

MAINTENANCE OF A DIVORCED MUSLIM WIFE : A CRITIQUE OF THE PROPOSED LAW

A WIFE'S right to be maintained by her husband has been recognised by all communities in varying degrees. The personal laws of Hindus, Christians, Jews and Parsis¹ make statutory provisions imposing an obligation on the husband to maintain his wife including a divorced wife till she remarries. A Muslim wife has no such statutory right to claim maintenance from her husband (apart from the rights conferred under the provisions of the Code of Criminal Procedure, 1973) but the Muslim personal laws provide for the husband's obligation to maintain her in a limited way.² The obligation of a husband to maintain his wife subsists not only during coverture but even upon dissolution of the marriage by divorce or annulment.

A Muslim husband is obliged to maintain his divorced wife only up to the period of *iddat* and thereafter, his liability is over. The period of *iddat* upon divorce is three menstrual courses (if the wife is in that stage) or otherwise three lunar months. In case the wife is pregnant, the period would extend up to the time of delivery or abortion even if it extends beyond the period of *iddat*, i.e. three months. If however the wife delivers before that period the period of *iddat* will terminate with that event. A divorced Muslim wife becomes entitled to her unpaid dower (*mahr*) which becomes payable immediately on divorce. Also under the Dissolution of Muslim Marriages Act, 1939, a wife on dissolution becomes entitled to her unpaid *mahr* and maintenance during the period of *iddat*.³ Under the provisions of the Code of Criminal Procedure, 1973, which is applicable to all sections including Muslims, a wife who is unable to maintain herself is entitled to be maintained by her husband. This right of maintenance extends even to a divorced wife until she remarries.

Quantum of maintenance

The amount of maintenance which a wife is entitled to have from the husband depends on a consideration of various factors. The Hindu

1. See the Hindu Marriage Act, 1955, the Hindu Adoptions and Maintenance Act, 1956, the Indian Divorce Act, 1869, and the Parsi Marriage and Divorce Act, 1936.

2. Non-Failure to provide maintenance for a period of two years by the husband gives to the wife a ground for dissolution under the Dissolution of Muslim Marriages Act, 1939, See Jaffer Hussain, Judicial Interpretation of Muslim Matrimonial Law in India, in Tahir Mahmood (ed.), *Islamic Law in Modern India* 175 at 182-83, (I.L.I., 1972).

3. See Tahir Mahmood, *Civil Marriage Law : Perspectives and Prospects* 41 (I.L.I., 1978).

Marriage Act, the Parsi Marriage and Divorce Act and the Indian Divorce Act mention the income of the parties, their conduct and other circumstances as important for fixing the quantum. The Hindu Adoptions and Maintenance Act, 1956 sets out factors like the position and status of parties, reasonable wants of claimant, their property, the number of dependents, *etc.* Under the Muslim personal law, the quantum of maintenance depends on various factors. The *Hedaya* and the *Fatawa-Alamgiri*⁴ lay down that the quantum of maintenance should be determined on the basis of the rank, financial position and circumstances of both the parties. In *C. Kurshid Unnissa Begum v. C. Abdul Basith*⁵ the Madras High Court held that the rate of maintenance to be allowed to a wife will depend on the following factors, *viz.* the status and income of the husband and the members of his family he has to maintain and the minimum expenses required by the wife for being maintained in a manner suited to her status. In this case, the wife was a lunatic and that fact was given due consideration in entitling her to an extra amount.

The Code of Criminal Procedure, 1973, is an endeavour to mitigate the suffering of destitute women by providing a uniform and expeditious provision enabling them to seek maintenance from husbands irrespective of their religion, caste or creed.⁶

The quantum of maintenance under the Act is however limited. The "maximum amount prescribed is Rs. 500 per month in the whole".⁷ A significant limitation on the wife's right to maintenance under the Act is provided by section 127 (3).⁸ According to this provision if a woman has received upon divorce the amount payable to her under the customary or personal law, then the magistrate shall cancel any maintenance order made in her favour under the provisions of section 125. The justification for this provision is, as pointed out by Ram Niwas Mirdha in the debate on this clause :

