



CRITICAL ANALYSIS OF THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986 WITH SPECIAL EMPHASIS ON MAINTENANCE

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ABSTRACT

India is a diverse land which abounds in personal laws. Every religion in personal matters is governed by its own laws. The controversy regarding the status of Muslim Women in legal jargon is taking place since time immemorial. When a divorcee offers emotional fractures then it is the duty of the Govt. to provide adequate facilities and securities to her. Consequently, the role of maintenance comes in to play. Maintenance signifies all those things which are necessary for the support of life and includes suitable food, raiment and lodging. Law of maintenance is personal as well as legal and constitutional right in nature and it arises from the very existence of relationship between the parties. Women strata of Muslim community have suffered immensely and are also still at the receiving end because of the dirty political tricks being played in India. The Muslim jurists have not kept legal and moral obligations distinct. The moral and legal duties are almost inextricably mixed. The right to maintenance is not merely a moral but also a legal obligation.¹ Muslim Law firmly believes that a man can take care of himself whereas the women cannot. Hence, the wife's right to maintenance is a

debt against the husband. "For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty; on the righteous."²

Keywords: Talaq; Iddat period; Shah Bano Case; Maintenance; S.125 Cr.P.C.

INTRODUCTION

Family is the footing of a society which is considered as the most vital religious rite in all religions of the world. Quran expresses Nikah (marriage) in the form of Zauj (equal partner) which literally means getting absorbed in each other the way rain water absorbs in the earth. If the relationship is imbalanced and differences occur then the religion allows both of the sexes for Talaq (divorce). But, the Quran first advises the husband and wife to reconcile their differences amicably on their own and if the two fail to do so then it describes an elaborate process to seek a mutually agreed solution.³ After the divorce, both of them are free from the bond and can freely marry someone else provided the wife would wait for iddat period to get over which is three months and if she is pregnant then she has to wait till the delivery. The reason behind the traditional period of three months is to find out if the lady is pregnant with the child of the former husband. The old age tradition is carried on because of the sole reason that no one challenged this logic in the modern era. During this time, the husband is responsible for all her expenses. The question comes forth is what about the maintenance provided by husband to his wife after the iddat period? Unlike other religions, the obligation of Muslims to provide for maintenance arises

¹ Bail. I. 445 : Hed. 140; Mohd. Just v. Haji Adam, I.L.R. 7 Bom. 71 : 15.I.C. 520.

² Quranic verse 2:241

³ Quranic verse 4:35



only when the wife has no property or resources to maintain herself.

Divorced Wife's Right to Maintenance

The Muslim Law of Maintenance comes into play only if the claimant (wife) has no means or property with which she can maintain herself. The givers of Muslim law lay down different rules regarding the claim of maintenance by wife when the marriage is dissolved by death or when it is dissolved by divorce. When the marriage is dissolved by death, the wife is not entitled to maintenance during the period of iddat.⁴ When the marriage is dissolved by divorce, the wife is entitled to maintenance during the period of iddat. If the divorce is not communicated to the wife even after the expiry of the period of iddat, she is entitled to maintenance till it is communicated to her.⁵ A Muslim husband is bound to maintain his wife as long as she is faithful and obeys him but he is not bound to maintain her if it contra. Maintenance of the wife is incumbent on the husband because this is the precept both in the Quran and the traditions.⁶ The wife is absolutely entitled to get maintenance from the husband even though she may have means to maintain herself.⁷

In the case of *Arab Ahemadha v. Arab Bail*⁸, the Gujarat High Court held that a divorced muslim wife is entitled to maintenance even after the period of iddat and under Sec. 125, Code of Criminal

Procedure. She is entitled to reasonable and fair amount of maintenance where courts should ensure that she gets sufficient means of livelihood after divorce and that she does not become a destitute or is not thrown on the streets without a roof over her head and without any means of sustaining herself and her children. The same has been ordained by Quran:

"For divorced women maintenance should be provided on a reasonable scale.

This is duty on the righteous. (Ayat 241)

Thus, doth God make clear His signs to you:

In order that you may understand. (Ayat

*242)."*⁹
*"And for the divorced woman also a provision should be made with fairness in addition to her dower. This is a duty incumbent on the reverent. (1964 ed)."*¹⁰

*"For divorced woman also there shall be provision according to what is fair. This is an obligation binding on the righteous. Thus, His commandments clear to you that you may understand."*¹¹

"Those of you, who shall die and leave wives behind them, should make a will to the effect that they should be provided with a years' maintenance and should not be turned out of their homes. But if they leave their homes of their own accord, you shall not be answerable for whatever they choose for themselves in a fair way. Allah is All-

⁴ The authority for this proposition is *Badruddin v. Aisha*, (1957) All LJ 300.

⁵ The authorities of this proposition are: *Marian v. Kadir*, AIR 1929 Oudh 527; *Asmtulla v. Khatunnissa*, AIR 1937 All 592; *Rashid v. Anisa* (1932) 59 IA; *Ahmed v. Khaun*, ILR (1939) 59 Cal 833; *Munnisa v. Noor Md.*, AIR 1965 AP 231.

⁶ Hed. 140.

⁷ *Said Ahmad v. Sultan Bibi*, A.I.R. 1943 Pesh. 73 at p. 75.

⁸ AIR 1985 SC at 952

⁹ The Holy Quran by Usuf Ali, 96.

¹⁰ The Running Commentary on the Holy Quran by Dr. Allamat Khadim

¹¹ The Quran, 38.



powerful. All-wise, likewise, the divorced woman should also be given something in accordance with the known fair standard. This is an obligation upon the God fearing people.”¹²

Shah Bano Case¹³

The case of *Mohd. Ahmed Khan v. Shah Bano Begum*¹⁴ alias *Shah Bano Case*¹⁵ agitated the ego of masculine counterpart and it was then the society realised that the Muslim divorcees should be given their rights. The judgement was not the first granting a divorced Muslim women maintenance under the Code of Criminal Procedure, 1973, it was the first where the Hon’ble Supreme Court narrated the Muslim law in depth. In April 1978, a 62-year-old Muslim woman, Shah Bano, filed a petition in court demanding maintenance from her divorced husband Mohammed Ahmad Khan, a renowned lawyer in Indore, Madhya Pradesh. Mohd. Ahmad Khan had granted her irrevocable talaq later in November. The two were married in 1932 and had five children— three sons and two daughters. Shah Bano’s husband had asked her to move to a separate residence three years before, after a prolonged period of her living with Ahmad Khan and his second wife. Shah Bano went to court and filed a claim for maintenance for herself and her five children under Section 125 of the Code of Criminal Procedure, 1973. This section is secular in nature and it provided for a legal obligation on the husband to maintain his wife if she has no resources to maintain herself. However, Ahmad Khan contested the claim on the grounds that under the Muslim Personal Law in India, a divorced women could be awarded

maintenance only during the iddat period and not latter. In case if she wants maintenance then she will have to be given maintenance by the other relatives. His arguments were widely supported by the All India Muslim Personal Law Board which contended that courts take the liberty of interfering in those matters that are laid out under Muslim Personal Law, adding it would violate the Muslim Personal Law (Shariat) Application Act, 1937. The board said that according to the Act, the courts were to give decisions on matters of divorce, maintenance and other family issues based on Shariat. This judgment was widely criticised by the Muslim community throughout the country. After detailed study, the decision was rendered by the Supreme Court of India in 1985 that Code of Criminal Procedure, 1973, would apply to all Indian citizens regardless of their religion as it is secular in nature.

Justice Y.V. Chandrachud said in his decision: “Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it then make as to what is the religion professed by the neglected wife, child or parent? Neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves are the objective criteria which determine the applicability of section 125. Such provisions, which are essentially of a prophylactic nature, cut across the barriers of religion. The liability imposed by section 125 to maintain close relatives who are indigent is founded upon the individual’s obligation to the society to prevent vagrancy and destitution. That is the moral edict of the

¹² Meaning of the Quran, Vol. I.

¹³ *Mohd. Ahmed Khan v. Shah Bano Begum*, A.I.R. 1985 S.C. 945.

¹⁴ *ibid.*

¹⁵ *ibid.*



law and morality cannot be clubbed with religion.”

Therefore, it was held that although the Muslim Law limits the husband’s liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the situation envisaged by section 125 of the Code of Criminal Procedure, 1973. The Court came to the conclusion that if the divorced wife is unable to maintain herself, the husband’s liability ceases with the expiration of the period of iddat, but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to section 125 of the Code of Criminal Procedure, 1973.¹⁶ The benefit of the generous jurisdiction under Section 125 of the Code of Criminal Procedure, 1973 is available to the wife irrespective of the question whether the divorce was anterior or subsequent to the coming into force of the Code.¹⁷

Then the Rajiv Gandhi Congress government, elected in 1984, passed the Muslim Women (Protection on Divorced Act), 1986. This statute overturned the verdict in the Shah Bano case and it was enacted that the maintenance can be made liable for the iddat period only. It also said that if a woman wasn’t able to provide for herself, the magistrate had the power to direct the Wakf Board for providing the aggrieved woman means of sustenance and for her dependent children too.

