



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

Maintenance - In Light of Personal Laws and Shah Bano Case

S. PoornaSindhu^a

^aPresidency University, Bangalore, India

Received 08 July 2022; Accepted 29 July 2022; Published 01 August 2022

Maintenance laws in India are the result of evolution in the religious and the common law. Maintenance is the amount given to the spouse or parents or even children to maintain themselves when they don't have the capability to do the same. Though the personal laws have their provisions for maintenance, the Code of Criminal Procedure, 1973 gives a wider perspective to the issue and includes a broader solution in case of failure of a person to maintain the claimant. Through evolution since time, the issue of maintenance has taken a new face and protects the rights of women and children and enables them financially to maintain them. From many cases dealing with the matter to the Shah Bano Begum judgment, somewhere partially the personal laws are overlapped by the common code and the same was challenged by the various community people. Through all these instances, the judiciary or the other communities solely aim for the upliftment of women after divorce and to protect them against the odds in society by making them financially independent but the interference of the judiciary with the religious laws was however not appreciated by the masses. Therefore, this paper is restricted to understanding the personal law provisions on maintenance with special reference to the Shah Bano case and the aftermath of the same.

Keywords: *maintenance, personal law, marriage.*

INTRODUCTION

“Maintenance”, interchangeably used as alimony, also called spousal support is simply the financial support that wife gets as her right after the divorce from her husband. Not only after

divorce but maintaining a wife, children and parents is the all-time fundamental duty of a person when they are not able to maintain themselves and that person is earning enough to do so. The purpose of granting maintenance to any person is to grant the same standard of living and to assure some financial security to the dependent person. However, the agreement of maintenance will cease to apply after the remarriage of the spouse to another man or after the death of the person. There are grounds on which the court rely on before granting the right to maintenance to the spouse/any person and are as follows-

- Maintenance should be the only source of income for the person seeking it. It means that if the person is having any other source of income enough to maintain oneself or is not solely dependent on the income or amount that they receive as maintenance. This is one of the essentials to get the maintenance.
- It is mandatory that the standard of living of both the parties before separation has to be considered by the court. Also, it is important to maintain the same standards as the spouse post-separation.
- The expenses required to maintain the wife and children must be calculated accordingly.
- The educational background, skills, and capabilities of the spouse who seeks maintenance will be considered. If the spouse is capable enough to make earnings and maintain herself with her skills, then granting maintenance is not necessary.

Maintenance is of two types- temporary and permanent. Chapter IX CrPC, from sections 125 to 128¹ deals with the concept of maintenance. Maintenance, as said, is not only for the spouse but also granted to the children and parents who are not able to maintain themselves. However, it is not any sort of punishment imposed on a person but mere security for the victim to serve justice and to maintain their living. Personal laws are differing from each other and for each religion. In Muslim law, maintenance is granted to the wife only in the period of Iddat. In Hindu law, maintenance is the ancillary relief from the husband. It can be claimed even without seeking a divorce from the husband and by residing separately as per Hindu personal law. Through this paper, we will further discuss the personal laws and common law

¹ Code of Criminal Procedure, 1973, ss 125-128

(CrPC) on maintenance with a critical analysis of the Shah Bano case & other judicial pronouncements.

ANALYSIS

Maintenance laws vary in every religion and also in every country. The implications are different. One of the similar points to note in all the laws is that it is available to not only wives but also to children and parents who are not able to maintain themselves. However, it depends on the status of claimants and the person who has to maintain it. This was held in the case of *Abdulmunaf v Salima*² where the court upheld the view that the wife will not be granted maintenance when she is capable to maintain herself but refuse to do it. Despite, the said fact, the fact of consideration is that the person who's paying the maintenance must also be capable to maintain the claimant. If the person denies or refuses to maintain even by having sufficient means, then the claimant has every right to claim maintenance under section 125 of CrPC and the same was held in the case of *Pandurang Bhaurao Dabhade v Baburao Bhaurao Dabhade*.³

On a similar note, if the person even by means to maintain refrains himself from such work just to avoid the payment of maintenance, he will not be released from such obligation or liability as in the case of *Yashpal Singh Thakur v Smt. Anjana Rajput*⁴ where the court held that the defendant has to pay maintenance as he has such means to do so even if he is not working. The main motive behind having the concept of maintenance is just to protect women or anyone above in need or to provide assistance to the persons who are not able to maintain themselves financially and not to punish them. Once the complaint is filed under the personal law or Cr.P.C, the court must decide on the eligibility to receive maintenance and demand the same from the accused but punishment cannot be awarded unless the orders of the court are not obeyed.

