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Dissolution of Marriage of Muslim Wife in Indian Law

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Abstract

Divorce signifies the dissolution of the marriage tie. All separations effected for causes directly originating in the husband are termed Talaq, and separations effected otherwise by the decree of the court are known as Farqat. Talaq in its literal sense means “the taking off of any tie or restraint”. The right of divorce is conceded in Muslim law, but the law prohibits its exercise by threats of divine displeasure, “it was”, says Baillie, originally forbidden and is still disapproved, but has been permitted for the avoidance of greater evils. Divorce among the ancient Arabs was easy and of frequent occurrence. In fact, this tendency has even persisted to some extent, in Islamic law. It was regarded by prophet to be the most hateful before the Almighty God of all permitted things; for it prevented conjugal happiness and interfered with the proper bringing up of children. Another attempt was made in 1939 with the Dissolution of Muslim Marriage Act. It laid down nine grounds on which a Muslim woman could seek divorce in the court. Islamic law then allowed a man to divorce his wife at will but a wife did not have the right either to give divorce or seek one. The only way out for them was to convert to another religion to annul her marriage. Alarmed at this trend, the Ulemas coaxed the British government to pass this Act. The next step was the Muslim Women (Protection on Divorce) Act, which was enacted only in 1986 after the Shah Bano controversy. The laws, passed in 1939 and 1986, were not the result of a concerted effort towards reforms.

Keywords: Divorce, dissolution of marriage, orthodox, Irretrievable Breakdown

Introduction

Among almost all the nations of antiquity, divorce was regarded as a natural corollary or marital rights. Romans, Hebrews, Israelis etc. all had divorce in one or the other form. Even though the provision of divorce was recognized in all religions Islam perhaps the first religion in the world which has expressly recognized the termination of marriage by way of divorce In England divorce was introduced only 100 years back. In India among Hindus, it was allowed only by Hindu marriage act, 1955. Before the passing of the act divorce was not recognized by Hindu Law. Divorce among the ancient Arabs was easy and of frequent occurrence. In fact, this tendency has even persisted to some extent, in Islamic law. It was regarded by prophet to be the most hateful before the Almighty God of all permitted things; for it prevented conjugal happiness and interfered with the proper bringing up of children. Another attempt was made in 1939 with the Dissolution of Muslim Marriage Act. It laid down nine grounds on which a Muslim woman could seek divorce in the court. Islamic law then allowed a man to divorce his wife at will but a wife did not have the right either to give divorce or seek one. The only way out for them was to convert to another religion to annul her marriage. Alarmed at this trend, the Ulemas coaxed the British government to pass this Act. The next step was the Muslim Women (Protection on Divorce) Act, which was enacted only in 1986 after the Shah Bano controversy. The laws, passed in 1939 and 1986, were not the result of a concerted effort towards reforms. They were more a result of reactions by the conservatives who saw reforms in personal law as an infringement on their right to religion and a threat to their male identity. Divorce signifies the dissolution of the marriage tie. All separations effected for causes directly originating in the husband are termed Talaq, and separations effected otherwise by the decree of the court are known as Farqat. Talaq in its literal sense means “the taking off of any tie or restraint”. The right of divorce is conceded in Muslim law, but the law prohibits its exercise by threats of divine displeasure, “it was”, says

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Baillie, originally forbidden and is still disapproved, but has been permitted for the avoidance of greater evils.

Dissolution of Muslim Marriage Act, 1939

Firm union of the husband and wife is a necessary condition for a happy family life. Islam therefore, insists upon the subsistence of a marriage and prescribes that breach of marriage contract should be avoided. Initially no marriage is contracted to be dissolved but in unfortunate circumstances the matrimonial contract is broken. One of the ways of such dissolution is by way of divorce. Under Muslim law the divorce may take place by the act of the parties themselves or by a decree of the court of law. However in whatever manner the divorce is effected it has not been regarded as a rule of life. In Islam, divorce is considered as an exception to the status of marriage. The Prophet declared that among the things which have been permitted by law, divorce is the worst. Divorce being an evil, it must be avoided as far as possible. But in some occasions this evil becomes a necessity, because when it is impossible for the parties to the marriage to carry on their union with mutual affection and love then it is better to allow them to get separated than compel them to live together in an atmosphere of hatred and disaffection. The basis of divorce in Islamic law is the inability of the spouses to live together rather than any specific cause (or guilt of a party) on account of which the parties cannot live together. A divorce may be either by the act of the husband or by the act of the wife. There are several modes of divorce under the Muslim law, which will be discussed hereafter. Qazi Mohammad Ahmad Kazmi had introduced a bill in the Legislature regarding the issue on 17th April 1936. It however became law on 17th March 1939 and thus stood the Dissolution of Muslim Marriages Act 1939.

