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**“Dharma is to protect the Needy”**

**Article on**

**Maintenance Rights of a Divorced Wife in India**

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## Abstract

Maintenance is one of the repercussions of divorce and the prerogative of divorced women. It gives them financial stability and a right to live creditably after the divorce. The respective courts evaluate the amount of the maintenance after contemplating the varied facts, evidence and grounds of each case. The foundation of maintenance as a concept comes from the social justice system of a civilized society. In the case of *Badshah v. Urmila Badshah Godse and Anr*<sup>1</sup> The Supreme Court of India held that the aim of the provision of maintenance is to empower the impoverished and bring social justice, equality and dignity to that individual. This law reflects the morals of the society and regulates relationships between people. In the case of *Sanjay Damodar Kale vs Kalyani Sanjay Kale And Anr*<sup>2</sup> Bombay High Court held that maintenance can be statutorily claimed under both personal laws and general laws, and no agreement can take that right away in contrast. The claim of the maintenance can be awarded during the course of the proceedings which is known as maintenance *pendente lite* and at the end of the proceedings which is known as *permanent maintenance*. Maintenance can be claimed under personal and general laws by wives, children and parents. Some personal laws even allow husbands who are unable to maintain themselves to claim maintenance from their wives. In this article we will discuss all the provisions under personal and general laws which entitle a wife to claim maintenance and also examine the differences between them.

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<sup>1</sup> *Badshah v. Urmila Badshah Godse and Anr* (2014) 1 SCC 188.

<sup>2</sup> *The Bombay High Court has held in Mr. Sanjay Damodar Kale v. Ms. Kalyani Sanjay Kale and Anr that "the statutory right of the wife of maintenance cannot be permitted to be bartered away or infringed by setting up an agreement not to claim maintenance. Such a clause in the agreement would be void under section 23 of the Indian Contract Act, being opposed to public policy", Judgment dated 26<sup>th</sup> May 2020 in Criminal Revision Application No. 164 of 2019*

## Introduction

Maintenance can be legally defined as a financial aid provided by one spouse to another following a legal separation or divorce. This financial aid helps the divorced wife to maintain herself, her children, her property and in a few cases to represent herself in the lawsuit. Hindu's, Muslim's, Christian's and Parsi's have their respective personal laws which contain different provisions for the maintenance but at the same time Section 125 of the Criminal procedure code, 1973<sup>3</sup> provides a general provision which can be invoked by any person irrespective of their religion. In the case of *Chaturbhuj v Sita Bai*<sup>4</sup> the Supreme Court held that the sole purpose of this provision is to prevent homelessness by obliging those who should support and assist those who are unable to do so and uphold a moral claim to do so.

Unlike the fact that it is secular in nature, this provision is gender specific in one aspect. Maintenance under this law is a right for a wife and not for a husband. In the case of *Savitaben Somabhai Bhatiya v. State of Gujarat*<sup>5</sup> the Supreme Court Interpreted the word "Wife" under Section 125(1) of CrPC as a legally wedded wife but the same was overruled in its recent judgments of *D. Velusamy v. D. Patchaiammal*<sup>6</sup> and *Chanmuniya v. Virendra Kumar Singh Kushwaha*<sup>7</sup> where the court expressly said that if a woman is in a marriage like relationship, though she will not be considered as a legally wedded wife but will have the right to claim maintenance under the provisions of Protection of Women from Domestic Violence Act, 2005.

When the term "legally wedded" holds so much prominence then what happens to the second wife under the religions which do not allow polygamous relationships?

### Maintenance under the Hindu personal laws

Hindu Marriage Act, 1955 and the Hindu Adoption and Maintenance Act, 1956 are the two acts which govern the personal maintenance laws of Hindu women in our country. According to

<sup>3</sup> Criminal procedure code (1973), Section 125.

<sup>4</sup> Chaturbhuj vs Sita Bai(2008) 2 SCC 316.

<sup>5</sup> *Savitaben Somabhai Bhatiya v. State of Gujarat* (2005) 3 SCC 636.

<sup>6</sup> *D. Velusamy v. D. Patchaiammal* (2010) 10 SCC 469.

