

Maintenance right of a Muslim wife: Law, Issues & Perspective

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Maintenance includes all the basic necessities of life, which is required by a person for the sustenance of his or her life. The term “Maintenance” is not defined in Muslim Law as such but reference can be given of Hindu Law ²on maintenance which defines the term as follows:

“in all cases, provisions for food, clothing, residence, education and medical attendance and treatment; in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage.”

According to Halsbury’s law of England,³ maintenance is the name given to the weekly or monthly payments which may be ordered on a decree of divorce, or nullity to be made for the maintenance and support of the wife during the joint lives of the spouses, maintenance for the children is a similar provision for their benefit, which may be made in proceedings for divorce, nullity, judicial separation and restitution of conjugal rights. Maintenance varies according to the position and status of the persons concerned.

So maintenance is a term which must vary according to the requirement of the time and the status of the persons entitled to get maintenance and the person liable to maintain.

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² Section 3 (c) Hindu Adoption & Maintenance Act, 1986. Taken from Marriage & Divorce Laws (Bare Acts), Universal Law Publishing Co. 2011.

³ Halsbury’s law of England, 3rd Edn, Vol. 12, p. 290

Maintenance under Muslim Law

Under Sharia⁴, maintenance is payable to wife children and parents. It is an obligation imposed on the part of the parties to a marriage agreement which creates a familiar relationship between the spouses. Islam provides some concept of maintenance⁵ which must be taken into account while providing maintenance.

- 1) Islam permits only those people except wife to be maintained by others who are bound to depend on others, either because of immaturity (or old age) or because they have no means to support themselves. A person is entitled to be maintained by others only in the extreme situation when there is no alternative except begging for one's livelihood.
- 2) The obligation to maintain, and to bear the burden of fooding and lodging, etc., of others, is reasonably restricted in Islam. The Islamic principle is that a person should not be allowed to suffer any monetary loss in maintaining others. In other words, maintenance of a person, except that of a wife, is to be provided out of the properties of the person who is being maintained whether that person is infant or adult. This is because under Islam the property is basically an individual property, there is no concept of any joint family property.

These two basic principles of Islamic law of maintenance may appear to be contradictory to each other.⁶ This is because the texts and the authorities on Muslim law have not clearly separated the moral obligation from the legal one. The ancient lawyers do not observe the modern distinction between a legal and a moral obligation⁷. Therefore it is not always easy to say what is legally enforceable.

⁴ Muslim Personal Law

⁵ Dr. Rakesh Kumar Singh, TEXTBOOK ON MUSLIM LAW, Universal Law Publishing Co., 2011 Edition, at page no. 158.

⁶ Ibid at page 158.

⁷ Asaf A. A. Fyze: OUTLINES OF MUHAMMADAN LAW, Oxford University Press, 5th Ed. 2008, at page no. 173

Under Muslim law the term “maintenance” is called *nafaqa* and it comprehends food, raiment and lodging, though in common parlance it is limited to the first. There are three causes⁸ for which it is incumbent on one person to maintain another:

- 1) Marriage
- 2) Relationship and
- 3) Property.

The highest obligation arises on marriage; the maintenance of the wife and children is a primary obligation. The second class of obligations arises when a certain person has ‘means’ and another is ‘indigent.’

B. MUSLIM WIFE’S CLAIM OF MAINTENANCE: LAW, ISSUES & REFORMATION

For the claim of maintenance of Muslim wife, the obligation is casted on the husband and this obligation arises out of marital relationship. According to the ordinary sequence of natural events the wife comes first. The wife is entitled to maintenance from her husband although she may have the means to maintain herself and although her husband may be without means.

Muslim wife’s claim of maintenance is divided in two different branches of law. One under Muslim Personal Law⁹ and another under general law of maintenance as reflected in Code of Criminal Procedure, 1973¹⁰ which is a secular remedy.¹¹

The husband’s duty to maintain commences when the wife attains puberty and not before; provided always that she is obedient and allows him free access at all lawful

⁸ Ibid at page 173

⁹ Sharia

¹⁰ Section 125

¹¹ To the extent of application of Section 125 of Code of Criminal Procedure to the Muslim wife, law is yet not clear and there is divergence of opinions amongst jurists and judges so far as the application of Section 125 is concerned.

