

Examining the Nature of the Requirement to Pay Post-Divorce Maintenance to a Muslim Divorcee in Bangladesh

Muhammad Azizur Rahman*

Abstract

Islam as the complete code of life, for the purpose of upholding the dignity of women and for ensuring their economic emancipation and empowerment, has granted in their favour the right to maintenance. Maintenance of a wife during the subsistence of the marriage is a legal obligation of the husband. There is no controversy that the husband is also bound to maintain the wife during the period of iddat, where the marriage is dissolved. There is a considerable debate, whether this obligation extends beyond the period of iddat. For the period beyond iddat, Islamic law provides for Mata'a which is regarded as a consolatory gift and a discretionary matter in Bangladesh. Mata'a is a parting gift to divorced women as a comfort and solace for the trauma they suffer from divorce. Depending on the facts and circumstances of a particular case, it may be ten times of maintenance. The philosophy behind it is to remove despair and grief caused to a woman by separation. The basic philosophy and objective behind Mata'a, nature of it, existing scenario of this right in our society, the causes that hinder realization of this right and certain other relevant issues will be focused in this Article.

Introduction

Maintenance, under Islamic law generally refers to the right of the wife to be provided at the husband's expense with all necessities of life including food, clothing and accommodation. Islamic law strictly requires a husband to maintain his wife during the subsistence of marriage and the period of iddat as well where the marital tie gets dissolved either on account of divorce or on account of death. In Bangladesh, there is no State mechanism to attenuate the plights of a divorcee who doesn't get remarried. Absence of such a welfare mechanism leads the divorcees in many cases to get involved in immoral and anti-social activities in order to earn their livelihood. For addressing the plights of a divorcee, Islamic law has provided for mata'a or post divorce maintenance. On account of literal and strict interpretation of the provisions relating to mata'a and absence of judicial activism in this respect, relief provided for in the form of mata'a by the Quranic verses has failed to procure expected outcome.

Conceptualizing Maintenance

In Arabic language, maintenance is called 'nafaqa'. The expression 'nafaqa' has been derived from the root 'nafaq' which means to spend. In short, 'nafaqa' means all those things which are necessary to the support of life (Khatoon, 2004).

To Justice Jamal Nasir, maintenance is the lawful right of the wife to be provided at the husband's expense with food, clothing, accommodation and customarily extends to other necessities of life

*Lecturer, Department of Law, ASA University Bangladesh

(Nasir, 1992). In view of Dr. Tanzil ur Rahman, maintenance is the consideration for the control which a husband exercises over movements of his wife (Rahman, 1978).

Generally, under Islamic law, the obligation to maintain another arises on account of the grounds like marriage, relationship and property. A husband becomes bound to maintain his wife not merely on the ground of marital relationship but on account of the wife's surrender of her person to her husband (Rahman, 1978). In order to exercise the right to maintenance, a wife is required to be physically fit for matrimonial intercourse and to be obedient to her husband. Besides, she must allow free access to herself at all reasonable time (Hidayatullah and Hidayatullah, 1990).

Maintenance of a wife during the subsistence of the marriage and the period of iddat, as has already been mentioned, is a legal obligation of the husband. There is a considerable controversy whether the maintenance extends beyond the period of iddat (Monsoor, 1998). In Bangladesh, it has been established that, the wife is not entitled to nafaqa or maintenance beyond the period of iddat. However, the Holy Quran, apart from providing maintenance during iddat period, speaks for endowing the divorced wife with mata'a which is idiomatically used to denote post divorce maintenance.

Conceptualizing Mata'a

Derivative Meaning

The expression mata'a has been originated from the Arabic root 'matun' which connotes pleasure, satisfaction, enjoyment and happiness as opposed to depression, gloominess, dejection, anguish and grief (Sheikh, 2012).

Idiomatically, it refers to the post-divorce financial support made by a divorcer to divorcee, for the purpose of strengthening the divorcee's sense of confidence, providing her with reasonable sustenance as well as helping her maintain social standing by removing the effects of divorce negatively affecting her (Islam & Nahar, 2011).

Status of Post-divorce Maintenance in Bangladesh: Revisiting Hefzur Rahman's Case

The Supreme Court of Bangladesh, in the famous case of Hefzur Rahman (Md) vs Shamsun Nahar Begum and another addressed the question of post divorce maintenance.

In this case, the High Court Division addressed to a suo motu legal query as to whether a wife could have claimed maintenance beyond iddat period. In explaining verse 241 of chapter II of the Holy Quran, the High Court Division held, a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of iddat for an indefinite period, that is to say, till she loses the status of a divorcee by remarrying another person.

The Appellate Division overruled the judgment of the High Court Division and held, a husband is bound to maintain his wife during the continuation of marriage and for the period of iddat where the marriage is dissolved and in Muslim law there is no such obligation on the husband to maintain his divorced wife after the iddat period. By explaining verse no. 241 of chapter II of the Holy Quran, the Court held, the wife may be provided with Mata'a for the period beyond iddat. In explaining the nature of Mata'a, the Court held, it is a consolatory gift left to the pleasure and means of the husband and not enforceable judicially.

Regarding the Distinction between ‘Nafaqa’ and Mata’a

A.T.M. Afzal C.J. held, ‘whatever be the meaning of mata’a it is certainly not maintenance as can be claimed within the meaning of maintenance under the Family Courts Ordinance’. As regards nature of mata’a he also held, mata’a has been translated as consolatory gift or compensation or indemnity. It is thus basically different from regular maintenance of the divorcee.

Justice Mustafa Kamal held, ‘nor mata’a means maintenance....if this meaning is given it will be counter to Ayats 233, 236 and 237 of Sura Al Baqarah and Ayats 6 and 7 of Sura At-Talaq. It is plainly inhuman, unjust, inequitable and unfair to impose on man the burden of maintaining a divorced woman which either he has not even touched or from whom he receives no consideration after divorce. Marriage in Islam is a contract both religious and social in nature and after the contract ends, the only consequential benefits are those described earlier and a forced and labored interpretation will lead to discrepancies and contradiction with the aforesaid Suras and Ayats.’

Regarding the Nature of the Requirement to Pay Mata’a

In this case, Justice Mustafa Kamal also held, the Prophet (S), the Sahabis of the Prophet (S), the Tabeyis, the Imams of all the four schools of thought in Islam, and the recognized commentators from the 3rd century Hijri upto the 15th century Hijri have never deviated from the following propositions with regard to mata’a:

- (1) Mata’a is a parting gift to divorced women as a comfort and solace for the trauma they suffer from divorce.
- (2) As it is a presentation denoting godliness, courtesy, equity, handsomeness and reasonableness, no limit has been fixed in its payment. It has been left to the pleasure and means of the husband.
- (3) Since mata’a is a presentation, the future life of the wife or her post divorce financial position has not been made a subject matter of consideration while giving mata’a.
- (4) Mata’a is a temporary one-off gift and is not a matter to be given repeatedly or at intervals.
- (5) Mata’a has never been judicially enforceable because it is a gift. A valid gift, once made, is judicially enforceable, but no one can compel another to make a gift through a process of law.

Assessing the Nature of Post-divorce Maintenance under Islamic Law

Post-divorce Maintenance under the Quranic Provisions

As regards Mata’a, verse no. 241 of chapter II of the Holy Quran provides, for divorced women, maintenance should be provided on a reasonable scale. This is a duty on the righteous (Pickthall, 1930). On the other hand, verse no. 240 of chapter II lays down, those of you who die and leave widows should bequeath for their widows a year’s maintenance and residence.

In verse no. 240 a stipulated period of one year is evident but, verse no. 241 does not reveal any time limit and merely provides that reasonable maintenance should be provided for the divorced women. By this verse, the Holy Quran clearly extends the principle of the husband’s responsibility for the maintenance of the wife after his death to the situation where he has divorced her (Rehman, 1998). Thus, the above mentioned verse makes it clear that, the Quran

indicates generally that something should be given to the divorced women (Rehman, 1998). However, it seems that, the Quran has left it for the believers themselves to decide the quantum of maintenance (Rehman, 1998).