<sup>7</sup> *Chanmuniya v. Virendra Kumar Singh Kushwaha*(2011) 1 SCC 141.

Section 18 of the Hindu Adoption and Maintenance Act, 1956 a wife has the right to maintenance from her husband. It is a gender specific law and does not give rights to a divorced wife. The husband is obliged to maintain his wife even if she is not living with him for any reason which is justified under this particular Section.

Whereas, when we talk about the Hindu Marriage Act, 1955, Section 25 is a different arrangement. Maintenance under this section can be claimed by both husband and wife. Hence, the provisions of this act are not gender specific.

In the case of *Kanchan v. Kamlendra*<sup>8</sup> it was concluded that the entitlement of maintenance for a husband is only when he can prove his physical or mental incapability to earn his independent living but in the case of *Manokaran v. Devaki*<sup>9</sup> It was held that the wife can claim maintenance anytime during the course of proceedings proving she has insufficient independent income whereas a husband has to prove his incapability to earn his income to seek maintenance. It was also seen in the case of *Chitra v. Dhruba*<sup>10</sup> that the amount of maintenance must be fixed and does not only provide the minimum existence but also the same level of comfort as the maintenance provider.

Also, the court held in the case of *Ramesh Chandra Rampratapji Daga v. Rameshwari Ramesh Chandra Daga*<sup>11</sup> that the court has the right to award maintenance under section 9-13 of the Hindu Marriage Act, 1955 at the time of passing of any decree which results in the breach of marriage.

### **Status of the second wife**

Hindu Marriage Act, 1955 rules out second marriage as void. Section 5(1) of the act lays down the rules of marriage to be a monogamous relationship between the two. Also, Section 17 of the act with reference to Section 494 and 495 of the Indian Penal Code, 1860 makes bigamy a punishable offence.

<sup>8</sup> *Kanchan v. Kamlendra* AIR 1992 Bom 493.

<sup>9</sup> *Manokaran v. Devaki* AIR 2003 Mad 212.

<sup>10</sup> *Chitra v. Dhruba* AIR 1988 Cal 98.

<sup>11</sup> *Ramesh Chandra Rampratapji Daga v. Rameshwari Ramesh Chandra Daga* AIR 2005 SC 422.

As it was held in the case of *Bhauraao Shankar Lokhande & anr v. State of Maharashtra & anr*<sup>12</sup>, that for the provisions of IPC to call the marriage punishable under bigamy, the marriage should be validly performed but when we talk about the maintenance, the solemnization of marriage or validly performed marriage is of no importance. Importance of a “legally-wedded” wife has been explained.

So, the question about the competency of the second wife to receive maintenance comes into the picture.

In the landmark decision of *Badshah v. Sou. Urmila Badshah Godse & anr*<sup>13</sup>, it was held that the second wife has the right to claim maintenance under Section 125 of CrPC. The court decided that even if a couple is living together for a long time without a solemnized marriage, the woman has the right to claim her maintenance rights. The second wife is also entitled to claim maintenance if she has been lied to about the status of the man and was unaware during the marriage that the man has a living spouse.

In the case of *Mallika & anr v. P kulandi*<sup>14</sup>, it was observed that misrepresentation of the death of the first wife will give the second wife entitlement to maintenance. In the case of *Rajesh Bai v. Shantabai*<sup>15</sup> The court declared the marriage of the woman void on the subsistence of her previous marriage but also told her to claim her maintenance under the Hindu Adoption and Maintenance Act, 1956.

Hence, these judgments make it oblivious of the fact the second wife can claim maintenance regardless of the fact of her legal status to the marriage. The proof of marriage is not as strictly required in the proceedings of Section 125, CrPC as it is necessary during the trial of offence of Section 494 of the Indian Penal Code, 1860. Providing communal justice has been fulfilled through these decisions and contemplation of these provisions of the Act.

<sup>12</sup> *Bhauraao Shankar Lokhande & anr v. State of Maharashtra & anr* 1965 AIR 1564.

<sup>13</sup> *Badshah v. Sou. