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MAINTENANCE FOR MUSLIM WOMEN IN INDIA.

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This paper deals with the concept of Maintenance of Women after dissolution of marriages under Muslim Law.

This subject matter has been one of the most controversial ones, and has undergone many changes over the years. This paper is an attempt to look at the series of changes which this law has undergone by virtue of enactments and case laws, and to look at what the present position of law is.

The paper commences with introducing the concept of maintenance in common parlance and then specifically under Muslim law. The paper explains that how initially, there was a conflict between Muslim Law and section 125 of CrPC, which is a general law. In this context, the famous Shah Bano case was decided, which became one of the most landmark judgments. In an attempt to resolve the conflict and clarify the position of law, the Supreme Court in this case gave precedence to CrPC over Personal Laws.

This, however, was met with a lot of resentment by the Muslim community, and under pressure, the The Muslim Women (Protection Of Rights On Divorce) Act, 1986 was passed in order to nullify the effects of the judgment.

However, interpreting this Act in Daniel Latifi v. Union of India, the Supreme Court, along with declaring the Act to be constitutionally valid, interpreted the same, and clarified that the position as settled in Shah Bano Case is the correct one, and that, if the true spirit of the Act is looked into, this position shall emerge. Also, there is no conflict between CrPC and Muslim Personal Law.

What these judgments and enactments contained and how the same affected the evolution of this particular law, shall be in dept elaborated in the paper being submitted.

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Introduction:- Concept of Maintenance with Specific Focus On Muslim Law**General Meaning of the Term:-**

The term maintenance includes all necessities for subsistence of life. The general meaning of the term can be well understood by referring to the definition given under Hindu law, since muslim law doesn't per se define the term, and hence, this reference shall be useful. The term as defined in Hindu Law means:-

“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.”¹

As indicated by Halsburys law of England, maintenance is "the name given to the week by week or regularly scheduled installments which may be requested on a declaration of separation, or nullity to be made for the upkeep and backing of the wife amid the joint lives of the life partners. Hence, it is a comparative procurement for their profit, which may be made in processes of judicial separation, nullity, divorce and restitution of conjugal rights”

Meaning of the Term under Muslim Law:-

Under traditional Sharia law, the law regarding maintenance was a little unclear, since there was no demarcation between a legal obligation or a moral or ethical duty under Muslim law, hence making it difficult to ascertain as to what is a person legally bound to do and what is a mere moral duty.

Under Quranic Law, a husband is obliged to provide maintenance to his wife and family, and the term signifies the amount he is liable to pay for the same.² The term used for maintenance under Muslim Law is called nafaqa and it comprehends food, raiment and lodging, though in common parlance it is limited to the first.³

The wife is entitled to maintenance from husband, despite the fact that she has means to maintain herself. In addition to this, the marriage contract may stipulate payment of special allowances by the husband, and in presence of these, it becomes the obligation of the husband to pay these to the wife. Such allowances are called kharch-e-pandan, guzara, mewa khore, etc.⁴ This can be claimed as a right. However, this is subject to a few exceptions. These are:-

1. A wife cannot claim maintenance if she is disobedient.
2. A wife cannot claim maintenance if she doesn't not allow free access to husband unconditionally.
3. A wife who deserts her husband is not entitled to maintenance.

The husband's obligation to maintain his wife is a personal liability, thus after his death, the wife is not entitled to be maintained by his relatives nor out of his property.⁵

We have established that maintenance is the right of the wife. The following circumstance give rise to such a right. These are:-

1. Marriage.
2. Divorce.
3. Pre Nuptial Agreement.

We may now move a step further to list the sources from which these rights emanate. There are three major sources. These are⁶:-

1. Muslim Personal Law.
2. Section 125, CrPC.
3. The Muslim Women (Protection of Rights on Divorce) Act, 1986.

The present paper shall focus on Maintenance of Muslim Women Post Divorce. The major research area is the conflict between CrPC and Muslim Personal law, and the position as settled by the famous Shah Bano Case.