times. If a wife deserts her husband she loses her right to maintenance.¹² 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-e-pandan*, *guzara*, *mewa khore*, etc. If husband refuses to pay maintenance, the wife is entitled to sue for it. Her right may be based on the substantive law, or she may sue under the provisions of Code of Criminal procedure which provides for general law of maintenance under Section 125 wherein the term “wife” is widely defined and explained¹³ so as to cover the claim of ‘legally wedded wife’ as well as of ‘divorced wife.’¹⁴ So in short Muslim wife’s claim of maintenance arises in following circumstances:

- 1) Out of the status of Husband & Wife (During the subsistence of marriage & out of the legal obligation imposed on the husband.)
- 2) Out of pre-nuptial agreement and
- 3) Out of divorce¹⁵. (After dissolution of marriage)

With respect to maintenance of *divorce wife*, right of maintenance commences on divorce or when she comes to know of the divorce and ceases on the death of her husband, for the her right of inheritance supervenes. In other cases where husband is alive and has divorced the wife, she can claim maintenance only during the *Iddat*¹⁶ period and not beyond that. The widow is therefore not entitled to maintenance during the Iddat of death. On this point there was a great controversy among the judiciary when the Supreme

¹² Tyaji 298, Supra note 7 at page no. 174.

¹³ Section 125 (1) Explanation (b) says: ‘Wife’ includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried.

¹⁴ On this count Muslim Law is different and in conflict with the general law of maintenance.

¹⁵ No question of maintenance arises after death of the husband since her succession right supervenes.

¹⁶ It is duration to be observed by Muslim wife in case of divorce by the husband or death of the husband and serves as a prohibition for any person to marry with her. Sec. 2 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 defines “Iddat”:

" 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; and

(ii) three lunar months after her divorce, if she is not subject to menstruation; and

(iii) if she is enceinte (pregnant) at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier;”

Court¹⁷ has taken a landmark step and has led to the conflict of law between two different branches of law: Muslim Personal law and general law under Section 125 of Criminal Procedure code, 1973 so far as the claim of (Muslim) divorced wife is concerned, which subsequently led to the enactment of new piece of legislation/law¹⁸ applicable exclusively to the Muslim divorced wife.

So with respect to the claim of Muslim women's right of maintenance, law is divided and reflected in following legislations:

- 1) Muslim Personal Law (Shariat Application) Act, 1937¹⁹.
- 2) Code of Criminal Procedure, 1973²⁰
- 3) Muslim Women (Protection of Rights on Divorce) Act, 1986²¹

□ **Claim of Maintenance during subsistence of marriage**

A wife's right to be maintained by the husband has been recognized by all personal law in varying degrees. So far as Muslim wives are concerned, the position is same. For a Muslim wife to claim maintenance (during subsistence of marriage) following things must have fulfilled.

- 1) Marriage must be valid

¹⁷ In the case of Mohammad Ahmed Khan V/s. Shah Bano Begum (AIR1985SC945)

¹⁸ Muslim Women (Protection of Rights on Divorce) Act, 1986.

¹⁹ Wherein Section 2 lays down that in the event of ambiguity or controversy or questions or dispute, (un-codified) Muslim Personal Law shall prevail or shall be applicable.

(Section 2: Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in case where the parties are Muslims shall be the Muslim Personal Law (Shariat).

²⁰ Section 125 of this Code applicable to the persons (wife/wives) irrespective of religion and is a secular remedy wherein even Muslim wife whether divorce or not, can claim maintenance. The provision is not governed or limited by Muslim personal Law. It's an independent remedy.

²¹ This legislation was enacted after the controversial judgment of Supreme Court in the case of Mohammad Ahmed Khan V/s. Shah Bano Begum (AIR1985SC945) so as to clarify the law with respect to the 'maintenance of divorced Muslim wife.'

- 2) Wife has attained puberty
- 3) Wife must be faithful and obedient to husband

□ **Claim of Maintenance out of Pre-nuptial agreement.**

It is the prominent feature of Muslim Law that, wife is entitled to recover maintenance from her husband on the basis of an agreement made between the spouse and or their guardian. Agreements²² made between the parties are valid and enforceable.²³

AT the same time wife is also entitled to a special allowance known as Kharchi-i-pandan²⁴, or Guzara or Mewa khori if stipulated in an agreement between the parties to the marriage or between their guardians, in case of minor parties.²⁵

□ **Claim of Maintenance after dissolution of Muslim marriage:**

The rule that, after divorce²⁶, the wife is entitle to maintenance during the period of Iddat²⁷ and until her delivery if she is pregnant, is clear and has been a debated provision since many years. Often judiciary encountered with the difficulty surrounding this rule which provides a minimum right of maintenance as compared to the Hindu divorced lady. This rule has been a bone of contention and on this count there has been a debate in a society as to uniformity²⁸ of the personal laws. Since in Muslim law it is very easy for the husband to get or to give divorce to the Muslim wife, he can very easily escape the liability of providing maintenance to the wife. As mentioned above it is no longer obligatory for the erstwhile husband to provide maintenance beyond Iddat period.