There are various personal laws to deal with the topic but the Muslim and Hindu personal laws are mostly in question before the law and evolved with time. In Hindu law, maintenance means a mere ancillary relief that the claimant can receive. It can be awarded to a woman in a

² *Abdul Munaf v Salima* (1979) CriLJ 172

³ *Pandurang Bhaurao Dabhade v Baburao Bhaurao Dabhad* (1980) CriLJ 256

⁴ *Yashpal Singh Thakur v Smt. Anjana Rajput* (2001), AIR 67

subsisting marriage or even after the separation. In case the husband is willing to pay the maintenance only on the condition that his wife has to reside with him in a conjugal domicile and the wife is reluctant to do the same, the court may consider the reasons given by the woman and decide on the matter. This right is also interpreted from the Hindu Adoptions and Maintenance Act, 1956 (hereinafter HAM Act, 1956).

Section 125⁵ of Cr.P.C and Hindu Marriage Act, 1955 (section 24)⁶ deals with interim maintenance which can either be filed by a husband or the wife during the proceedings. This can be done only when the applicant is completely dependent and have no source of income to maintain and the limit on the amount is nowhere mentioned in the acts as it is up to the discretion of the court decision. In the case of *Dr. Kulbhushan v Raj Kumari and Anr*⁷, it was held that the amount will be decided at the discretion of the court considering the facts and background of such a case. it was also held that the maintenance should approximately be around 25% of the net-worth income of the husband. Maintenance in this sense generally includes the essentials like food, housing, education, clothing, health, and also marriage expenses in the case of an unmarried daughter as stated in section 3(b)(i) of the HAM Act, 1956.

Section 20 of the HAM Act, 1956 also binds the parents (both mother and father) equally to maintain their children (legitimate or illegitimate), most preferably in their minority. In the case of an unmarried daughter, as mentioned already, the parent's obligation to maintain will extend till their daughter gets married and expenses of the same have to be taken care of by the parents only. However, this does not free them exclusively from such obligation as in the case where the married daughter who is not able to maintain herself even after the marriage can claim her right from the parents under section 125 Cr.P.C.HAM Act, 1956 (S.20)⁸ also states that the independent children are equally bound to maintain both the parents (mother & father) with the equal quantum of maintenance. This is the first act to put forth any such provision in India and this obligation on children is binding on both sons and daughters.

⁵ Code of Criminal Procedure, 1973, s 125

⁶ Hindu Adoptions and Maintenance Act, 1956, s 24

⁷ *Dr. Kulbhushan v Raj Kumari and Anr.*, (1971), AIR 234

⁸ Hindu Adoptions and Maintenance Act, 1956, s 20

In Muslim Law, the maintenance rights are more or less similar to the other personal laws with a few differences. In Muslim Law, a wife who obeys all the reasonable orders of the husband and who is faithful to her husband, children, and parents who are unable to maintain themselves and other persons in the prohibited relationships as well are eligible to claim maintenance. Cohabitation is the other considering factor in this personal law that alters the maintenance rights. If the wife refuses to cohabit with her husband with unreasonable cause, this can be a ground to refuse to maintain her, and otherwise, there exists an obligation despite her means to maintain herself. If the husband refuses to maintain his wife on any unreasonable grounds, she may sue her husband under section 125 Cr.P.C. Similarly, if the wife refuses to maintain the conjugal domicile without proper grounds, the husband may file for the restitution of conjugal rights. Despite these facts in Muslim law, the other factors which will make a wife ineligible to claim maintenance are when the wife disobeys her husband and, is incapable of consummation or refuse to cohabit, never visit the matrimonial home, is unfaithful, remarries another man or is elopes with another man when she's already in other marital relation, etc. After a divorce in Muslim law, the wife will be entitled to maintenance till the Iddat period is over and not after as the right ceases thereafter.

Even though Muslim law does not recognize maintaining an illegitimate child by the father, under section 488⁹ of the code of criminal procedure, the father of an illegitimate child will however be bound to maintain the child even if the mother of such child refuses to submit the custody of the child to such father. However, this section of Cr.P.C will apply to anyone only when they reach out to the courts expressly asking for it. In Christian and Parsi law, the claim of maintenance can be initiated by civil or by criminal proceedings. But the religion will be a matter of concern only in such civil proceedings and not in the criminal proceedings. The Christian personal law follows the Indian Divorce Act, 1869 which is similar to the Hindu Marriage Act. The difference between the acts is that the former does not provide the right of interim maintenance to the husband, unlike the latter which provides such a right to both parties. The appreciating point in the Indian Divorce act is that it allows maintenance to the claimant forever after the divorce when such party is incapable to maintain itself. The Parsi

⁹ Code of Criminal Procedure, 1973, s 488

and Christian laws on maintenance are quite similar where the Christians follow the Indian Divorce Act, the Parsis are bound to the Parsi Marriage and Divorce Act, 1936.