Maintenance of Divorcees under Muslim Law:-

Maintenance under, CrPC- Before and After 1973:-

Initially, it was provided in the CrPC(earlier under section 488) that only a wife is entitled to maintenance by husband. It was claimed by the husbands that once dissolution takes place, a woman ceases to be a wife and hence is not longer entitled to maintenance. However, in Muslim law, taking a divorce is relatively easier and hence, it led to situations where the same was being misused by the husbands.

¹ Section 3 (c) Hindu Adoption & Maintenance Act, 1986.

² Khan Ephroz , “ Women and Law : Muslim Personal Law Perspective”(Rawat Publications , 2003) 302

³ Prof. Ashok Wadje, “Maintenance Right of Muslim Wife: Perspective, Issues & Need for Reformation” National Law University, Jodhpur Law Journal.

⁴ ibid

⁵ G. Chakraborty, “ Law Of Maintenance” Sodhi Publications , 2003.

⁶ ibid

Looking at this loophole, an amendment was made in 1973, wherein under section 125, a divorcee was entitled to maintenance till the time she remarries. Being secular in nature, this provision applies to all women, including Muslim women.⁷

Conflict of Muslim Personal Law with section 125 of CrPC:-

Under Muslim Personal Law, a woman is entitled to maintenance only till the end of the Iddat period. Iddat is the period when co-habitation of the parties end, on the expiry of iddat the spouses will stand divorced. The period of iddat consists of three menstrual cycles or three lunar months , in case of pregnant women , the iddat period would extend up to the time of delivery.⁸

Hence, we can see a direct conflict, since CrPC does not recognize iddat period and maintenance goes beyond the same.

Secondly, in Muslim Law, polygamy is permitted, and under section 125, marriage to another woman becomes a ground for claiming maintenance. In Mohammed Haneefa v. Mariam Bi⁹ the Court stated that in case of a clash between personal law and CrPC, the former shall prevail. This position was seconded by the Supreme Court in Saira Bano v A.M Abdul Gafoor.¹⁰

This caused a lot of dilemma in the legislature. To resolve this dilemma, Section 127(3) was added under which that if a divorced woman receives an amount due to customary or personal laws of the community, the magistrate can cancel any order for maintenance in her favour.

Judicial Decisions interpreting the Scope of Section 127:-

However, since the judiciary favoured the right of women to claim maintenance, the conflict continued.

It was held in Bai Tahira vs Ali Hussain Fissalli Chothia¹¹ that payment of "illusory sums" focused around the Muslim personal laws ought to be considered to diminish the measure of maintenance payable by the spouse , however that does not acquit the spouse from the commitment in light of the fact that each lady independent of her religion is entitled to maintenance. The divorced wife has this right except from when the aggregate payment stipulated by custom is pretty much sufficient to substitute the maintenance .

Thus the spirit behind Section 127(3)(b) is that a wife can't profit from both , unless the whole sum paid under the customary law is deficient.

An extra requirement was included by the Apex court in Fuzlunbi v. K Khader Vali¹². The instalment of the sum focused around Muslim law must be pretty much identical to the month by month maintenance to the divorcee, required till her remarriage or demise, with a specific end goal to substitute the maintenance recompense commitment.

The Supreme Court expressed in Zohara Khatoon vs Mohd. Ibrahim¹³ that the expression "wife" in S.125 and S.127 of CrPC incorporates Muslim ladies who get separated by method for Talaq or under the Dissolution of Muslim Marriage Act,1939.

Therefore, the conflict between Muslim Personal Law and CrPC still continued, and section 127 was not sufficient to satisfy the Muslim community who opposed section 125 as a detriment to their personal laws.

It was in this context of growing conflict and dissatisfaction that the famous Shah Bano Case surfaced and went on to become the most landmark judgment in this subject matter.

⁷ <http://www.lawteacher.net/family-law/essays/maintenance-of-wife-under-hindu-law-essays.php> last accessed on March 19, 2016

⁸ Khan Ephroz , " Women and Law : Muslim Personal Law Perspective" Rawat Publications , 2003

⁹ AIR 1969 Mad 414

¹⁰ AIR 1987 SC 1103

¹¹ 1979 AIR SC 362

¹² AIR 1980 SC 1730

¹³ 1981 AIR SC 1243

Mohd Ahmad Khan v. Shah Bano Begum¹⁴ or the Shah Bano Case:-**Facts of the Case briefly stated:-**

In the present case, a 62 year old woman was divorced and subsequently denied maintenance. She had not remarried. On moving the court of the Judicial Magistrate at Indore under section 125 of the CrPC, and claiming maintenance of Rs 500 per month, she was awarded a maintenance of Rs 25 per month from the husband. Aggrieved by the low amount, she filed a revision petition before the Madhya Pradesh High Court, which entitled her to a maintenance of Rs 179.20 per month.

The husband appealed against this order before the Supreme Court, his main contention being that since the dissolution had taken place, she ceased to be his wife and under Muslim law, he was not obliged to pay her maintenance. Also, since he had paid the dower amount during the Iddat period, the wife was not entitled to any maintenance.

Muslim bodies like All India Muslim Personal Law Board and Jamiat Ulema-e-Hind joined the case as interveners.¹⁵ The case was decided by a five judge bench composed of chief justice Chandrachud, Jangnath Misra, D A Desai, O. Chinnappa Reddy, and E S Venkataramiah.

Judgment of the Court:-

The Supreme Court dismissed the appeal and upheld the decision of the High Court. The Supreme Court held that if the wife is equipped to maintain herself then the spouse's commitments would stop post iddat.

However in the event that she can't do so, a recourse under section 125 is available and, hence, the appellant had to pay.

The Supreme Court stated that if the Holy Quran is correctly interpreted, then it can be inferred that there is no conflict between section 125 of the CrPC and Muslim Personal Law at all, since even under Islamic Law, the husband is obliged to pay maintenance to the divorced wife.

The Supreme Court explained this judgment by saying that, even if there is a conflict, section 125 of CrPC is a secular law, and hence, applies to all women, irrespective of their religion. It further stated that CrPC shall prevail over Muslim Personal Law in case of a conflict. The court held:-

“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 entitled to have recourse to Section 125 of Cr. P.C.”¹⁶

Hence, the Supreme Court settled the position of law that in case a Muslim woman is divorced, incapable of maintaining herself and has not remarried, then she shall be entitled to maintenance under section 125 of the CrPC.

Reaction to the Judgment:-

The judgment had a lot of political repercussions and had to face a lot of criticism from the orthodox Muslim Community. Different Civil Code altogether for Muslims was demanded and caused a lot of controversy and heated debates.¹⁷ The main protestors were Obaidullah Khan Azmi and Syed kazi. They had formed an organization in 1973 known as the All India Muslim Personal Law Board devoted to upholding what they saw as Muslim Personal Law, and through this organization, they voiced their opinions against the judgment.¹⁸

¹⁴ AIR 1985 SC 945

¹⁵ Ibid

¹⁶ Main text of Shah Bano Judgment

¹⁷ Narain, Vrinda. Reclaiming the Nation: Muslim Women and the Law in India. India: University of Toronto Press.

¹⁸ "The Shah Bano legacy". The Hindu. 2003-08-10

Developments Post Shah Bano Case:-

The Rajeev Gandhi government, coming under pressure from Islamist groups decided to nullify the judgment, and in a effort to do the same, it passed The Muslim Women (Protection Of Rights On Divorce) Act, 1986.¹⁹ This act became one of the most controversial legislations enacted.

The relevant provisions of this act are sections 3(1)(a) and 4(1), which stated that the former husband must provide "a reasonable and fair provision" and maintenance within the period of iddat²⁰ and, that in case she is unable to maintain herself after the period of iddat, she can claim maintenance from her relatives and if they cannot pay, then she can claim from the Wakf Board as per S.4(2),²¹ respectively. It doesn't characterize a maximum limit to the maintenance. It expresses that women may look for fair and reasonable remuneration amid the iddat, and that any kids borne of the marriage are eligible for a further maintenance.

Reaction to the Act and Controversies surrounding the same:-

The Act was seen as oppressive as it denied divorce Muslim ladies the right to fundamental support which ladies of different beliefs had recourse to under CrPC.

The Bharatiya Janata Party saw it as 'appeasement' of the minority group and discriminatory to non-Muslim men, in light of the fact that they were still bound to pay maintenance under Section 125, Cr. PC.²²

Minority Rights Group International, an NGO based in the U.K., denounced the law, commenting that it "highlighted the disjunction between constitutional law premised on the principle of sexual equality and religious laws which discriminate on the basis of this very category."²³

The Constitutional validity of the Act was challenged on the ground of being violative of Article 14, 15 and 21. The basic question raised by right activists was the necessity of enacting an Act, which completely segregates a portion of the population by having a special enactment despite a secular remedy being available.²⁴

The Act was also criticised for being arbitrary for two main reasons.

"Firstly, the use of the word within implied that there was no provision in the Act which could entitle a woman to maintenance post iddat period.

Secondly, the Act diminished the scope of Section 125 of the CrPC, since, by virtue of this Act, the Muslim men were at the option of making the said section of CrPC inapplicable to them."²⁵

A state of confusion was prevalent among the judiciary, since on the face of it, the Act seemed to be in favour of Muslim women, because of the use of words like fair, reasonable, provision etc. However, the act didn't provide for any circumstance in which the maintenance could exceed the iddat period.

The controversy was on its peak between Gujarat and Andhra High Courts in the cases of Arab Bail And Fathimunnissa Begum .²⁶

¹⁹ Paras Diwan, "Law of Marriage & Divorce" S.Jain, P.Diwan, Universal Law Publishing Co, 6th Edition 2011

²⁰ Section 3(1)(a), The Muslim Women (Protection Of Rights On Divorce) Act, 1986

²¹ Section 4(1)&(2), The Muslim Women (Protection Of Rights On Divorce) Act, 1986

²² <http://www.thehindu.com/thehindu/2003/08/10/stories/2003081000221500.htm> last accessed on March 21, 2016.

²³ <http://www.youthkiawaaz.com/2012/06/the-shah-bano-case-a-landmark-case-in-indian-family-law/> last visited on March 26, 2016

²⁴ <http://www.lawteacher.net/indian-law/essays/daniel-latifi-v-union-of-india.php> last accessed on March 26, 2016

²⁵ Ibid

²⁶ <http://www.divorcelawyers.co.in/maintenance-concept-practice-for-muslim-women/> last accessed on March 24, 2016

Hence, a situation of ambiguity prevailed, and the court started interpreting the Act, as shall be discussed in the next section.

Position Post Enactment of The Muslim Women (Protection Of Rights On Divorce) Act, 1986- Daniel Latifi v. Union of India²⁷:-

As noted in the previous section, the Act had created a lot of ambiguity, and the judiciary started interpreting the Act.

The Andhra Pradesh High Court took a strict view saying that the use of the word with signifies that in no case can the maintenance exceed the iddat period.

On interpreting this, the Gujarat High Court, relying on the words fair and reasonable, awarded a lump sum payment to the divorced wife as maintenance.

The position was finally settled by another landmark judgment in 2001, called Daniel Latifi v. Union of India.

Daniel Latifi v Union of India:-

In this case, a writ was filed under Article 32 challenging the constitutional validity of the Act. The case was heard by a bench consisting of Mr. G.B. Pattanaik, Mr. S. Rajendra Babu, Mr. D.P. Mohapatra, Mr. Doraiswamy Raju and Mr. Shivaraj V. Patil.

In this case the constitutional validity of the Act was upheld and an interpretation of the provisions of the Act was provided.

The Court looked into the Preamble, Statement of Objectives and Reasons of the Act. Huge reliance was placed on the judgment in the Shah Bano case as well.

The court concluded that, one, the Act does not violate Articles 14, 15 and 21 and hence, is not ultra vires. The court stated that “the legislature does not want to enact unconstitutional laws.”

The court went on to interpret the Act, and the Supreme Court stated “that a construction that results in making an Act ultra vires has to be discarded and one that upholds the validity of the Act preferred”²⁸

The court made the following interpretations.

Firstly, interpreting the meaning of the term “within” used under section 3(1)(a) of the Act read with the terms fair and reasonable, the court arrived at the conclusion that the maintenance, being fair and reasonable, should exceed the iddat period but must be made within the iddat period. Such maintenance made during iddat period should be for her entire future, that is the time after the expiration of iddat period as well.

