



International Journal of Humanities & Social Science Studies (IJHSSS)
A Peer-Reviewed Bi-monthly Bi-lingual Research Journal
ISSN: 2349-6959 (Online), ISSN: 2349-6711 (Print)
Volume-II, Issue-III, November 2015, Page No. 161-169
Published by Scholar Publications, Karimganj, Assam, India, 788711
Website: <http://www.ijhsss.com>

Maintenance Rights in Muslim Personal Law

Tarannum Siddiqui

Sarojini Naidu Centre for Women's Studies, Jamia Millia Islamia, New Delhi, India

Abstract

In India Muslim community, as a whole form the largest minority community. But in India many Muslim women are not aware of the own rights in relation to Muslim Personal law. In this paper explain and clarify Muslim women maintenance in Muslim Personal law.

Introduction: The dictionary meaning of the word *nafah* (maintenance) is the money someone given to a person that they are legally responsible for, in order to pay for their food, clothes, and other necessary things. The implied meaning here is the money given by the husband to maintain his wife and children. The following versus of the Holy *Quran* gave rise to the rights and obligations of maintenance: "Let the men of means spend according to his means, and the men whose resources are limited, let him spend according to what God has given him."¹ "Let the women live (in *iddat*) in the same style as ye live, according to your means".² "But he shall bear the cost of their food and clothing on equitable terms".³

What is *nafah* (maintenance)? Generally, it includes food, clothing, dwelling and other necessary articles, which are necessary for the livelihood and comfort of a woman. The basis for the liability of maintenance is marriage. Under the *Shariah*, a wife cannot be compelled to cook and stitch her clothes; it is the husband who has to provide her with a servant for that work. The husband is also bound to provide her with a separate house or a separate portion of a house with a separate entrance or exit. If the wife resides at her parent's house for a valid reason, her right of maintenance is not affected. It is obligatory on the part of the husband to maintain his wife, behave with her on equitable terms and take proper care of the wife. If he has more than one wife, he should provide maintenance to all of them and treat them equitable, should not discriminate between them in providing maintenance and should not prefer one against the other.

The valid marriage, it is the liability of the husband to maintain the wife. There is no liability of maintenance in case of an irregular marriage where irregularity is due to absence of witnesses at the time of *nikah* ceremony. Where the wife refuses to live with the husband due to non-payment of prompt dower, her refusal to live with the husband or return to his house due to some valid reason e.g. his cruelty, the right of maintenance is not affected.

Maintenance during the Period of *Iddat*: *Iddat* can be of two kinds, one on the death of the husband and the other on divorce by the husband. In case of *iddat* on the death of the husband, the

¹ Al- Quran Surah, Al-Talaq, LXV: 7.

² Al- Quran Surah, Al-Talaq, LXV: 6

³ Al- Quran Surah, Al- Baqara, 11:233

wife is not entitled to maintenance unless she is pregnant at the time of death of the husband and she is entitled to maintenance till her pregnancy is over. In case of *iddat* on divorce, the wife is entitled to maintenance only till the period of *iddat*.

Fixing the Amount of Maintenance: Under the *shariah*, according to *Hanafi* school of thought, the status of the wife is taken into consideration while fixing the amount of maintenance. According to *Shafei* School, the status and capacity of the husband is the determining factor. According to other jurists, the status and capacity of both the husband wife should be taken into consideration while fixing the amount of maintenance.

Past Maintenance: According to *Hanafi* school of thought the wife cannot claim past maintenance from her husband unless there is an agreement between them or there is a decree of a Court entitling her to get maintenance from her husband, whereas according to *Shafeis*, the wife is entitled to past maintenance. This is so because according to *Hanafis*, maintenance is a gratuity while according to *Shafeis*, maintenance is a debt.

If the husband neglects or defaults continuously in providing maintenance to his wife, the wife has a right to go to the Court. The Court on being satisfied of the wife's claim shall pass an order against the husband for maintenance allowance. If the husband still neglects to pay the maintenance amount, the Court is empowered to pass an order for the husband's imprisonment for a fixed period.

An agreement, whether anti nuptial or past nuptial between the husband and wife in which the husband agrees to pay maintenance to the wife is valid under *Shariah* and enforceable in law. Whereas an agreement between the husband and wife that no maintenance shall be due on the husband or an undertaking by the wife that she would not claim maintenance allowance from the husband is void. Under *Shariah* such a contract is against public policy.

Maintenance Issues of Muslim Women in India: On the continuance of marriage it was held in a case that a husband is bound to maintain his wife so long as she is faithful to him and obeys his reasonable orders. A husband is not bound to maintain a wife who disobeys him by refusing to live with him. But what degree of disobedience will disentitle of maintenance, it is immaterial that she has the means to maintain herself while the husband has no means.

The wife loses rights to maintenance in the following circumstances:

1. She is a minor, incapable of consummation
2. She refuses free access to him at all reasonable times.
3. She is disobedient.
4. She refuses to live with him in the conjugal home or abandons the conjugal home without any reasonable ground.
5. She deserts him.

But if the husband is guilty of cruelty or keeping a concubine at home, she retains the right of maintenance.

“For divorced women maintenance should be provided on a reasonable scale.”⁴ “Thus both God make clear this signs to you, in order that ye may understand.”⁵ “Let the women (live in *iddat*) in the same style as ye live, according to your means, annoy them not, so as to

⁴ Al Quran, Surah AL- Baqara. 11:241.

⁵ Al Quran, Surah AL- Baqara. 11:242.

restrict them, and if they carry life (in their wombs) then spend (your substance) on them until they deliver their burden: and if they suckle your off springs, give them their recompense and take mutual counsel tighter according to what is just and reasonable...⁶

These verses (*ayats*) make it very clear that the Holy *Quran* imposes an obligation on Muslim husbands to provide maintenance on their divorce wives. If the divorced wife is able to maintain herself, the husband's liability to provide maintenance ceases with the expiration of the period of *Iddat*. If she is unable to maintain herself, she is entitled to take recourse to Section 125 of the Criminal Procedure Code 1973. This was the position prior to the passing of the Muslim Women (Protection of rights on Divorce) Act, 1986.

Muslim Women (Protection of rights on Divorce) Act, 1986: Section 125 Criminal Procedure Code 1973 empowers the Magistrate to order maintenance in favour of women. A "Wife" includes a divorced wife for the purpose of Section 125. Hence, any woman who has been divorced or has obtained divorce from her husband and has not remarried can seek a maintenance order against her former husband, if she is unable to maintain herself and her husband has failed to maintain her despite having sufficient means to do so. On such an application by the wife, the Magistrate can order the husband to pay a monthly allowance (maximum up to Rs. 5000). If he fails to comply with the order of the Magistrate, the Magistrate can issue a warrant for levying the amount fixed in the order. If he still continues to evade the order and the amount remains unpaid in full or part, the Magistrate can sentence him to imprisonment up to one month or till due payment is made, whichever is earlier. Under Section 127(3) the Magistrate shall also cancel the order if he has been remarried, (ii) where she was divorced by the husband and if she has received, whether before or after the date of the said order, the whole of the sum which under any customary or Personal Law applicable to the parties was payable on such divorce or (iii) where she had obtained divorce from the husband and if she had voluntarily surrendered her right of maintenance after her divorce.

The most important judgment, which changed the course of Muslim law regarding Muslim women in India, was *Mohd. Ahmad Khan vs. Shah Bano*.⁷ The Supreme Court held that a Muslim husband is liable to provide maintenance to a divorced wife who is unable to maintain herself. The Court also held that dower is payable at the time of dissolution of marriage if the wife is unable to maintain herself./ the Court further held that the fact that deferred dower (*mahr*) is payable at the time of dissolution of marriage cannot justify the conclusion that it is payable on divorce. Divorce may be a convenient or identifiable point of that at which the deferred amount is to be paid by the husband to the wife. Hence *mahr* is not the amount, which is mentioned under Section 127(3) (b). This judgment led to a large scale protest by Muslims throughout the country and it was regarded as interference into the Personal Law of the Muslims. The intense controversy led to the passing of the Muslim Women (Protection of Rights on Divorce) Act 1986.

The dictionary meaning of the word *nafah* (maintenance) is the money someone gives to a person that they are legally responsible for, in order to pay for their food, clothes, and other necessary things. The implied meaning here is the money given by the husband to maintain his wife and children. The following verse of the Holy *Quran* gave rise to the rights and obligations of maintenance: "Let the men of means spend according to their means, and the men whose resources

⁶ Supra not 2

⁷ AIR 1985, SC, 945.

are limited, let him spend according to what God has given him.”⁸ “Let the women live (in *iddat*) in the same style as ye live, according to your means”.⁹ “But he shall bear the cost of their food and clothing on equitable terms”.¹⁰

What is *nafah* (maintenance)? Generally, it includes food, clothing, dwelling and other necessary articles, which are necessary for the livelihood and comfort of a woman. The basis for the liability of maintenance is marriage. Under the *Shariah*, a wife cannot be compelled to cook and stitch her clothes; it is the husband who has to provide her with a servant for that work. The husband is also bound to provide her with a separate house or a separate portion of a house with a separate entrance or exit. If the wife resides at her parent’s house for a valid reason, her right of maintenance is not affected. It is obligatory on the part of the husband to maintain his wife, behave with her on equitable terms and take proper care of the wife. If he has more than one wife, he should provide maintenance to all of them and treat them equitable, should not discriminate between them in providing maintenance and should not prefer one against the other.

The valid marriage, it is the liability of the husband to maintain the wife. There is no liability of maintenance in case of an irregular marriage where irregularity is due to absence of witnesses at the time of *nikah* ceremony. Where the wife refuses to live with the husband due to non-payment of prompt dower, her refusal to live with the husband or return to his house due to some valid reason e.g. his cruelty, the right of maintenance is not affected.

Maintenance during the Period of *Iddat*: *Iddat* can be of two kinds, one on the death of the husband and the other on divorce by the husband. In case of *iddat* on the death of the husband, the wife is not entitled to maintenance unless she is pregnant at the time of death of the husband and she is entitled to maintenance till her pregnancy is over. In case of *iddat* on divorce, the wife is entitled to maintenance only till the period of *iddat*.

Fixing the Amount of Maintenance: Under the *shariah*, according to *Hanafi* school of thought, the status of the wife is taken into consideration while fixing the amount of maintenance. According to *Shafei* School, the status and capacity of the husband is the determining factor. According to other jurists, the status and capacity of both the husband wife should be taken into consideration while fixing the amount of maintenance.

Past Maintenance: According to *Hanafi* school of thought the wife cannot claim past maintenance from her husband unless there is an agreement between them or there is a decree of a Court entitling her to get maintenance from her husband, whereas according to *Shafeis*, the wife is entitled to past maintenance. This is so because according to *Hanafis*, maintenance is a gratuity while according to *Shafeis*, maintenance is a debt.

If the husband neglects or defaults continuously in providing maintenance to his wife, the wife has a right to go to the Court. The Court on being satisfied of the wife’s claim shall pass an order against the husband for maintenance allowance. If the husband still neglects to pay the maintenance amount, the Court is empowered to pass an order for the husband’s imprisonment for a fixed period.

An agreement, whether anti nuptial or past nuptial between the husband and wife in which the husband agrees to pay maintenance to the wife is valid under *Shariah* and enforceable in law.

⁸ Al- Quran Surah, Al-Talaq, LXV: 7.

