras Diwan, *id.* at 131.

18 "Iddat period" means in the case of a divorced woman:

i) three menstrual courses after the date of divorce, if she is subject to menstruation;
 ii) three lunar months after the 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 delivery of her child or the termination of her pregnancy, whichever is earlier, section 2 (b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986.

19 "Iddat" is an Arabic word and its literal meaning is 'counting'. Counting here means counting the days of possible conception to ascertain whether a woman is pregnant or not. Under Muslim law, it is the period during which, a woman is prohibited from re-marrying after the dissolution of her marriage. A widow or a divorced wife cannot marry again during this period. The object of *iddat* is to ascertain the paternity of a possible conception by her former husband. After divorce or death of the husband, if the woman remarries immediately and a child is born within normal course, then there is every likelihood that the conception could be by the former husband and not by the present. Therefore it would be difficult to establish as to who may be regarded as the father of such a child. To overcome this difficulty, Muslim law provides that she cannot remarry before the expiry of a specified period called *iddat*. After this period, the possible conception by the former husband would naturally become apparent and visible. Marriage with a woman who is observing *iddat* is irregular under Sunni law. Under Shia law, it is void.

period, there is no obligation on the part of a Muslim husband to maintain her.

After passing of the Muslim Women (Protection of Rights on Divorce) Act 1986, after completion of *iddat* period, if she is unable to maintain herself out of her own earnings or other property, she can apply for maintenance before magistrate court. If the magistrate is satisfied with the contents of the petition, he may make an order to pay such reasonable and fair maintenance to her, directing her children if any and are in a position to pay such maintenance or parents if any and are in a position to pay such maintenance or her relatives (as would be entitled to inherit her property on her death), if any and are in a position to pay such maintenance to her. If she is unable to get maintenance from any of them, then finally the magistrate orders the state wakf board to pay such maintenance as determined by him.²⁰ But if on the date of hearing of the application, a divorced woman and her former husband declare by affidavit or any other declaration in writing that they would prefer to be governed by the provisions of section 125 of CrPC, the magistrate shall dispose of such application accordingly.²¹

Hence in order to avoid a lengthy procedure for obtaining maintenance after completion of *iddat*, the simple and the best way to get maintenance from husband is to enter into an agreement for the payment of maintenance even after completion of *iddat*.

The wife is also entitled to the special allowance known by the name of *Karch-i-Pandan* (betel box expenses) or *Mewa Khori* (allowance for eating fruits) if stipulated in ante-nuptial agreements between the parties to the marriage or between their parents in case the parties are minors, and the wife as a beneficiary, can claim it in a court of law. It is a personal allowance paid to the wife by the husband among Muslims of rank.²²

In *Ali Akbar v. Fatima*²³ under an ante-nuptial agreement, it was agreed that, in addition to the amount of maintenance, the husband would also pay to the wife, a sum of Rs. 25/- monthly even when the wife lived separately from her husband. The agreement was held valid and enforceable.

Delegated divorce: (*Talaq-i-Tafweez*)

This form of delegated divorce is the most potent weapon in the hands of a Muslim wife to obtain freedom from an unhappy marital tie without intervention of any court. Generally only a Muslim husband can dissolve their marriage by pronouncing *talaq* and a Muslim wife has no power of pronouncing *talaq* unless

20 Muslim Women (Protection of Rights on Divorce) Act, 1986, s. 4.

21 *Id.*, s. 5.

22 *Supra* note 15 at 60.

23. (1929)11, Lah 85, cited in Paras Diwan, *id.* at 131.

delegated to her. Generally, a Muslim wife of an unhappy marital tie can release herself from that tie by resorting to khula form of divorce, *i.e.*, by giving some consideration to him for giving his consent.

This form of delegated divorce has been commonly used in the pre-nuptial agreements. The delegation of power to divorce may be made even in the post-marriage agreements. She can pronounce *talaq* on the happening of the events specified. The events may be that, on his entering into a second marriage or keeping a concubine or fails to maintain her for a specified period or whenever his behavior is cruel or when he refuses to pay prompt dower. Here the wife divorces herself on behalf of her husband under his power delegated to her by him. The marriage dissolves as if it has been pronounced by the husband.