Post-divorce Maintenance in light of the Practices of the Companions of the Prophet

The companions of the Prophet (PBUH) favoured maintenance for a divorced woman. To Ibn Abbas, a famous companion of the Prophet (PBUH), Allah commands the husband to provide fair provisions for the wife in case of divorcing her before sexual intercourse (Islam & Nahar, 2011). In his view, this order of Allah imposes a bounden duty upon the husband for the very reason that it serves as a substitute for dower (Islam & Nahar, 2011). He believed, determination of the amount of mata'a is dependent upon time, society and the financial capacity of the husband. Abdur Rahman ibn Awf, a renowned companion of the Prophet (PBUH) paid to his divorced wife a slave girl, an essential and precious gift during that period (Islam & Nahar, 2011).

Views Held by Different Schools of Islamic Jurisprudence

Hanafi School

According to Imam Abu Hanifa, a divorcee can be given mata'a only in the following two cases-

- (i) Where a woman entered into wedlock without determination of dower and divorced before consummation; and
- (ii) Where dower has been fixed but matrimonial alliance was severed before the consummation of marriage (Islam & Nahar, 2011).

Maliki School

To Imam Malik Ibn Anas, mata'a is recommended for all divorcees except those with fixed dowers and whose marital tie was annulled before the consummation (Islam & Nahar, 2011).

Shafii School

Imam Al-Shafii holds that a divorcee who is not divorced on account of her own fault is entitled to get mata'a. In his view, there is no restriction to pay mata'a to the wife who is divorced before consummation (Islam & Nahar, 2011).

Hanbali School

As regards the nature of the requirement to pay mata'a, the scholars belonging to this school hold the same view as the scholars belonging to the Hanafi and Shafii Schools (Islam & Nahar, 2011). In light of the provisions and the views mentioned above, it is a cogent assertion that Islamic law indicates generally that something should be given to the divorced women (Islam & Nahar, 2011). But, the Appellate Division of the Supreme Court of Bangladesh in Hefzur Rahman's case did not take any attempt to establish such a relief through judicial activism.

Reforms introduced in different countries

In order to ensure this sort of relief granted under Sharia law, certain Muslim countries have brought about reforms in their statutory laws. For example, in Jordan, Article 134 of Jordanian Family Law of the Personal Status; in Egypt, Article 18 of the law no. 25 of 1929 as amended by the law no.100 of 1985; Article 165 of Kuwaiti Code of Personal Status; in Yemen, Section 56 of the Islamic Family Law (Federal Territories) Act, 1984 provide almost similar provisions to the effect that, if the husband exercises his right of talaq arbitrarily or unjustly, the wife will be entitled, in addition to her maintenance, to a compensation (Islam & Nahar, 2011).

Article 52 of the Family Code, 1894 of Algeria, Article 117 of Syrian law of Personal Status (Qanun al – Ahwal al – Shakhsiyya), 1975 and Article 71 of Yemeni Law of Personal Status empower judges to decide whether the right of divorce has been exercised arbitrarily or not, and makes women entitled to compensation, in case, it is exercised arbitrarily. For instance, Article 71 of Yemeni Law of Personal Status lays down, if the husband divorces his wife and it is established before the judge that the husband has divorced her whimsically without any justified cause and that this will cause her distress the judge may rule in her favour considering the husband's financial condition that he pay her compensation not exceeding the amount of one year's maintenance in addition to the maintenance for the waiting period (Islam & Nahar, 2011).

In Indonesia, under the Kompilasi Hukum Islam di Indonesia (KHI), payment of mata'a has been made compulsory, where the wife is divorced before consummation and no amount of dower has been fixed and if the divorce takes place at the will of the husband. In other cases payment of mata'a falls within the category of sunnah (Islam & Nahar, 2011).