Then, Shah Bano’s lawyer Danial Latifi challenged the Act’s Constitutional validity. The Apex Court, though upholding the

validity of the new law, said the liability can’t be restricted to the period of iddat. Thereafter, Shah Bano withdrew the maintenance claim she had filed.

Maintenance of wife under the Section 125 of Cr.P.C.:

Section 125 of the Code of Criminal Procedure, 1973 which was earlier Section 488 of the old Code, conveys that a wife, whether Muslim or not is entitled to claim maintenance against the husband on the ground of the husband’s refusal to maintain her.

Under Cr.P.C., only wife (a woman who has been divorced by or has obtained divorce from her husband & hasn’t remarried) can claim for maintenance. The said section defines ‘wife’ as including a divorced wife, containing no words of limitation to justify the exclusion of Muslim women from the scope. The ambit of wife is defined irrespective of the religion professed by her or by her husband. A wife who refuses to stay with her husband due to legal grounds such as bigamy, cruelty & adultery has the right to special allowance under this Act. But a wife does not possess right to claim maintenance if she’s living in adultery or she’s living separately by mutual consent. The various sections of Cr.P.C. are criminal in nature and are used for the criminal charges. The benefit of the generous jurisdiction under Section 125 of the Code of Criminal Procedure, 1973 is available to the wife irrespective of the question whether the divorce was anterior or subsequent to the coming into force of the Code.¹⁸

¹⁶ B.R. Verma, Commentaries on Mohammedan Law, Law publishers (India) Pvt. Ltd., 10th Ed., 2007, pg 893

¹⁷ Noor Mohd. v. Jannat Bai, (1988) 1 H.L.R. 271 at p. 273 (M.P.)

¹⁸ Noor Mohd. v. Jannat Bai, (1988) 1 H.L.R. 271 at p. 273 (M.P.)



The Section 125 of the Cr.P.C. states the provisions as follows:

“S.125 Order for maintenance of wives, children and parents.

(1) If any person leaving 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 itself, 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 itself,*
- (d) or, His father or mother, unable to maintain himself or herself”*

The provision under Cr.P.C. explains that If the husband having sufficient means neglects or refuses to maintain his wife who is unable to maintain herself, or his legitimate or illegitimate minor child, whether married or not unable to maintain themselves provided a married daughter and the major child who is abnormal either physically or mentally, unable to maintain oneself, a Magistrate of the first class may, order to husband to pay a monthly allowance such as the Magistrate thinks fit.

In the case of *Bai Tahira v. Ali Hussain*,¹⁹ J. Krishna Iyer explained that every divorcee, wife, Muslim or non-Muslim, was entitled to benefit of maintenance allowance and the dissolution of the marriage under personal law makes no difference to this right. The rights vested

under S.125 of Cr.P.C. is not taken away by the new Act, in the absence of any provisions under the new Act creating a bar for enforcement of the order passed under S.125 of the Cr.P.C. before coming into force of this Act, a Mohammedan wife who obtained an order of maintenance under S.125 of Cr.P.C. is entitled to enforce the said order of maintenance. In view of this position of law, the recovery proceedings initiated by a divorced Muslim wife are perfectly maintainable in law and, therefore, the petition challenging the legality of the recovery proceedings initiated before the Judicial Magistrate First Class were dismissed.²⁰ A person against whom an order under S.125 (3) Cr.P.C. is made does not become liable to imprisonment on passing of an order of maintenance, his liability to suffer imprisonment only starts if, he fails to respond to a warrant issued under S. 125 (3) Cr.P.C. for payment of maintenance.

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

The landmark legislation, namely, the Muslim Women (Protection of Rights on Divorce) Act 1986 was passed by the Rajiv Gandhi Government on 19th May, 1986 to protect the rights of Muslim Women in regard to Divorce after the decision of *Shah Bano's Case* was challenged before the Hon'ble Supreme Court. Progressive Muslims and others dubbed this enactment as a great setback for Muslim women.