The delegation may be unconditional or subject to certain conditions or contingency. If the husband fails to fulfill that condition or upon happening of that event, she may repudiate the marriage. Where a wife is given the option to divorce herself under a *tafweez*, she cannot be compelled to exercise her right. She may or may not exercise the right.

In *Moharam Ali v. Ayesha Khatun*²⁴ the Calcutta High Court held that, an agreement by which the husband authorized his wife to divorce herself from him in the event of marrying a second wife without her consent is valid.

In *Sainuddin v. Latifunnessa*,²⁵ there was an agreement between husband and wife under which, the husband delegated to the wife, his own power of giving three *talaqs* in the event of his marrying a second wife without the permission of the first wife. The husband took a second wife without the permission of the first wife. Accordingly the first wife gave herself, three *talaqs* under the authority of the *tafweez*.

It was held that as the event upon the happening of which, the wife was given the authority to divorce herself was valid under Muslim law and since that event has happened, the divorce by the wife was effective and the marriage must dissolve.

The delegation of the power of divorce to the wife may either be permanent or temporary (only for a specified duration). A temporary delegation of power is irrevocable but a permanent delegation may be revoked by the husband. Hence instead of demanding for permanent delegation of *talaq*, it would be better if the conditions and contingencies are mentioned in the agreement. Then it will be helpful to them.

Mere happening of the contingency is not sufficient to dissolve the marriage. She must exercise that right expressly.

In *Magila Bibi v. Noor Hussain*,²⁶ the husband had given a written authority to his

²⁴ (1915)19 CWN 1226, cited in Mohammad Nazmi, *Mohammadan Law* 74 (2nd edn. Central Law Publications, Allahabad, 2008).

²⁵ (1918)46 Cal 141, cited in R.K. Sinha, *supra* note 1 at 93.

²⁶ AIR 1992 Cal 92.

wife that she may, at her will, divorce him whenever she wanted. The document was signed by both husband and wife. After some time, when she felt that husband was cruel to her and also came to know that he was not a medical graduate as she was told before the marriage, she pronounced *talaq* under the above mentioned written delegated authority.

She informed her decision to husband. The Calcutta High Court held that only because wife too had signed the written delegation by husband, the document does not become 'bilateral delegation'. It continues to be 'unilateral delegation' and *talaq* by wife is valid even without the consent of husband. The court further observed that since the *talaq* under delegated authority is valid, the wife as divorced woman, is entitled to claim her right of maintenance *etc.*, under the Muslim Women (Protection of Rights on Divorce) Act, 1986.

Different forms of Muslim marriage

Muta marriage

Muta marriage is a temporary marriage recognized by the Ithna Asharis of Shias. All the requisite formalities of marriage such as offer and acceptance have to be observed in the *muta* marriage. Every condition forming part of the contract of *muta* marriage should be spelled out at the time when the contract is entered into. In this form of marriage, the period of cohabitation and amount of dower must be clearly specified.²⁷

A wife in a *muta* marriage is not entitled to maintenance. But if in the contract of marriage, it is specifically stipulated, the wife will be entitled to maintenance for the whole term even if the husband chooses not to cohabit with her.²⁸ That is the importance of marriage agreements.

Kabin-Namah or *Nikah-Namah*

It is a deed of marriage wherein, all the conditions of marriage such as the amount of dower, mode of payment, questions relating to custody of children, dissolution of marriage, maintenance and any other conditions which the contracting parties desire to lay down are incorporated.²⁹ So a Muslim woman can impose all the conditions in it which are favourable to her and support her.

27 Without dower, the contract is void and no union results. If the duration of the term is not specified, such a marriage will be treated as a permanent union like any other permanent Muslim marriage giving rise to all incidents of such union including the right of mutual inheritance and wife's right to maintenance.

28 Paras Diwan, *supra* note 15 at 43.

29 Ameer Ali II, 287; Bokhari 67-68, cited in Nishi Purohit, *supra* note 3 at 127.

In *Bachoo v. Bismillah*³⁰ the husband promised in writing to pay a maintenance allowance to the wife for certain period. On failure of the husband to do so, the writing was to operate as *talaqnama*. The Allahabad High Court held that it was a conditional *talaq*. The condition was non-payment of maintenance allowance to the wife during the agreed period. On default of the husband to pay maintenance to wife, the condition was fulfilled. Thus, the *talaq* became effective without any further pronouncement.