⁹ Al- Quran Surah, Al-Talaq, LXV: 6

¹⁰ Al- Quran Surah, Al- Baqara, 11:233

Whereas an agreement between the husband and wife that no maintenance shall be due on the husband or an undertaking by the wife that she would not claim maintenance allowance from the husband is void. Under *Shariah* such a contract is against public policy.

Maintenance Issues of Muslim Women in India: On the continuance of marriage it was held in a case that a husband is bound to maintain his wife so long as she is faithful to him and obeys his reasonable orders. A husband is not bound to maintain a wife who disobeys him by refusing to live with him. But what degree of disobedience will disentitle of maintenance, it is immaterial that she has the means to maintain herself while the husband has no means.

The wife loses rights to maintenance in the following circumstances:

1. She is a minor, incapable of consummation
2. She refuses free access to him at all reasonable times.
3. She is disobedient.
4. She refuses to live with him in the conjugal home or abandons the conjugal home without any reasonable ground.
5. She deserts him.

But if the husband is guilty of cruelty or keeping a concubine at home, she retains the right of maintenance.

“For divorced women maintenance should be provided on a reasonable scale.”¹¹ “Thus both God make clear this signs to you, in order that ye may understand.”¹² “Let the women (live in *iddat*) in the same style as ye live, according to your means, annoy them not, so as to restrict them, and if they carry life (in their wombs) then spend (your substance) on them until they deliver their burden: and if they suckle your off springs, give them their recompense and take mutual counsel tighter according to what is just and reasonable...”¹³

These verses (*ayats*) make it very clear that the Holy *Quran* imposes an obligation on Muslim husbands to provide maintenance on their divorce wives. If the divorced wife is able to maintain herself, the husband’s liability to provide maintenance for ceases with the expiration of the period of *Iddat*. If she is unable to maintain herself, she is entitled to take recourse to Section 125 of the Criminal Procedure Code 1973. This was the position prior to the passing of the Muslim Women (Protection of rights on Divorce) Act, 1986.

Muslim Women (Protection of rights on Divorce) Act, 1986: Section 125 Criminal Procedure Code 1973 empowers the Magistrate to order maintenance in favour of women. A “Wife” includes a divorced wife for the purpose of Section 125. Hence, any women who has been divorced or has obtained divorced from her husband and has not remarried can seek a maintenance order against her former husband, if she is unable to maintain herself and her husband has failed to maintain her despite having sufficient means to do so. On such an application by the wife, the Magistrate can order the husband to pay a monthly allowance (maximum up to Rs. 5000). If he fails to comply with the order of the Magistrate, the Magistrate can issue a warrant for levying the amount fixed in the order. If he still continues to evade the order and the amount remains unpaid in full or part, the Magistrate can sentence him to imprisonment up to one month or till due payment is made,

¹¹ Al Quran, Surah AL- Baqara. 11:241.

¹² Al Quran, Surah AL- Baqara. 11:242.

¹³ Supra not 2

whichever is earlier. Under Section 127(3) the Magistrate shall also cancel the order has been passed gets remarried, (ii) where she was divorced by the husband and if she has received, whether before or after the date of the said order, the whole of the sum which under any customary or Personal Law applicable to the parties was payable on such divorce or (iii) where she had obtained divorced from the husband and if she had voluntarily surrendered her right of maintenance after her divorce.

The most important judgment, which changed the course of Muslim law regarding Muslim women in India, was Mohd. Ahmad Khan vs. Shah Bano.¹⁴ The Supreme Court held that a Muslim husband is liable to provide maintenance to a divorced wife who is unable to maintain herself. The Court also held that dower is unable to maintain herself./ the Court further held that the fact that deferred dower (*mahr*) is payable at the time of dissolution of marriage cannot justify the conclusion that it is payable on divorce. Divorce may be a convenient or identifiable point of that at which the deferred amount is to paid by the husband to the wife. Hence *mahr* in not the amount, which is mentioned under Section 127(3) (b). This judgment led to a large scale protests by Muslim throughout the country and it was regarded as interference into the Personal Law of the Muslims. The intense controversy led to the passing of the Muslim Women (Protection of Rights on Divorce) Act 1986.