The vital essentials of the Act are

- (i) Right to maintenance during the period of iddat;
- (ii) Right to fair and reasonable provisions for her entire life;

¹⁹ (1979) Cr LJ 154.

²⁰ Nagoor Mohamed Farooq v. Mavada Roashan Jahan, 2001 (4) Knt. L.J. 216 at pp. 223, 225.



- (iii) Right to receive alimony for the child till two years from divorce;
- (iv) Right to receive maintenance from the State Wakf Board in some exceptional circumstances.

The Act provides the Muslim-divorced woman a reasonable and fair provision of maintenance within the iddat period by her former husband and in case she maintains the children born to her before or after the divorce, the period shall extend to two years from the date of the birth of the children. She will also be entitled to mahr and all the properties given to her by her relatives, friends, husband and the husband's relatives. If all of these benefits are not provided to her at the time of divorce, she is entitled to apply to the magistrate for an order directing her former husband to provide for such maintenance, the payment of mahr or the delivery of the properties. Secondly, if a Muslim-divorced woman is unable to maintain herself after the iddat period, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to the Muslim Law in the proportions in which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay, the shares of these relatives also. But where a divorcee has no relatives or such relatives or any one of them who has not enough means

to pay the maintenance or the other relatives who have been asked to pay the shares of the defaulting relatives also do not have the means to pay the maintenance ordered by him or the shares of the relatives who are unable to pay.²¹ In the case of *A.A. Abdulla v. A.B. Mohmuna Saiyadbhai*²², the court held that a divorced Muslim woman is entitled to maintenance and that this maintenance is not limited to iddat period. The decision was based on Section 3(1)(a) of The Muslim Women (Protection of Rights on Divorce) Act, 1986, of India²³. It interpreted this Section as on or before the expiration of the iddat period, the husband is bound to make and pay a reasonable and fair provision and maintenance to the wife, not that the maintenance is to be given only during the iddat period. It concluded that to interpret the provision otherwise would be to abrogate the rights of Muslim women under other laws.²⁴

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²¹ B.R. Verma, Commentaries on Mohammedan Law, Law publishers (India) Pvt. Ltd., 10th Ed., 2007, pg 893

²² A.I.R. 1980 Guj. 141.

²³ Annual Review of Population Law, Vol. 13, 1986, Section 320

²⁴ <https://www.ncbi.nlm.nih.gov/pubmed/12289669>

²⁵ A.I.R. 1980 Guj. 141.

²⁶ Annual Review of Population Law, Vol. 13, 1986, Section 320



provision otherwise would be to abrogate the rights of Muslim women under other laws.²⁷

According to the said Act, the husband, at the time of divorce, should pay the mehr and make one-time provision for her as provided for in the Quran and give three months' maintenance. Therefore, a woman has to get a lump sum amount at the time of divorce. The first judgment to provide the same was given by the District Magistrate of Lucknow, Ms. Rekha Dixit. Even after the Act being in place several Muslim women across the nation filed cases for maintenance under Section 125 of the Cr.P.C..

A couple of years ago, the Bombay High Court awarded a woman maintenance for life under the provisions of the 1986 Act. The Judge's interpretation of the new Act was that the woman should be given enough within the iddat period to maintain herself for life.²⁸ It totally depends upon how the courts interpret the vague and ambiguous Act that was passed by the Congress Government.

The Calcutta High Court Judge tried to interpret S. 3 of the 1986 Act widely stating "A divorced Muslim woman is entitled to maintenance after contemplating her future needs and it is not limited only up to the iddat period. The phrase used in Section 3 (I) (A) of the Act, 1986, is reasonable and fair provision and maintenance has to be made to see that the divorced woman gets sufficient means of livelihood after divorce and that she does not become destitute or is not thrown out on the street."²⁹

The Act mandates that no provision has been made in the Act for the purpose of obtaining maintenance from her husband till the date of divorce, therefore till that date the provision of Cr.P.C. shall be applicable. The Act came in play on 19th May, 1986, therefore till 18th May, 1986 whether a woman was divorced or not she was entitled to maintenance under S.125 Cr.P.C. reason being that the Act is not retrospective in nature. The Act allows the Muslim husband to regain freedom of avoiding the payment of maintenance even in the iddat period if he claims that he is financially unfit to do so which is contrary to the principles of Muslim Law as the liability to maintain his wife during iddat period is unconditional and compulsory under any circumstances.

Section 3 of the Act does not apply if there is a decree order of a Court granting maintenance to a wife earlier as the section does not start with a non-obstante clause.³⁰ In the case of *Danial Latifi v. Union of India*,³¹ some guiding principles were laid down—

- (i) a Muslim husband is liable to make reasonable and fair provisions for the future of the divorced wife. This includes the period beyond iddat period in terms of S.3 (1) of the Act.
- (ii) Liability of Muslim husband to his divorced wife arising under S.3 (1) (a) of the Act to pay maintenance is not confined to iddat period.
- (iii) A Muslim divorcee who has not remarried and has no means to maintain herself after the iddat period can proceed as provided under S.4 of the Act against her relatives who are liable to maintain her in proportion

²⁷ <https://www.ncbi.nlm.nih.gov/pubmed/12289669>

²⁸ The Hindu

²⁹ The Hindu

³⁰ Sirazuddin Ahmed Saheb Bagwan v. Khatija Sirajuddin, 1996 (II) D.M.C. 449 at p. 451 (Bom)

³¹ 2001 (2) H.L.R. (S.C.) 528 : J.T. 2001 (8) S.C. 218



to the properties which they inherit on her death. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Waqf Board established under the Act to pay such maintenance.³²

After divorce, a Muslim wife is entitled to maintenance from her former husband during the period of iddat and until her delivery of she is pregnant. However, the Muslim Personal Law does not speak of two separate things, one, by way of a reasonable and fair provision, and two payment of maintenance. The words 'provision' and 'maintenance' seem to convey the same meaning. The words 'a reasonable and fair provision' in S.3 (1) (a) though ostensibly may appear to be distinct, but in reality they are one and the same thing.³³ Right to get maintenance from her husband is a vested right of a woman of any religion and there is absolutely nothing in the Act which tends to take away this right. On the contrary, the Act recognizes the said right available to Muslim woman even under the Personal Law.³⁴

Under Muslim law, Mehr or dower means a property which the husband is obliged to pay to his wife in consideration of her marriage. The wife can refuse to live with her husband and deny him to sexual intercourse so long as the prompt dower is not paid to her. The fair and reasonable provision mentioned in the Act should not be substituted with Mehr or dower. It can not be a consideration for divorce. It is an obligation of a husband arising from a contract, or otherwise imposed by law or custom on the husband as a token of his respect for his wife.

The drawback to this Act is that when the Act is silent only then the provision of S.125 Cr.P.C. is applicable only when the divorced Muslim woman and her former husband agree. Then, there is no direct applicability of Waqf Board to contribute for making the payment of maintenance to any destitute lady. The Board has got its own finances and only from those funds the maintenance is to be paid. The Act provides that the Magistrate can order the Board to pay maintenance of the divorcee when she is unable to maintain herself and she has no relative or the relatives are bankrupts.

Conclusion

"In the theatre of life, it seems, man has put the autograph and there is no space for a woman even to put her signature."³⁵ The personality of a Muslim woman is considered to be the soul of the Muslim men in literal sense, who is tied to the apron strings of the rules formed by the patriarchy. The Rajiv Gandhi Govt. did create a law to regulate the pattern and provide reasonableness to the muslim divorcee but still the strings were left in the hands of the powerful former husband because according to the Act if they refused to let the petition be filed in S. 125 Cr.P.C. then the women may be deprived of their rights. It totally depends upon the discretion of the Magistrate how s(he) interprets the said Act so that the divorcee can live a secured life. The whole scenario signifies that religious traditions have more weight than gender equality and the only way to stop this is having a uniform law. The vibrations of Uniform Civil Code would lead to a positive impact on the Muslim personal law. It would

³² Mustafiran Bibi v. Abdul Rasid Khan, 2003 (2) H.L.R. 98 at pp. 98-99 (Orissa).

³³ Abdul Haq v. Yasmin Talat, 1998 (2) H.L.R. 318 at p. 319 (M.P.)

³⁴ Wali Moammed v. Batulbai (2003) 7 I.L.D. 1015 at p. 1021 (M.P.)

³⁵ Indian Young Lawyers Association vs The State of Kerala; Writ Petition (Civil) No. 373 of 2006.



allow the Muslim divorcees to claim maintenance for her lifetime. But the said issue is facing immense opposition and uproar by the Muslims on the ground that it would encroach upon their personal law and the Hindu law would supersede over their personal law. Even though it has already been signified that the Uniform Civil Code is a secular legislation.