Section 2 of the Act runs thereunder:

A woman married under Muslim law shall be entitled to obtain a decree for divorce for the dissolution of her marriage on any one or more of the following grounds, namely:-

- A. **That the whereabouts of the husband have not been known for a period of four years:** if the husband is missing for a period of four years the wife may file a petition for the dissolution of her marriage. The husband is deemed to be missing if the wife or any such person, who is expected to have knowledge of the husband, is unable to locate the husband. Section 3 provides that where a wife files petition for divorce under this ground, she is required to give the names and addresses of all such persons who would have been the legal heirs of the husband upon his death. The court issues notices to all such persons appear before it and to state if they have any knowledge about the missing husband. If nobody knows then the court passes a decree to this effect which becomes effective only after the expiry of six months. If before the expiry, the husband reappears, the court shall set aside the decree and the marriage is not dissolved.
- B. **That the husband has neglected or has failed to provide for her maintenance for a period of two years:** it is a legal obligation of every husband to maintain his wife, and if he fails to do so, the wife may seek divorce on this ground. A husband may not maintain his wife either because he neglects her or because he has no means to provide her maintenance. In both the cases the result would be the same. The husband's obligation to maintain his wife is subject to wife's own performance of matrimonial obligations. Therefore, if the wife lives separately without any reasonable excuse, she is not entitled to get a judicial divorce on the ground of husband's failure to maintain her because her own conduct disentitles her from maintenance under Muslim law.
- C. **That the husband has been sentenced to imprisonment for a period of seven years or upwards:** the wife's right of judicial divorce on this ground begins from the date on which the sentence becomes final. Therefore, the decree can be passed in her favor only after the expiry of the date for appeal by the husband or after the appeal by the husband has been dismissed by the final court.
- D. **That the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years:** the Act does define 'marital obligations of the husband'. There are several marital obligations of the husband under Muslim law. But for the purpose of this clause husband's failure to perform only those conjugal obligations may be taken into accounts which are not included in any of the clauses of Section 2 of this Act.
- E. **That the husband was impotent at the time of the marriage and continues to be so:** for getting a decree of divorce on this ground, the wife has to prove that the husband was impotent at the time of the marriage and continues to be impotent till the filing of the suit. Before passing a decree of divorce on this ground, the court is bound to give to the husband one year to improve his potency provided he makes an application for it. If the husband does not give such application, the court shall pass the decree without delay. In Gul Mohd. Khan v. Hasina the wife filed a suit for dissolution of marriage on the ground of impotency. The husband made an application before the court seeking an order for proving his potency. The court allowed him to prove his potency.
- F. **If the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease:** the husband's insanity must be for two or more years immediately preceding the presentation of the suit. But this act does not specify that the unsoundness of mind must be curable or incurable. Leprosy may be white or black or cause the skin to wither away. It may be curable or incurable. Venereal disease is a disease of the sex organs. The Act provides that this disease must be of incurable nature. It may be of any duration. Moreover even if this disease has been infected to the husband by the wife herself, she is entitled to get divorce on this ground.
- G. **That the husband treats her with cruelty, that is to say-**
 - (a) Habitually assaults her or makes her life miserable

by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or (b) Associates with women of ill-repute or leads an infamous life, or (c) Attempts to force her to lead an immoral life, or (d) Disposes of her property or prevents her exercising her legal rights over it, or (e) Obstructs her in the observance of her religious profession or practice, or (f) If he has more than one wives, does not treat her equitably in accordance with the injunctions of the Holy Quran.

Judicial Pronouncements

India's Supreme Court is considering petitions that challenge Muslim laws governing marriage on the grounds that they discriminate against women, a charged issue that risks angering the country's orthodox Muslims. A panel headed by the chief justice that is hearing the petitions directed the government this week to release an official 2015 report that looks at the impact of some of India's religion-specific laws on women's rights and recommends legal reform. Among the petitioners calling for change is Shayara Bano, a Muslim woman whose husband, after 13 years of marriage, divorced her by triple talaq, a practice that allows Muslim men in India to leave their wives unilaterally and often instantaneously by saying "talaq," meaning divorce, three times. Other similar petitions were put together by the court and are being heard at the same time. The next hearing in the case is expected in May. The Indian constitution protects gender equality, but on issues of marriage, divorce and inheritance, different religious communities are governed by their own so-called personal laws. Whether a person is subject to those laws is usually determined by their religion at birth.