²² Pre & post nuptial agreements

²³ For example in the case of Hamidan V/s Mohammad AIR 1932 Lah 65., court held that an agreement that in case the husband ill-treats the wife, takes a second wife or keeps a concubine, she will be entitled to live separately and claim certain amount of maintenance from the husband.

²⁴ Personal allowance paid by the husband to the wife. Generally it is stipulated in the marriage contract. The wife can claim it in a court of law.

²⁵ Sikandar V/s Hassan, AIR 1936 Oudh 196. Available at: Supra note 5, page no. 162

²⁶ Muslim marriage can be dissolved by *Talaq* where only husband can dissolve the marriage and by *divorce* under Dissolution of Muslim Marriage Act, 1939 where only wife can provide divorce on the basis of grounds available under the Act.

²⁷ Supra note 16

²⁸ For the first time concern was shown in the case of Mohammad Ahmed khan V/s Shaha Bano Begum (AIR 1985 SC 945)

Following are the laws which are related to the aspect of providing maintenance after the dissolution of marriage:

1. Muslim Personal Law²⁹
2. Section 125 of Code of Criminal Procedure, 1973³⁰ and

²⁹ Un-codified and which gets authority from Muslim Person Law (Shariat) Application Act, 1937.

³⁰ Order for maintenance of wives, children and parents

(1) If any person having sufficient means neglects or refuses to maintain

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain himself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain himself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

[Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.]

Explanation.-For the purposes of this Chapter.-

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

[(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.]

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole, or any part of each month's allowance [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

3. The Muslim Women (Protection of Rights on Divorce) Act, 1986.

As discussed above, a wife's right to be maintained by the husband has been recognized by all personal law in varying degrees. So far as Muslim wives are concerned, the position is same. But when comes to the claim of divorced wife is concerned, law is different on this issue. A Muslim husband's duty to maintain his divorced wife extends up to the period of *Iddat* and thereafter his liability is over. Under other personal laws a divorced wife is entitled to maintenance until she remarries or indulges in post-divorce adultery. But the Muslim law does not provide for any maintenance to a divorced wife after the period of *Iddat*.

Muslim law as well as all the other matrimonial Laws except Special Marriage Act, 1954) apply to persons only on the ground of professing a particular religion and if all such Laws grant to the divorced wives such larger right to post-divorce maintenance, but Muslim law denies such right, the Muslim wives have obviously been discriminated against and that too because of their professing Muslim religion and such denial may be violative of Article 15 (1) of the Constitution of India.

□ **General versus (Muslim) Personal Law: conflict of law:**

As mentioned above Section 125 of Cr. P.C is also applicable to the Muslims including divorced Muslim woman³¹, irrespective of fact that in Muslim personal law, wife ceases

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.-If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an [allowance for the maintenance or the interim maintenance and expenses of proceeding , as the case may be] from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her, husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

³¹ As per Explanation (b) appended to Section 125 defines: "Wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

to be wife on Talaq. Muslim husband is liable to provide maintenance for divorced wife who is unable to maintain herself, so long as she had not remarried.³²

The fictional relationship of the wife even after the divorce has been created by the statute in view of the social conditions prevalent in the country to prevent former husband to drive their erstwhile wives to a state of poverty and destitution till they remarry. So it is clear that woman continues to be the wife within the meaning of section 125 of Code of Criminal Procedure, 1973 irrespective of religion and application of personal law.

If we look at the Muslim Personal law (as discussed above), on the point of claim of Muslim divorced lady that it is no longer obligatory for the erstwhile husband to provide maintenance beyond Iddat period, it comes in conflict with right of Muslim divorced lady “to claim maintenance u/Sec. 125 of Code of Criminal Procedure. The Code of Criminal Procedure, 1973 is a general law applicable to all the persons irrespective of their religion. Muslim personal law is a special law applicable to those who are professing Muslim religion and those who are convert to Muslim. In the event of conflict between a special law and a general law, it is accepted judicial principle that special law shall prevail over the general law.³³

In the wake of this controversy as well as contradiction in the two different branches of law, Supreme Court³⁴ has taken a landmark and bold view by upholding the claim of Muslim divorced lady under Section 125 of Code of Criminal Procedure, 1973. Supreme Court has acknowledged its previous views³⁵ on the same issue.

