

## MUSLIM WOMEN HAS THE RIGHT TO MAINTENANCE: A CRITICAL APPRAISAL

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### ABSTRACT

*In the Famous in Shah Bano case<sup>1</sup> it was determined by the apex court that a divorced Muslim woman could receive maintenance from her husband until she remarried, to overcome the effect of this case parliament enacted Muslim women (protection of right on divorce) Act, 1986. Which lays down that a divorced woman shall be entitled to a reasonable and fair maintenance to be made and paid to her within the iddat period by her former husband. The provisions of the act have been interpreted in Daniel latifi, Iqbal Bano, shamim Bano, shamima farooqui and recently in Ishrat Bano case. The law discussed in various decisions reflect that a divorced Muslim Women is entitled to a reasonable and fair maintenance.*

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### Introduction

The Muslim woman has the right to receive maintenance from her husband. The provisions related to the maintenance of Muslim women are mentioned in section 488 Cr.P.C1898 and section 125 Cr.PC, these sections unnecessary to provide social justice and protection to Muslim women.

Maintenance is called 'NAFAQA', and it comprehends food, remind and lodging, though in common parlance, it is limited to the first. There are three causes for which it is incumbent on one person to maintain another-marriage, relationship and property. The highest obligation arises on marriage the maintenance of the wife and children if a primary obligation<sup>2</sup>.

A wife is entitled to recover maintenance from the husband as follows:

- **Wife's right to maintenance under the personal law**
  - during the continuance of the marriage-A wife whose marriage is valid (or irregular only on the grounds of absence of witnesses) is entitled to maintenance from her husband even if she has the means to maintain herself and the husband is necessitous is subject to the following conditions: that the wife has attained an age at which she can render conjugal rights to the husband; that, except for reasonable cause, she is accessible for conjugal intercourse; that except for reasonable cause she resides with the husband and obeys is reasonable commands provided that if the right to maintenance is suspended owing to the non-fulfillment of any condition, it would revive on the removal of the cause.
  - After dissolution of the marriage by divorce-(whether it was revocable or irrevocable), the wife is entitled to maintenance (except where the divorce is the result of her on misconduct) till the date of the expiry of the period of Iddat or the date of the communication of the divorce to her, whichever is letter but not after that<sup>3</sup>.
- **Wife's Right to Maintenance under an Agreement**

A wife is entitled to recover maintenance from her husband on the basis of an agreement made between the parties of their s provided that such an agreement is not opposed to any law or to public policy or the policy of Mohammedan law<sup>4</sup>.

All agreements net at the time of the marriage are to be constructed in the same way as the provisions of any other contacts<sup>5</sup>. The purpose of a grant to maintenance is primacy and indication that the grant it was intended to be only for the life of the guarantee.

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- **Wife's Right to Maintenance under Cr.P.C.1898**

Section 488 of Cr.P.C.1898 laid down, "if any person having sufficient means or refuses to maintain his wife... Unable to maintain itself, the District magistrate, A presidency magistrate, A sub - Divisional magistrate or a magistrate for the first class may upon proof of such neglect or refusal, order search person to make a monthly allowances for the maintenance of his wife..., Such monthly rate,not exceeding (500 rupees) in the whole, as such magistrate think fit, and to pay the same to such person as the magistrate from time to time directs<sup>6</sup>.

While interpreting above section, it was held that whatsoever might be the personal law of any wife she must in order to entitle her to an order under sub –section (1) of sec. 488, Cr.p.c., establish, inter alia, that there is present neglect or refusal on the part of her husband to maintain her. In H. Syed Ahmed versus Naghath Parveen Taj Begum<sup>7</sup>, K.S. Hegde justice clarified the position and pointed out, "The plea of personal law, makes no appeal to me. The criminal procedure code is a law of the land and not only any community. If there is a conflict between the law enacted by the legislature and the personal law, then the former prevails. The legislative will a supreme in the land unless controlled by the constitution. There is no constitutional guarantee to respect the personal law of any community...It is true that the personal law of the Muslims as such has not been changed. But if they come within the mischief of section 488,Cr.P.C. they shall be governed by its provisions notwithstanding their personal law."in the same tone M.C. Desai justice opined that the right given by section 488 to a wife to claim maintenance from her husband is a statutory right which is independent of the personal law of the parties and is not affected for governed or by it<sup>8</sup>.