Let us now examine the provisions of Muslim Women (Protection of Rights on Divorce)Act 1986. This is a declamatory law. The jurisdiction under the Act rests with the Criminal Courts to ensure speedy disposal of cases. Under Section 2(a) of the Act a “divorced women” means a Muslim law who was married according to Muslim Law and has been divorced by or has obtained divorce from her husband in accordance with Muslim law. Section 2(b) defines “*iddat* Period” in the case of a divorced women as(i) three menstrual courses after the date of divorce if she is subject to menstruation, (ii) three lunar months after her divorce, if she is not subject to menstruation and (iii) if she is enceinte at the time of divorce, the period between the divorce and delivery of her child or the termination of her pregnancy, whichever is earlier. Under section 2(c) a Magistrate means a Magistrate in the first class exercising jurisdiction under the Code Criminal Procedure 1973 in the area where the divorced women resides.

Section 3(i) lays down that notwithstanding anything contained in any other law for the time being in force, a divorced women 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 borne 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* 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 the marriage by fair provision and maintenance or the husband or any relatives of the husband or his friends. Under Section 3(2) where a reasonable and fair provision and maintenance or the amount of *mahr* or divorced women on her divorce, she or anyone duly authorized to a divorced women on her divorce, she or any one duly authorized by her behalf, make an application to the Magistrate for an order for payment of such provision and maintenance, *mahr* or dower, or the delivery of properties, as the case may be.

¹⁴ AIR 1985, SC, 945.

Under Section 3(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 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 filing of application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced women as he may determine fit and proper having regard to the need of the divorced women, the standard of life enjoyed by her during her marriage, and the means of her former husband and 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 women. Under Section 3(4), if any person against whom an order has been made under Section 3(3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or dower due in the manner provided for levying fine under the Code of Criminal Procedure, 1973, and may sentence such person for the whole or any amount remaining unpaid after execution of the warrant, to imprisonment for a term which may extend to one year or until payment, is made.

Under Section 4(1), if the Magistrate is satisfied that a divorced women has not remarried and is not able to maintain herself after the “*iddat* period”, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine as fit and proper. While making such order, the Magistrate shall have regard to the needs of the divorced woman the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such period as he may specify in the order. The provision says that if the divorced woman has children, the Magistrate shall order the parents of the divorced women to pay maintenance to her. The second provision says that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on a proof of such inability furnished to him, order that the share of such relatives as may appear to have the means of paying the same in such proportions as the Magistrate may think fit.

Under Section 4 (2), if the divorced women is unable to maintain herself and she has no relatives as mentioned in sub Section (1), or such relatives or any of them have not enough means to pay the maintenance ordered by the Magistrate, or the other relative have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relative under the provision to sub-Section (1), the Magistrate may, by order direct the State *Waqf* Board functioning in an area where the women resides, to pay such maintenance as determined under sub-Section (1) or to pay the shares of such of the relatives who are unable to pay.

Under— Section 5, if on the date of the first hearing of the application under sub-Section (2) of Section 3, a divorced women and her former husband declare, by affidavit or any other declaration in writing either jointly or separately that they would prefer to be governed by the provision of section 125 to 128 of the Code of Criminal Procedure, 1973 and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly. Section 6(1) provides for to make rules for carrying out the purpose of this Act. Under Section 6(2) the rules for carrying out the rules may provide for the form of affidavit and declaration to be filled under Section 5 and the procedure to be followed by the Magistrate while disposing of the application under the Act. Section 7 is transitional provision. It provide that where an application by

a divorced women under Section 125-127, Code of Criminal Procedure, 1973 is pending before a Magistrate on the commencement of this Act, shall, notwithstanding anything contained in that Code and subject to the provisions of Section 5 of the Act, be disposed of by such Magistrate in accordance with the provisions of this Act.