The liability of the husband, therefore, is not limited to the iddat period. Therefore, this Act is not in contravention of section 125 of CrPC.

The court stated the following which comprehensively explains the position:-

“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 filing an application before the Magistrate as provided in Section 3(3) but nowhere the Parliament has

²⁷ AIR 2001 SC 3958.

²⁸ Syed Khalid Rashid, MUSLIM LAW, Eastern Book Company, 4th Ed.

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.”²⁹

The above clarifies the position of law as settled by the case, quite comprehensively.

It further stated that if a woman doesn't remarry she has the recourse under section 4 of the Act against her relatives in proportion of the properties they shall inherit after her death. If the relatives are not in a position to do, the judicial body can order the WAKF Board to pay for the maintenance of the woman.

Effects of Daniel Latifi Judgment:-

Daniel Latifi judgment basically revived the principles settled in Shah Bano case that, the husband's liability to maintain his wife doesn't end with the iddat period.

However, it explained this principle, not as contravening the Act which was enacted as a result of the Shah Bano case, as a commentary on that Act. Also, the Act is consistent with section 125 of the CrPC and hence, there is no scope for conflict.

Hence, the position of law is that, the provisions of the Act basically emanate from principles set forth in the Shah Bano case.

The same has not been changed till now, and continues to govern matters related to maintenance of Muslim women after dissolution of marriage.

The principle has been seconded by the Supreme Court once again in Iqbal Bano V/s. State of U.P.³⁰. In the case the court reiterated the position that divorced women are entitled for maintenance beyond the Iddat period and stated that provisions of the Act do not contravene 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 fulfils his obligation u/Sec. 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986³¹.

This was once again reiterated in the recent judgement in Shabana Bano v. Imran Khan³² that after the expiry of iddat, a divorced Muslim woman can seek maintenance under S.125CrPc as long as she doesn't re-marry.

Hence, the position as laid down in the Daniel Latifi case is the settled position and has not undergone any change.

Conclusion:-

We see that under Muslim law, maintenance post divorce has been a controversial subject matter. Initially, there were two sources from which the right to maintenance of a divorced Muslim woman emanate- these were section 125 of CrPC and the Muslim Personal Law.

There was a conflict between the two since, under CrPC, the right of a woman to claim maintenance was beyond the iddat period and under Muslim Personal Law, the husband was obliged to pay maintenance only during iddat period.

To resolve this, section 127 was inserted in CrPC, but this was unsuccessful in resolving the conflict and being a substitute for maintenance.

In this context, the famous Shah Bano Case was decided, which settled the position of law. The case gave precedence to CrPC over Muslim Personal Law, and stated that if the divorced woman does not have the means to

²⁹ Main Text of Daniel Latifi v. Union of India Judgment

³⁰ AIR 2007 SC 2215

³¹ Flavia Agnes, “FAMILY LAW: VOLUME II-MARRIAGE, DIVORCE, AND MATRIMONIAL LITIGATION”, Oxford University Press, 2011

³² AIR 2010 SC 305

maintain herself, the it is the obligation of the husband to maintain her for her entire lifetime, and hence, well beyond the iddat period.

The judgment caused a lot of unrest among traditional Islamic groups, which saw this as an attack on their personal law.

Coming under pressure, the Rajeev Gandhi led government enacted the Muslim Women (Protection Of Rights On Divorce) Act, 1986. This act stated that the husband is obliged to provide fair and reasonable maintenance within the iddat period. This led to a lot of ambiguity and a sense of confusion prevailed over the interpretation of the terms.

This confusion was finally resolved by another landmark judgment, Daniel Latifi v. Union of India. In this case, the Supreme Court upheld the constitutional validity of the Act and stated that the same does not contravene Article 15, 15 and 21 of the Indian Constitution. Interpreting the terms, the Court said that the husband is obliged to provide for maintenance of the divorced woman even beyond iddat period, since the term fair and reasonable provision implied this. The term within was construed to mean that such a maintenance should be made within the iddat period. However, the obligation does not end with the Iddat period.

Therefore, the case is credited for serving dual purpose of maintaining the constitutional validity of the Act and reiterating the position which was settled in the Shah Bano Case. The position has been seconded by Court in various instances and stands unchanged.

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