Muslim woman's right to maintenance under Section 125 of Criminal Procedure Code 1973.

The right of a Muslim wife to get maintenance from the husband or from the property of the husband ceases with the death of the husband. The Muslim woman is not entitled to maintenance during the death of the husband. Code of Criminal Procedure, 1973 Even under Section 125, A widow is not entitled to maintenance. Under Muslim law, a woman whose marriage has been severed is entitled to maintenance from her former husband till the end of Iddat, but not after the Iddat period. The right of the divorced woman to maintain is based on the following Quranic verses- "Let the divorced woman live in the same period of Iddat, the way you live, spend your money, do not disturb them and if she is pregnant Then spend your money on them until she is relieved of her obligation. And if she gives milk to your child, then give them treatment... and a good judicial for divorced women. There should be a provision. This obligation is for those who fear Allah"<sup>9</sup>.

It is clear from the verses of the Quran Sharif that a divorced woman has the right of maintenance from her husband only for the period of Iddat, and if she is pregnant. Then until the child is born she will be entitled to maintenance. Under Section 125 of the Criminal Procedure Code, 1973, the word 'wife' includes a wife who has been divorced who has not remarried. In the case of Zohra Khatoun v. Mohammad Ibrahim<sup>10</sup>, the Supreme Court expressed that under Section 125 of the Code of Criminal Procedure, 1973, it includes not only a divorced wife, but also includes a wife including marriage under the Divorce Act 1939. Has received the decree of dissolution. Therefore, even after obtaining the decree of separation under this Act, the wife can get maintenance from her former husband. Provided he has not remarried another.

In Mohammad Ahmed Khan v. Shah Bano Begum<sup>11</sup>, "before a bench of five judges, the question , of far reaching consequences arose before the apex court were,first,whether a divorced Muslim women is entitled to maintenance under section 125 of the Cr.p.c.? Second, whether a Muslim husband is under an obligation to pay the maintenance to the divorced wife beyond the period of Iddat?" In suit, the Hon'ble Supreme Court said that the Muslim husband has the exclusive right to abandon his wife whenever he wants, without any reason, improperly or without reason. The Supreme Court held that sub-clause (k) of the Explanation to Section 125(1) includes a divorced woman who has not remarried under 'wife', therefore, such a divorced wife who has remarried only after the period of her Iddat. The former is entitled to receive maintenance from her husband.

The Supreme Court said that if the divorced wife is able to take care of herself, then her obligation to take care of her husband ceases after the period of Iddat if she is unable to maintain herself then Section 125 Cr.P.C. The Supreme Court is entitled to help. Section 125 and Muslim law have no contradiction with regard to the responsibility of a Muslim husband for the maintenance of a divorced wife who is unable to maintain herself. Various Quran on the Holy Quran Referring to the comments, the Hon'ble Supreme Court stated that the Quran puts the responsibility of the maintenance of the divorced wife on the Muslim husband.

Section 125 is truly secular in nature...In *Jigarkaur v. Jaswant Singh*<sup>12</sup>, Subba Rao, Justice speaking for the court said that section 488 of the Cr.P.C. 1898, intends to serve a social purpose. The statutory right available to her under that section is unaffected by the provisions of the personal law applicable to her.

Regarding the second question, it was contended by the appellant that under the Muslim personal law the liability of the husband to maintain a divorced wife is limited to the period of Iddat. The outcome of this decision is that there is no conflict between the provisions of section 125 and those of the Muslim personal law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.

Enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986:

To overcome the effect of the *Shah Bano Begum* case, Parliament enacted the Muslim Women (Protection of Rights on Divorce) Act, 1986. Under section 3 of the Act, a divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within Iddat if the period by her former husband. A divorced woman and her former husband has option to be governed by the provisions of section 125 to 128 of the Cr.P.C., 1973.

The right to maintenance of a divorced wife under the above Act vis-a-vis the Criminal Procedure Code came up for discussion in a number of cases before various High Courts and the Supreme Court. Some of the cases are being discussed here.

In *Arab Ahmedia Abdullah versus Arab Bail Mohmuna Shayad bhai*<sup>13</sup> M.B. SHAH Justice said that a divorced Muslim woman is entitled to maintenance after contemplating her future needs and the maintenance is not limited only up to Iddat period.

The constitutionality of the Muslim Women Act was challenged before the apex court in *Daniel Latifi v. Union of India*<sup>14</sup> a five-Judges bench<sup>15</sup> explained the scope of the Act. Confirming the validity of the Act, the Supreme Court made the following findings:

- The obligation of the Muslim husband to make a proper and fair maintenance for his divorced wife, including the maintenance of the husband, at the time of his wife's Iddat and even after the Iddat.
- If a Muslim woman who has not remarried is unable to maintain herself even after the period of Iddat then she can proceed to sue relatives under Section 4 of the Act and get maintenance.
- The provisions of the Muslim Women Act 1986 do not violate Articles 14, 15 and 22 of the Constitution.

In *Iqbal Bano v. State of Uttar Pradesh*<sup>16</sup>, the Supreme Court held that under Section 3 (1) (a) of the Muslim Women Act, a Muslim husband is not only liable for the maintenance of his divorced wife for the period of Iddat but suitable and appropriate provision will have to be made for the maintenance of his divorced wife during the period. This provision is necessary only when the woman is unable to maintain herself.

In the case of *Shabana Bano v. Imran Khan*<sup>17</sup>, the Supreme Court once again determined that Section 125 of the Code of Criminal Procedure would apply in relation to the maintenance of a Muslim divorced woman. This woman will be entitled to maintenance from her husband even after passing the Iddat period, provided she has not married again.

In *Shamim Bano v. Asraf Khan*<sup>18</sup>, the Supreme Court clarified that the High Court is not correct in its opinion that when the appellant wife filed an application under section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, she exercised her option. As the Magistrate still retains the power of granting maintenance under section 125 of the Code to a divorced Muslim woman and the proceeding was continuing without any objection and the ultimate result would be the same, there was no justification on the part of the High Court to hold that the proceedings after the divorce took place were not maintainable. Therefore it was held that the order of the High Court declining to interfere with the order not granting maintenance to exercise its inherent power was not proper.

In *Shamima Farooqui vs. Shahid Khan*<sup>19</sup>, it was clarified that Muslim divorced women can apply for maintenance under section 125 of Cr. P.C. In this regard, Deepak Mishra J., observed, "it can never be forgotten that the inherent and fundamental principle behind section 125 Cr. P.C. is for amelioration of the financial state of affairs as well as mental agony and anguish that a woman suffers when she is compelled to leave her matrimonial home. The status is that there has to be some acceptable

arrangements so that she can sustain herself...Be it clarified that sustenance does not mean and can never allow to mean a mere survival. There can be no shadow of doubt that an order under section 125 Cr.p.c. can be passed if a person despite having sufficient means neglect or refuse to maintain the wife. Sometime apply is advanced by the husband that he does not have means to pay, for he does not have a job for his business is not doing well. These are only bald excuses and, in fact, they have no accessibility in law. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under section 125 Cr.P.C."<sup>20</sup>