Dower

Dower or *mabr* is an integral part of Muslim marriage. It is fixed by an agreement between the parties to the marriage. In case it is not done, it will be determined by operation of law. In the former case, it is known as specified dower and in the latter case, proper dower. The specified dower is divided into prompt dower and deferred dower. The prompt dower is payable immediately after marriage at any time on demand by the wife. Generally, which part of the dower is prompt and which is deferred, is fixed in the contract or in the *Mabr-nama* or *Kabin-Namah*. It is usual to fix half of the amount as prompt and the other half as deferred. But there is no hard and fast rule. Parties are also free to stipulate the immediate payment or postponement of the entire dower. The parties may also stipulate that 1/3 as prompt dower³¹ or 1/5 as prompt dower³² or 2/3 as prompt and the remaining as deferred dower.

Any agreement made between the parties to the marriage or their guardians in case of minors, for non-payment of dower will be void and the wife will be entitled to it.

Hence it would be better if the whole amount is fixed as prompt dower. It will be easy to collect from her husband and useful to her because she can invest that amount and get interest also on that amount. And she need not face troubles in collecting the amount after dissolution of marriage if a part of the amount is fixed as deferred dower or whole amount as deferred dower.

Right of retention

The woman, whose marriage has been dissolved by divorce or death of husband, has a right to continue to hold the possession of her husband's property till her dower debt is satisfied. The right of retention of the possession of her husband's estate is not available to a wife during the subsistence of the marriage unless there

30 1936 All LJ 302, cited in R.K. Sinha, *supra* note 1 at 85.

31 *Tufi Kunmissa v. Ghulam* (1877)1 All 560; *Fatima v. Saduddin* (1865)2 Bom HCR 291, cited in Paras- Diwan, *supra* note 15 at 62.

32 *Elden v. Mazhar* (1877)1 All 485, cited in Paras Diwan, *supra* note 15.

is a contract to the contrary. Another advantage of the right of retention is that if she was in the possession of her husband's property, the period of limitation for the recovery of dower-debt will not apply. Generally the limitation period for recovery of dower-debt is 3 years. She can retain it till her dower is paid. She can even satisfy her dower debt out of the rents and profits of the property. If she was dispossessed from that property by any person, she can file a suit for possession of the same.³³ In this way, marriage agreements between the parties plays very important role in regulating the marital relations.

Conclusion

The matrimonial conditions under Muslim law are very helpful and useful to the Muslim women to protect themselves from an uncertainty in marital life and they support them after dissolution of marriage and even during marriage. So there is a necessity to enter into such agreements which support them in many ways.

At the time of marriage, if she puts a condition for seeking employment, then she can come out of the house and seek employment so that she can stand on her own even if her marriage is dissolved. Such a condition prevents her husband from restraining her movements.

She can get maintenance from her husband even after dissolution of marriage after completion of *iddat* period and she need not resort to the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 if there is a condition in the marriage agreement which imposes liability on the husband to pay maintenance even after dissolution of marriage.

Through marriage agreements, she can also prevent her husband from contracting another marriage during the subsistence of her marriage with her husband, though a Muslim husband can take up to four wives at a time. It strengthens the marital relations and she can get her husband's total love and affection, since nobody will be there to share it and it also improves her financial position which supports her in the event of her husband's death since no other wife of her husband and their children will be there to share her husband's property.

With marriage agreements, she can also get personal allowance such as *Karch-i-Pandan* or *Mewa Khori* and even in *muta* marriage, she can get maintenance. She is at liberty to fix any ratio of prompt dower or she can demand whole amount as prompt dower so that she need not face troubles in collecting the amount after dissolution of marriage either from her husband or from his legal heirs.

³³ In such a case, in respect of immovable property, the period of limitation is sixmonths from the date of dispossession and in respect of movable property, three years from the date on which, she first learned in whose possession, the property was.

Thus it can be said that the marriage agreements will act as a weapon in the hands of a Muslim women. By laying conditions, they can regulate their marital relations, they can strengthen their position and can lead happy life and even they can come out of an unhappy marital tie. So their future is in their hands in the form of marriage agreements.

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