In examining the features of these modern provisions, Chief Justice ATM Afzal in the case of Hefzur Rahman (Md) vs Shamshunnahar Begum and another held, 'The common feature which is to be found in the relevant provisions of all these countries is that Mata'a has been made a subject of legislation of the respective countries and invariably it has been subjected to certain conditions, namely, where a divorce has been made arbitrarily, without a just cause etc. And in no country there is found to be any provision of granting Mata'a for a lifetime or till remarriage of the divorcee generally'.

In Malaysia, section 58 of the Islamic Family Law (Federal Territories) Act, 1984 empowers both the spouses to claim division of the matrimonial assets on the death of one of them or in case of divorce. On the basis of contributions of the spouses during their conjugal life, such a claim of division of matrimonial assets is made. This mechanism serves as a great relief to both the spouses (Islam & Nahar, 2011).

In India, in light of the decision upheld in the famous case of Danial Latifi and another vs. Union of India, a sum is paid to a divorcee during the period of iddat in addition to the amount of maintenance by considering her future life as per section 3(1) (a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (Islam & Nahar, 2011).

Impediments Faced in Bangladesh and Recommended Steps

In Bangladesh, on account of the factors like ignorance, patriarchal structure of the society, conservative approach of the judiciary, lack of speedy, effective and efficient legal procedure, lack of personal security of the women in society post divorce maintenance or Mata'a can't be realized in practice. In order to ensure proper realization of post divorce maintenance in Bangladesh, the following steps should be taken-

- (i) Awareness as regards this right should be increased. Different communication media can play a vital role in this regard;
- (ii) Judiciary should have a positive and gender sensitive attitude considering the miseries of a divorcee in our society;
- (iii) Social attitude towards the rights of women is to be changed;
- (iv) Personal security of women is to be ensured; and
- (v) Justice delivery system should be made less expensive and speedy. Legal aid should be ensured.

Concluding Remarks

Islamic law, for the purpose of attenuating the trauma suffered by a woman on account of divorce, has provided for Mata'a. Depending on the facts and circumstances of a particular case, Mata'a may be ten times of usual maintenance. But, in our legal system, payment of Mata'a has been made discretionary and has been left to the pleasure of the husband. Due to patriarchal structure of the society, conservative attitude of the society, lack of personal security of women and conservative approach of the judiciary, rate of realization of this right in practice is very poor. The Appellate Division of the Supreme Court in Hefzur Rahman case could have said that every righteous person should give Mata'a. By raising awareness, changing social attitude towards the rights of women and by ensuring their personal security this right can be made fruitful and effective.

Reference

- Khatoon, Halima (2004) '*An Analysis of the Law of Nafaqa: Principle and Practice in Bangladesh*', the Islamic University Studies, Vol. 5, No. 2, p. 47.
- Nasir, J. Jamal, (1992) '*The Status of Women under Islamic Law*', London, p. 59.
- Rahman, Dr. Tanzil ur, (1978) '*A Code of Muslim Personal Law*', Hamdard Academy, p. 257.
- Hidayatullah, M. and Hidayatullah, Arshad, (1990) '*Mulla's Principles of Mahomedan Law*', LexisNexis, p. 150.
- The Quran II: 228 and II: 241.
- Monsoor, Dr. Taslima (1998) '*Maintenance to Muslim Wives: The legal Connotations*', The Dhaka University Studies, Vol. 9, No. 1, p. 63.
- Sheikh, Mohammad Adam (2012) '*Post divorce Financial Support from the Islamic Perspective*', International Institute of Islamic Thought, p. 173.
- Islam, Mohammad Azharul and Nahar, Azizun (2011) '*Rethinking the Plights of Divorcee under Islamic Family Law*', the Dhaka University Law Journal Vol. 22, No. 2, p. 101.
- 51 DLR (AD) 173.
- Pickthall, M., (1930) '*The Meaning of the Glorious Quran*', London, p. 56.
- Rehman, Fayyazur, (1998) '*Post-divorce Maintenance for Muslim Women in Pakistan and India*', Bangladesh Journal of law, p. 32.
- Section 158(a) and (b) of the Kompilasi Islam di Indonesia.
- Section 159(a) and (b) of the Kompilasi Islam di Indonesia.
- (2001) 7 SCC 740.