It was held in *Aga Mohamed Jaffar Bindaneen vs. Koolsum Beebee*¹⁵ that a Muslim widow had no right of maintenance out of her deceased husband's estate in addition to what she takes by inheritance or by will.

In *Danial Latifi vs. UOI*¹⁶ the Supreme Court held that reasonable and fair provision and maintenance under Section 3(i) (a) is not limited for the *iddat* period, it extends for the entire life of the divorced wife, until she marries. The Court further held that right to a reasonable and fair provision referred to in Section 3 is a right enforceable and fair provision referred to in section 3 is a right enforceable only against the divorced women's former husband and is in addition to what he is obliged to pay as maintenance. Reasonable and fair provision would be worked out with reference to the needs of the divorced women, the means of the husband and the standard of life enjoyed during subsistence of marriage.

Again in *Sabra Shamim vs. Maqsood Ansari*¹⁷ it was held by the Supreme Court held that under Section 3(1) (a) and Section 4 of the Muslim Women (Protection of Rights on Divorce) Act 1986, a divorced wife is entitled to maintenance not merely till *iddat* period but for her entire life until she remarries.

Maintenance under Section 4 of the Act: In *Tamilnadu Waqf Board vs. Syed Fatima Nochi*¹⁸ the Court held that it is futile for a divorced women seeking maintenance to run after relatives who are not possessed of means to offer her maintenance and fighting litigation in succession against them in order to get negative order justifying her last resort of moving against the state *Waqf* Board. She can plead and prove such relevant fact regarding the inability of her relatives to maintain her in one proceeding and direct her claim against the State *Waqf* Board in the first instance.

Anti-Nuptial Agreement for Grant of Maintenance: In *Muhammad Moinuddin vs. Jamal Fatima*¹⁹ a case the parties had entered into a pre-nuptial agreement for grant of an allowance in case of disunion or dissension between the couple. On dissension the husband divorced her and the wife claimed the allowance. The Court held that contract valid and held the divorced wife to be entitled to receive the allowance as per the contract.

In *Mydeen Beevi Ammal vs. T.N. Mydeen Rowthe*²⁰, the husband settled certain properties on his first wife for maintenance for her life (after he married for the second time without her consent). Subsequently, he divorced the first wife and fields a suit for the possession of the properties settled on her. The Court held the wife entitled to the income of the properties for her lifetime whether she was divorced or not.

¹⁵ (1897)24 IA, 196.

¹⁶ AIR 2001, SC, 3958.

¹⁷ (2004)9, SCC, 616.

¹⁸ AIR, 1995, Mad, 88.

¹⁹ (1921)ILR 43 AII 650.

²⁰ AIR, 1951 MAD 992.

Impotency of Husband: In *Siraj Mohd. Khan Jan Mohd.Khan vs. Hafizunnissa yasin Khan*²¹ the Court held that impotency of husband amounts to both mental and legal cruelty, hence is a just ground for wife's refusal to live with the husband and claim maintenance from him.

Cruelty: A wife can refuse to live with the husband on the ground of his cruelty and still claim maintenance from him. Attribution of un-chastity to a wife without justification or proof amounts to mental cruelty thereby amounting to legal cruelty for the purpose of deciding the claim of maintenance. In a case the husband leveled false and baseless allegations of un- chastity on the wife, disowned the paternity of his two children and in another case, the husband made allegations of adultery against the wife. In both the cases, the Court held that the behavior of the husband amounts to cruelty and the wife is entitled to live separately and claim maintenance.

Conclusion: The maintenance of the wife is the mandatory duty of husband in Islam law, in Islamic law is that it makes legal provision for maintenance of wives, dependent children and other relative who are unable to maintain themselves, but regardless of his minority, illness, imprisonment or any other disablement of the wealth of his wife.

²¹ AIR 1981, SC, 1972.