MAINTENANCE IN CODE OF CRIMINAL PROCEDURE

The provisions dealing with maintenance in the code of criminal procedure are sections 125, 126, 127, and 128¹⁰. Though there are personal laws dealing with it, Cr.P.C deals with it commonly. Provisions of Cr.P.C. are attracted when there is an express or implied denial or refrain to maintain the claimant. The personal laws on the issue and the common law do not clash with each other but go hand in hand. When the party is already granted the maintenance order, the courts will refer to the code to decide on the quantum of the amount to be as maintenance. As mentioned, maintenance can only be granted when the claiming party is unable or incapable of maintaining itself and the burden of proof that they are deprived of the means to maintain themselves is upon the claimant. Section 125 acts as a quick remedy against the refusal to maintain and applies to every citizen equally despite religion and provisions of personal laws.

Section 125 of the code states that-

Order for maintenance of wives, children, and parents.

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

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

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

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

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father, or mother, at such monthly rate not exceeding five

¹⁰ Code of Criminal Procedure, 1973, ss 125, 126, 127, and 128

*hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.*¹¹

The provision also states that if the wife claims maintenance by living in adultery or when the divorce happened on mutual consent, then the court will not grant the same and if it is proven after the judgment, it will get altered or cancelled by the competent court.

REFERENCE TO SHAH BANO CASE

Before this landmark judgment by the Supreme Court, maintenance to Muslim women was granted only till the period of Iddat. After the Iddat period, the women were denied their right of maintenance under personal laws which hampered their rights. This view was held to be violative and the court had taken the opposite view in the case of *Mohammad Ahmed Khan v Shah Bano Begum*¹².

In the Shah Bano case, the appellant is Mr. Ahmed Khan, husband of Shah Bano and an advocate by profession. The couple got married in the year 1932 and they had five children. In the year 1975, the appellant disowned his wife Shah Bano and drove her out of their house. In 1978, the respondent filed a suit in the lower court under section 125 of the Code of Criminal Procedure claiming maintenance from her husband of Rs. 500/- per month. Thereafter, in the same year, her husband divorced her by irrevocable triple talaq. The lower court having the jurisdiction granted Rs. 25/- to the respondent as maintenance. Aggrieved by the decision of the court, she appealed to the High Court which granted up to Rs. 175.20/- as her maintenance amount per month. The appellant filed a Special Leave Petition in the Supreme Court under Article 136¹³ of the Indian constitution. The contentions made by the appellant were that in the Muslim Law, maintenance ceases to exist after the Iddat period. The party stated that he maintained her for two years which already extended from the Iddat period, and if he

¹¹ Code of Criminal Procedure, 1973, s 125

¹² *Mohammad Ahmed Khan v Shah Bano Begum* (1985), AIR 945

¹³ Constitution of India, 1950, art.136

continues to maintain the woman after such divorce it will be considered as “Haram” in Muslim personal laws.

The Supreme Court after looking into the matter addressed the issues which read as-

1. What is the extent of applicability of Section 125 of CrPC to Muslim women?
2. Is there an obligation on the husband to maintain his divorced wife beyond the Iddat period under the Muslim Personal Law?
3. Does the Muslim Personal Law contain any provision talking about the sum payable to the wife on divorce?

Deciding on the first issue, the constitutional bench of the Supreme Court held that in this case, the common law is section 125 of CrPC conflicts with the Muslim Personal Laws. So, the question before the court of law is that in such case of conflict between the two, whether the former prevails over the latter. The court opined and concluded on this issue stating that even if there is a conflict between the provisions of personal law and common law, the Muslim women will be entitled to maintenance under the common law that is under section 125 of CrPC and not the Muslim law in this matter.

Deciding on the second issue, the court considered that under the Muslim law, the right of maintenance of a woman from her husband ceases immediately after the expiry of the Iddat period as per the Shariat law. The court after referring to the Quran contended that it is not stated in Quran that the maintenance should be limited to the Iddat period but it merely imposes the obligation on the husband to maintain his divorced wife. After rejecting the other contentions made by the appellants as the court felt that they are “distinctions without a difference”, the court concluded that the right to maintenance extends beyond the Iddat period and the women can claim the right under section 125 CrPC. However, the court held that this right beyond Iddat applies to the women who are not able to maintain themselves and have no sufficient means to do so, and for the women who can maintain themselves, the right extends only till the Iddat period.