³² Haroon Rashid V/s. Requeeba Khatoon, 1997 (1) BLJR 93. Available at: Dr. Rakesh Kumar Singh Universal Law Publ. Co. Ltd., Ed. 2011, at page 163.

³³ S. Arumuganainar vs M/S. Jeenath Roadways. Available at: <http://www.indiankanoon.org/docfragment/1932121/?formInput=patent%20fromdate:1-1-2005%20todate:31-12-2005> Last visited on November 21, 2012, at 4:30 pm.

³⁴ Mohammad Ahmed Khan V/s Shaha Bano Begum (AIR 1985 SC 945)

³⁵ Bai Tahira V/s Ali Hussain (AIR 1979 SC 362) & Fazlunbi V/s K. Khader Vali (AIR 1980 SC 1730) Available at : Dr. Sebastian Champappily, MUSLIM LAW: AN ANALYSIS OF JUDGMENTS, Southern Law Publishers, Cochin, 1st Ed. 2006 at page no. 80.

□ **Mohammad Ahmed Khan V/s Shah Bano Begum:**³⁶ A reformatory step.

As noted above the judgement given by the Supreme Court is landmark has paved way towards the unification of personal laws. The judgment was described by Mathew, J as:

*“ This (Shah Bano Begum case) is the most brilliant decision and we must compliment the five-judge Bench for this teleological, schematic and purposive interpretation to ameliorate the conditions of the Muslim wives who can be discarded by their husbands whenever they choose to do so, for reasons good, bad or indifferent and indeed, for no reason at all.. This is in perfect consonance with the spirit of our Constitution which, while banning all discriminations on the ground of sex in Art 15 (1), has nevertheless encouraged ‘special provisions for the women. Since Judiciary is also the State or at least a part thereof.. ”*³⁷

Facts of the Case: The case was with respect to Ms. Shah Bano, a 62-year-old Muslim woman Madhya Pradesh was divorced by her husband in 1978 and was subsequently denied maintenance. Thereupon she filed a petition under Section 125 of Cr. P.C. in the court of Judicial Magistrate, Indore asking for maintenance at the rate of Rs. 500 per month. During which husband divorced her by pronouncing Talaq. She did not remarry. In defence to Shaha Bano’s petition for maintenance, he took the pleas that since she is ceased to be wife after Talaq, hen has no obligation to maintain her. However, Magistrate ordered him to pay monthly allowance to his divorced wife, of Rs. 25 per month. Against this order of the Magistrate Shah Bano filed a revision application in the MP High court praying for the enhancement of maintenance allowance. The MP High Court increased the maintenance rate to Rs. 179.20 per month. Mohd. Ahmed Khan preferred an appeal to the Supreme Court. The Supreme Court dismissed the appeal and confirmed the judgment of the High Court.

Judgment and Principle: The Supreme Court by setting a landmark precedent for the for the Courts within the territory of India held that Section 125 of Cr. P.C., 1973 applies

³⁶ AIR SC 1985 945

³⁷ Keshvananda Bharati AIR 1973 SC 1461(1949). Available at: A. M. Bhattacharjee, MUSLIM LAW & THE CONSTITUTION Eastern Law House, 2nd Ed., at page no. 153

to all irrespective of the religion practiced by the persona and section 125 overrides the persona law if there is anyh conflict between the two. To this extent the judicial pronouncement is instrumental. The court also held that

“It would be incorrect & 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 entitle to have recourse to Section 125 of Cr. P.C.”³⁸

Thus it seems from the above mentioned observations of the Supreme Court that there is no conflict between the provisions Section 125 of Cr. P.C and those of the Muslim personal law on the question of *Muslim Husband’s obligation to provide maintenance for a divorced wife who is unable to maintain herself.*

So with the help of this judgment Supreme 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 case created considerable debate and controversy about the extent of having different civil codes for different religions, especially for Muslims in India. This case caused the government³⁹, with its absolute majority, to pass Muslim Woman (Protection of Rights on Divorce) Act, 1986 which weakened the judgment of the Supreme Court and, in reality, denied even entirely destitute Muslim divorcees the right to maintenance from their former husbands.