In *Syed Ziauddin v. Parvez Sultana*, Parvez Sultana was a science graduate and she wanted to take admission in a college for medical studies. She needed money for her studies. Syed Ziauddin promised to give her money provided she married him. She did. Later she filed for divorce for non-fulfillment of promise on the part of the husband. The court granted her divorce on the ground of cruelty. Thus we see the court's attitude of attributing a wider meaning to the expression cruelty. In *Zubaida Begum v. Sardar Shah*, a case from Lahore High Court, the husband sold the ornaments of the wife with her consent. It was submitted that the husband's conduct does not amount to cruelty. In *Aboobacker v. Mamukoya*, the husband used to compel his wife to put on a sari and see pictures in cinema. The wife refused to do so because according to her beliefs this was against the Islamic way of life. She sought divorce on the ground of mental cruelty. The Kerala High Court held that the conduct of the husband cannot be regarded as cruelty because mere departure from the standards of suffocating orthodoxy does not constitute un-Islamic behavior. In *Itwari v. Asghari*, the Allahabad High Court observed that Indian Law does not recognize various types of cruelty such as 'Muslim cruelty', 'Hindu cruelty' and so on, and that the test of cruelty is based on universal and humanitarian standards; that is to say, conduct of the husband which would cause such bodily or mental pain as to endanger the wife's safety or health.

Irretrievable Breakdown

Divorce on the basis of irretrievable breakdown of marriage

has come into existence in Muslim Law through the judicial interpretation of certain provisions of Muslim law. In 1945 in *Umar Bibi v. Md. Din*, it was argued that the wife hated her husband so much that she could not possibly live with him and there was total incompatibility of temperaments. On these grounds the court refused to grant a decree of divorce. But twenty five years later in *Neorbibi v. PirBux*, again an attempt was made to grant divorce on the ground of irretrievable breakdown of marriage. This time the court granted the divorce. Thus in Muslim law of modern India, there are two breakdown grounds for divorce: (a) non-payment of maintenance by the husband even if the failure has resulted due to the conduct of the wife, (b) where there is total irreconcilability between the spouses. The Gauhati High Court in *Musst. Rebun Nessa v. Musst. Bibi Ayesha & others*,¹¹ has observed that the correct law of Talaq as ordained by the Holy Quran is that (i) Talaq must be for a reasonable cause; (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one from the wife's family and the other from the husband. If an attempt fails, talaq may be effected. In *Zaffar Hussain v. Ummat-ur-Rahman*, the wife of the plaintiff alleged that her husband had stated before several persons that she had illicit intercourse with her brother and imputed fornication to her. Among other grounds, a plea was taken that the law of Lian had no place in Anglo-Mohammadan law and must be considered obsolete. It was held that Qazi of the Muslim law was replaced by the court. It was held that a Muslim wife is entitled to bring a suit for divorce against her husband and obtain a decree on the ground that the latter falsely charged her with adultery. In *Noor Jahan Bibi v. Kazim Ali*, one Noor Jahan filed a suit against her husband Kazim Ali who charged her that she was of bad character and she was enamoured of one Asghar Ali and committed adultery with him. The court held that, the doctrine of Lian has not become obsolete under the Muslim law and therefore, a Muslim wife can bring a suit for divorce against her husband on the ground that, her husband has charged her with adultery falsely, by virtue of Section 2 (ix) of the Dissolution of Muslim Marriages Act, 1939.

Shayara Bano v. Union of India and others

In this case has brought enthusiasm in everyone's mind as it has challenged the concept of 'instantaneous triple Talaq' and not the concept of 'triple Talaq'. The PIL was filed by Ms Shayara Bano. This petition has been greatly been supported and believed to have given a chance to those who have suffered. The PIL was initiated by Ms Shayara Bano, a resident of Uttarakhand, who was constantly abused by her husband and eventually divorced by way of Triple Talaq at one go. Her difficulty was heard by the SC of India. India is a secular country and its citizens deserve to be happy, content and should always have the right to equality and justice. Hon'ble Supreme Court has chosen to allow the rights of those who truly deserve it, is commendable and a positive step towards the injustice that women are subjected to. The bench of the Supreme Court has declared the judgement that the triple talaq has been held unconstitutional and violative of various articles in the Indian Constitution.

Muslim Women (Protection of Rights of Marriage) Bill

The Lok Sabha is set to take up the Muslim Women

(Protection of Rights of Marriage) Bill to enact a law that will outlaw instant triple talaq or talaq-e-biddat. The Bill, it is learnt, has a provision for a three-year jail term and fine for any Muslim man who divorces his wife by uttering talaq three times in quick succession. The Proposed Bill, that is expected to be tabled in Lok Sabha by Law Minister Ravi Shankar Prasad, also deals with subsistence allowance for Muslim women and custody of minor children. The proposed law, sources said, will make triple talaq a cognizable and non-bailable offence.

Conclusion

After passing of the Dissolution of Muslim Marriage Act, 1939, the position of Muslim women is improved. This is the most progressive enactments passed by the legislature and after *Shayara Bano v. Union of India* and others the central government wants to pass proposed bill on Muslim Women (Protection of Rights of Marriage) Bill which will make triple talaq a cognizable and non-bailable offence and made Triple talaq unconstitutional. Now we hope that she can release from an unhappy marital tie on various grounds recognized by Islam and also by legislation, through judicial process. Thus, with these changes, the position of Muslim women is improved. These are welcome changes which are desirable in the present day society.

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