Deciding on the third issue, the court held that there is no such amount to be paid to the divorced wife “on divorce”. “Mahr” is different from maintenance. Mahr is the amount

payable by the husband to his wife as consideration of marriage. There are types within it, one of which states that the Mahr will be paid at the time of divorce at the discretion of parties or the contract made at the time of marriage. Therefore, even if the amount is paid at once on divorce, it will be a Mahr amount as decided on marriage, if any, and not the maintenance amount unless specified. Therefore, the Muslim women are entitled to their rights under section 125 CrPC and the Mahr amount, if taken at the time of divorce, will not result in any alteration of the maintenance amount as per section 127¹⁴ of CrPC.

AFTER THE SHAH BANO BEGUM CASE

After the landmark view given by the constitutional bench, there were a lot of controversies that resulted in protests and riots in the country against the judgment. As a result of these agitations, the Rajiv Gandhi government then introduced the *Muslim Women (Protection of Rights on Divorce) Act, 1986* which again limited the right of maintenance to women till the Iddat period as earlier. This legislation is the opposite view of the Shah Bano judgment. The reasoning held by the implementing government was that by pronouncing such judgment in the landmark case, the judiciary was leaning towards the idea of a Uniform Civil Code in the country. Therefore, the government opined that the judiciary should not intrude on the personal laws of the religion unless there is a demand for the same from within the religion.

After the Shah Bano judgment and the enactment of the new legislation, there was a case that is *Daniel Latifi v Union of India*¹⁵ which challenged the constitutional validity of the act. In the provision of the act, it is stated that the woman will be eligible to claim reasonable and fair maintenance only till the period of Iddat, and even after that if she's unable or incapable to maintain herself, then she has to claim it from her family members and in their failure to maintain, she can claim it from the WakfBoard of Muslims. The Solicitor General, the All-India Muslim Personal Law Board, and the National Commission for Women supported this creative interpretation pronounced in this case by the Hon'ble bench of the Supreme Court. They stated that section 4 of the act clears the minds of confusion and avoids all the vagrancy

¹⁴ Code of Criminal Procedure, 1973, s 127

¹⁵ *Daniel Latifi v Union of India* (2001) 7 SCC 740

and ambiguity in the prior judgment and opined that the provision is good enough to guarantee justice to the aggrieved Muslim women.

The petitioners in the above case however contended that section 125 of CrPC is a common procedural law that must be implied equally to every citizen of India. Denial to apply the same to Muslim women is a clear violation of their fundamental rights guaranteed under the constitution of India. It was contended that the act is not only violating equality of law but also violating equal protection before the law and is also against Article 21¹⁶ of the constitution. They stated that it was against the basic feature of the constitution that is secularism as the act is unconstitutional, violative of articles 14 and 21, and is also considered to be Un-Islamic. Despite all these arguments, the court upheld its prior interpretation and the constitutionality of the act. The court held that the provision did not violate the rights in any way as it stated that the husband will still be liable to make a fair and reasonable provision of maintenance on divorce till the Iddat period. Therefore, it was held that the act was not violating any right of the women under articles 14 and 21¹⁷ of the Indian constitution and is neither against the basic structure of the constitution. Hence, it is valid and constitutional and applies to all Muslim women equally.

CONCLUSION

Maintenance is the sum to assist the person who is unable to maintain themselves. Along with all the personal laws, Section 125 of CrPC deals with it commonly and equally to all the citizens of the country as it is a procedural law and not civil. Shah Bano Judgment, though criticized by the masses, upheld the rights of the aggrieved Muslim women and guaranteed them the rights by considering them to be equals to the other women of other religions. However, this was opposed by the Muslim Women (Protection of Rights on Divorce) Act which was challenged and upheld in the case of Daniel Latifi case. Though the mass of people was against the prior judgment, the court intended to bring equal rights to the Muslim women and bring them at par with the other religious women in the matter of maintenance and also protect their rights under Articles 14 and 21 of the Indian constitution. This idea of the court

¹⁶ Constitution of India, 1950, art.21

¹⁷ Constitution of India, 1950, art.14 and art.21

was mistaken by the people who felt that the judiciary is in favour of implementing UCC in the country and it was assumed to be one of such steps. Nevertheless, it is most important to protect individual rights as guaranteed by the constitution. Above all, the government should focus on assuring equality for all citizens and also equal protection of them before the law.