□ **Muslim Women (Protection of Rights on Divorce) Act, 1986: an illusion.**

The Muslim Women (Protection of Rights on Divorce) Act, 1986⁴⁰ is a declaratory law⁴¹ and codifies some pre-existing rules of Muslim Law. Under this law, maintenance can be

³⁸ Supra note 5 at page168

³⁹ Government led by former (Late) Prime Minister Rajiv Gandhi

⁴⁰ Hereinafter called “Muslim Women Act.”

claimed from divorced husband, relatives or from Wakf Board. The Act makes provision for:

- Maintenance of a divorced Muslim woman during and after the period of Iddat and
- For enforcing her claim to unpaid dower and other exclusive properties.

Mainly the Act provides *reasonable and fair provision and maintenance*⁴² to be made and paid from her former husband within the period of Iddat. It means that the

⁴¹ Beauty Bandy: MAINTENANCE OF MUSLIM DIVORCEE FROM WAKF PROPERTY: A SOCIO-LEGAL STUDY, Kashmir Journal of Legal Studies, published by Kashmir Law College, Srinagar, at page no. 55.

⁴² **3 Mahr or other properties of Muslim woman to be given to her at the time of divorce**

(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to-

- (a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;
- (b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;
- (c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and
- (d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be.

(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 of mahr 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 the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, 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 woman: Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974), and may sentence such person, for the whole or part of any amount remaining unpaid after the

divorced woman is entitled to a reasonable and fair provision and maintenance from her former husband. The time limit for this provision and maintenance is only Iddat as mentioned in Section 2 (b) of the Act. The word 'provision' in the context of the Act would mean that the action of providing something beforehand or arranging in advance to meet the needs of the divorced wife. It may be that provision can be made for her other needs such as clothes, food and such other things depending upon the means of the husband.

But use of some words created a problem in interpretation of the Act in favor of divorced Muslim lady. Words such as 'within', 'reasonable' & 'fair' and 'provision' for future life created a confusion in the minds of judiciary in order to enforce the law in favor of Muslim lady. Prima facie it seems Act is made for the benefit of woman but there is nothing in this Act which can be read to mean the husband is liable to make reasonable and fair provision and maintenance beyond the period of Iddat. Muslim Woman Act seems arbitrary with respect to:

Firstly, Act does not provide a provision by empowering her to get maintenance beyond the period of Iddat, since the word used is 'within.'

Secondly, Act⁴³ under restricted the application of Section 125 of Cr. P.C. to the Muslim divorced lady as it is left optional for the husband and/or for the Parties to the litigation to be governed by Section 125 of Cr. P.C.⁴⁴

execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

⁴³ **Sec. 5 Option to be governed by the provisions of sections 125 to 128 of Act 2 of 1974**

If on the date of the first hearing of the application under sub-section (2) of section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure, 1973 (2 of 1974), and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly.

Explanation.- For the purposes of this section, "date of the first hearing of the application" means the date fixed in the summons for the attendance of the respondent to the application.

⁴⁴ Hardly any husband consents for the application of Section 125 of Cr. P.C. since it imposes a penal liability in the event of failure to provide maintenance.

In this context, the moot question is, have the provisions of the Act of 1986 ameliorated the plight of Muslim divorcees.

□ **Post-‘Muslim Women Act’ position:**

Judiciary started interpreting the provisions of the Act in different directions, since as stated above provisions & words (including Preamble⁴⁵) of the Act seems unclear and ambiguous.

AP High Court has observed that use of word ‘within’ does not permit an interpretation to be put to the section that the liability of the husband to make a reasonable and fair provision and maintenance to his divorced wife extends beyond the period of Iddat.⁴⁶

With respect to the controversial nature of this Act, a writ petition under Article 32 of the Indian Constitution was filed challenging the constitutional validity of the Act in the case of **Daniel Latifi V/s Union of India**⁴⁷ by making Section 3 of the Act as the pivotal point since this provision was interpreted *restrictively*.

By analyzing the *Preamble* of the Act, *Statement of Objects and Reasons* of the Act, and the judgment given by Supreme Court in *Mohammad Ahmed Khan V/s Shaha Bano Begum*, Court has advocated the validity of the Act and came to the following conclusion:

- 1) 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.

⁴⁵ An Act 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. (Since Statement of Objects & Reasons refers to the Supreme Court judgment but does not provide any thing to that effect in the body of the statute).

⁴⁶ Supra note 5 at page no. 171, in the case of : Usman Khan V/s Fathimunnisa Begum (AIR 1990 AP 225)

⁴⁷ AIR2001SC3958.

- 2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to *iddat* period.
- 3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after *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.
- 4) The provisions of the Act do not offend Articles 14 15 and 21 of the Constitution of India⁴⁸.