Recently in *Zubair Ahmed v. Ishrat Bano*<sup>21</sup> the High court clarified that the right of maintenance available to wife from husband is absolute right and even divorce cannot effect this right unless the wife is disqualified on account of remarriage or her sufficient earning. Section 125 of the Criminal Procedure Code has been enacted with a specific purpose to protect women and children and to prevent vagrancy and destitution among them. This law is not community centric or religion centric and perhaps, one of the most secular enactments ever made in the country. It is an instrument of social justice and aims to render justice on the basis of equality to wife in particular, may be divorced including a divorced Muslim wife. Gender justice is a constitutional promise and the provision of maintenance provided under section 125 of the Code is one of the tools to translate the constitutional promise into social reality. Moreover, Article 21 of the Constitution guarantees every person a right to live with dignity and a dignified life is not possible unless a fair and reasonable provision is made by the husband towards the maintenance of his divorced wife. Therefore, while interpreting and applying this beneficial legislation, the Constitutional vision of equality, liberty and justice, more particularly social justice to the women and marginalized sections of society, must be present when the courts are dealing with an application of destitute wife or helpless children and aged and infirm parents. Social justice adjudication or social context adjudication requires application of equality jurisprudence where the parties to a litigation are unequally situated in terms of socio-economic structure and dilution of the technical procedure often followed in adversarial system.

### Conclusion

The above discussion of leading pronouncements made by Various High Courts and the Apex Court of India makes it emphatically clear first, that the provisions of Muslim Woman (Protection of Rights on Divorce) Act, 1986 reflects that a divorced woman is entitled to a reasonable and man fair provision for maintenance. The Parliament intended that the divorced woman gets sufficient means of live hood after the divorce, and the word an 'provision' indicates that something is provided in advance for meeting the needs of the wife. Second, the "reasonable and fair 'provision may include provision for residence, food, clothes and other articles for her. Third, the expression ' within the Iddat period" used in Sec. 3 of the Muslim Woman Act mean on or before or during, not beyond the period of Iddat, therefore, the husband is bound to make and pay maintenance to the wife and if he makes any default to pay then the wife is entitled to recover it by making an application to the Magistrate under Sec.3(2) of the Act but no where the Parliament has provided that reasonable and fair provision and maintenance is limited only for the Iddat period or that it is to be paid only during the Iddat period not beyond it. Fourth, the wording of Sec. 3 of the Act indicate that the husband has two separate and distinct obligations: (1) to make a reasonable and fair provision for his divorced wife; and (2) to provide' maintenance for her. The emphasis of the section is on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, with in the Iddat period. In the last, it is pertinent to note the observations made by Dipak Misra J., who spoke, "When the marriage breaks up, a woman suffers from emotional fractures, fragmentation of sentiments, loss of economic and social security and, in certain cases, inadequate requisites for survival. A marriage is fundamentally a unique bond between two parties. When it perishes like mushroom, the dignity of the female fame gets corroded. It is the law's duty to recompense, and the primary obligation is that of the husband".

### Reference

1. Mohd. Ahmed Khan v. Shah Bano AIR 1985 SC 945.
2. Asafa. A. Fyzee, "outlines of Mohammadan Law" (ed. 1976) p.211.
3. Verma's, Mohammedan Law (4<sup>th</sup> edition), 1968, p.260.
4. Idid.
5. Ahmad kasim v. Khatun Bibi, 1933 cal. 27 at p. 33.
6. Smt. Bela Rani Chatgterjee v. Bhupal Chandra Chatterjee AIR 1956 cal. 134. As per J.P. Mitter J. to whom Renvpada Mukherjee J. agreed.

7. AIR 1958 Mysore 128, para 7.
8. RamjiMalviya v. Smt. Munni Devi Mal viya AIR 1959 ALL. 767 para 4.
9. Holly Quran (241:2)
10. AIR 1984 SC 1243.
11. AIR 1985 SC 945.
12. AIR 1963 SC 1521, at p. 1525.
13. AIR 1988 Guj. 141.
14. (2001) 1 SCC 740.
15. Bench comprised of G.B. Pattanaik, S. RajendraBabu, D.P. Mohapatra, Doraiswamy Raja and Shiv Raj Patil J.J.
16. (2007) 6 SC Cases 785.
17. AIR 2010 SC 305 at p. 309.
18. AIR 2014 SC (Supplement) 463.
19. AIR 2015 SC 2025.
20. AIR 2015 SC 2025 Para's 10, 15 and 16.
21. 18 Oct. 2019 ALL. High Court.