In certain cases, under customary or personal law, certain sums are payable to a divorced woman and in case they are paid, the Magistrate's order giving maintenance would be cancelled. Now, whether

4. Fyzee, *Outlines of Muhammadan Law* 213 (1974).

5. A.I.R. 1955 N.U.C. (Madras) 5671.

6. See s. 125 of the code.

7. For interpretation of the term, see *Ramesh Chandra v. Veena Kaushal*, A.I.R. 1978 S.C. 1807.

8. S. 127 (3): Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that—(a)

(b) the woman has been divorced by her husband and that she has received. . . the whole of the sum which under any customary or personal law applicable to the parties, was payable to the parties on such divorce, cancel such order

the maintenance should be reasonable or unreasonable, is not the point.⁹

Section 127 (3) raised two questions. Firstly whether the "sum" received by the divorced woman under the personal law included dower or *mahr*.¹⁰ Secondly, was the wife debarred from claiming further maintenance even if the aforementioned amount paid to her was just nominal?¹¹ These questions gave rise to conflicting opinions amongst the High Courts: In *Rukhshana Parvin v. Mohd. Hussein*,¹² *Hamid Khan v. Jammi Bai*¹³ and *Qayyum Khan v. Noorunisa*¹⁴ the courts construed the provision as including dower or *mahr* and thereby denied maintenance to the claimant wives. On the other hand in *Kunhi Moyin v. Pathumma*,¹⁵ Khalid, J., while excluding *mahr* and the amount payable during *iddat* from the scope

9. *L.S.D.*, dated 11-12-1973, col. 317.

10. Dower or *mahr* is a sum of money or property which a husband undertakes to give to his wife in consideration of the marriage. The dower may be either prompt (*i.e.* the amount being payable on demand) or deferred (*i.e.* one payable on dissolution of marriage by death or divorce). Quite often part of the amount is specified as 'prompt' and part of it as 'deferred'.

As to the amount of *mahr*, it varies from person to person. In fact, the husband may fix up any amount he likes even though it may be beyond his means and capacity. Under the early Hanafi law the minimum was fixed at ten *dirhams i.e.* between thirty to forty rupees. *Asma Bibi v. Abdul Samad*, 32 All. 167 (1909); 5. I.C. 411 (1910) Now however, there is no limit and the amount is fixed after taking into consideration factors such as the financial circumstances of the parties, status of the wife's paternal family, her personal qualifications and intellectual achievements. Sometimes the amount fixed is too high and not within the means of the husband. This is done for purposes of glorification and show and quite often, is not intended to be honoured. This is known as fictitious dower (*mahr-as-sunnat* or *mahr-i-talfil*). In these cases the parties privately settle a small amount and the court can hold that a contract under which a fictitiously high amount is settled is just sham.

According to Amir Ali's observations, in India, among the upper middle class the amount of the dower ranges from 4,000 rupees to 40,000 rupees. In Bihar, the latter is generally speaking, the customary dower; in lower Bengal there is no custom. Among the lower classes, the *mahr* varies from 50 rupees to 400 rupees. In princely families, the dower consists of several lakhs.

Though normally the amount of dower is fixed at the time of marriage there are cases where the amount is not specified. In such cases the wife is entitled to what is called "proper dower" (*mahr-i-misl*). The determination and fixation of such amount would depend upon consideration of a number of factors.

11. For instance, amongst the Garo tribe of Meghalaya, a compensation known as *dai* of Rs. 50 is payable by the party responsible for the divorce to the other spouse.

12. 1977 Cr.L.J. 1041 (Bombay).

13. I.L.R. 1978 M.P. 595.

14. 1978 Cr.L.J. 1476. (A.P).

15. 1976 K.L.T. 87.

of the terms 'sum payable under customary or personal law' expressed an apprehension that "this section may be pressed into service by some ingenious husbands to defeat the provisions contained in section 125" (of the code). A similar liberal interpretation was given in *Muhammed v. Sainabi*¹⁶ where the court rejected the argument that the amount payable in lieu of *mahr* and other household articles which belonged to her would absolve the husband of any further liability to maintain her. However, it was not until *Bai Tahira v. Ali Hussain*¹⁷ that the controversy was resolved by the very rationale interpretation given by Justice Krishna Iyer to the provisions of sections 127 (3) (b). In this case, the husband Ali Hussain divorced his wife Tahira. A compromise was entered into in respect of properties and amount payable to her by way of *mahr* and *iddat* money. However, some years later the wife filed an application for maintenance under section 125 of the Code of Criminal Procedure. The magistrate awarded a monthly allowance of Rs. 400 for her and Rs. 300 for the child. On appeal, this order was set aside by the Bombay High Court. The wife appealed to the Supreme Court. Krishna Iyer, J., while granting the wife's appeal, stated:

The payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate that 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.¹⁸

In this case though the husband had discharged his obligation in respect of the *mahr* amount of Rs. 5,000 and *iddat* allowance of Rs. 180, he could not be absolved of his obligation under section 125 of the code towards the wife "except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance."¹⁹

According to the Court :

[T]he scheme of the complex of provisions in Chap. IX has a social purpose. Ill-used wives and desperate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets . . . Where the husband by customary payment at

16. 1976 K.L.T. 711.

17. A.I.R. 1979 S.C. 362. For a different view on the same subject see *Kamalakshi v. Sankaran*, A.I.R. 1979 Ker. 116 where the Kerala High Court denied the wife's claim to maintenance under section 125 of the code because she had received the amount payable to her upon divorce under the custom.

18. *Supra* note 17 at 365.

19. *Id.* at 366.

the time of divorce, has adequately provided for divorcee, a subsequent series of recurrent doles is contra-indicated and the husband liberated The key-note thought is adequacy of payment which will take reasonable care of her maintenance.²⁰

It is unfortunate that this enlightened judicial approach is sought to be nullified by a member of Parliament—G.M. Banatwalla—by introducing a Bill²¹ seeking to further restrict the maintenance right of certain women. The Bill seeks to supersede the Supreme Court decision in *Bai Tahira* and make clear that any sum payable on divorce to a woman under the personal law will disentitle her from maintenance under section 125 of the code on receipt by her of such sum. The Bill is a retrograde step, and if enacted would be extremely harsh on the Muslim women. As has been pointed out by a Muslim jurist:

The *mahr* contracted for is, in some parts of India fixed even for well-to-do persons at an absurdly low figure of Rs.40/.It thus offers little security for the women. Even when the *mahr* is larger, the husband too often somehow procures its remission by the wife.²²

The idea of maintenance under section 125 of the code is to provide a reasonable maintenance to a wife and not to deny that and it is the latter which the Bill is trying to do. After all the maximum amount payable is Rs. 500/-per month which is not at all on the higher side considering the present rate inflation, and it will be most unfortunate if the wife's right to get even this little amount on divorce is denied to her. Would not a woman, with no means, be impelled to seek sanctuary in the streets and fall an easy prey to exploitation? No one expects that the husband should be fleeced, but the wife's position needs to be safeguarded too. In case she has received any payments from him, the same should be duly adjusted and taken note of while considering her claims to further maintenance. If the amount under the personal law is sufficient, the court may not order any further amount but if it is not enough, the husband should be enjoined to supplement the amount. The justification for the Bill as stated in the Statement of Objects and Reasons is to restore to the Muslims their personal law which in the view of the author of the Bill the Supreme Court had encroached upon by its decision in *Bai Tahira*. This view seems to be based on some old and obscure text of the Islamic law which the author fails to make clear. However, the *Quran* has ordained:

20. *Id.* at 365.

21. See G.O.I., Extraordinary, part II, p. 138 (March 1980).

22. Daniai Latifi, 'Change and the Muslim Law. in *supra* note 2 at 99, 111.

Unto those women that are divorced a reasonable provision is due; this is a duty incumbent on those who fear God.¹²

The Bill is neither in consonance with the text of the *Quran* nor is it in keeping with the needs of the modern times. Principles of sound logic, justice and reasonableness should not be eclipsed by obscurantism.

Fortunately, the Bill is a private member's Bill and one hopes that this unjust proposal would not receive countenance of the government without whose support it is bound to fail in Parliament.

*Kusum**

23. Quoted by Danial Latifi, *supra* note 22 at 110.

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