At the same time Court has observed on the basis of appropriate reading of the Act:

“the word 'provision' indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her cloths, and other articles. The expression "within" should be read as "during" or "for" and this cannot be done because words cannot be construed contrary to their meaning as the word "within" would mean "on or before", "not beyond" and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay a maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filling an application before the Magistrate as provided in Section 3(3) but nowhere the Parliament has provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

⁴⁸ Ibid at para 37.

In this case though Courts were of opinion that prima facie the provisions of the Act appear to be violative of Article 14 of the Constitution mandating equality and equal protection of law to all persons otherwise similarly circumstanced and also violative of Article 15 of the Constitution which prohibits any discrimination on the ground of religion as the Act would obviously apply to Muslim divorced women only and solely on the ground of their belonging to the Muslim religion, on an analysis of this judgment we can say that the Act is valid and operative since as it is rightly said the Court⁴⁹ in the same case that *Legislature does not intend to enact unconstitutional laws* and in fact “an appropriate” reading of the Act would reveal that nowhere the Parliament has provided that reasonable and fair provision and maintenance is limited only for the *Iddat* period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

With respect to the validity of the Act Court has provided that “it is well settled that when by appropriate reading of an enactment the validity of the Act can be upheld, such interpretation is accepted by courts and not the other way.” Thus the Supreme Court held that a construction that results in making an Act *ultra vires* has to be discarded and one that upholds the validity of the Act preferred⁵⁰.

Supreme Court once again in **Iqbal Bano V/s. State of U.P**⁵¹ reiterated that divorced women can claim maintenance beyond the period of *Iddat* and held at the same time that provisions of the Muslim Women Act do not offend Article 14, 15 & 21 of the Indian Constitution. The court further observed that “right under Section 125 of Cr. P.C. extinguishes only when she receives “fair or reasonable” settlement u/Sec. 3 of the Muslim Women Act. The wife will be entitled to receive maintenance u/Sec. 125 of Cr.P.C. until the husband fulfills his obligation u/Sec. 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986⁵²

⁴⁹ Supra at note 51 at paragraph no. 34

⁵⁰ Syed Khalid Rashid, MUSLIM LAW, Eastern Book Company, 4th Ed., at page no. 189.

⁵¹ (AIR 2007 SC 2215)

⁵² Kunhimohammed v. Ayishakutty (2010 2 KLT 71) Available at: Flavia Agnes, FAMILY LAW: VOLUME II-MARRIAGE, DIVORCE, AND MATRIMONIAL LITIGATION, Oxford University Press, 2011, at page no. 164.

C. CONCLUSION:

Unlike other personal laws, a Muslim divorced woman is placed separately and differently. Even the application of general law (Section 125 of Cr. P.C.) was subjected to the requirement of statuses & 'religion' of a person (Muslim Divorced woman). When a deserted or destitute Muslim (divorced) wife who is unable to get maintenance by virtue of prohibition in Muslim Law, approaches & files application under Section 125 of Cr. P.C., the usual ploy adopted by the husband was to plead that he has already divorced his wife and hence he is not liable to pay maintenance. This argument became stronger after the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986.

Fortunately, the judiciary has shown awareness towards the pitiable position of Muslim woman and has in real sense empowered Muslim women, especially divorced woman whose miseries are uncountable. The decision given by the Supreme Court in Danial Latifi case settles the law in favour of the divorced Muslim wife and vests her with a "constitutional right" to livelihood through maintenance (the beginning of which was made by a path breaking judgment of Supreme in Shaha Bano Case). The present Act invites more criticism than praise. The content of the Muslim Women (Protection of Rights on Divorce) Act, 1986 has left an opportunity to the judiciary to not only provide some relief to the deserted Muslim wives but also spur a countrywide debate on the need to look after them and not abandon them to destitution. It has expanded the horizons of the egalitarian motive of the Act. In fact, it becomes a need of the hour to do away with (maintenance) laws which are based on religion and which restrict the application of general laws with respect to the basic "livelihood" of the person as is guaranteed & envisaged under Article 21 of the Indian Constitution. So keeping in mind the guarantee of *Livelihood* State cannot enact or enforce those laws which takes away *egalitarian* "right to be maintained" by those who are under legal or/and moral obligation to maintain someone. State must try to enforce the mandate or requirement of a common civil code

under Article 44 of the Indian Constitution at the least with respect to the some essential & basic aspects of personal laws.

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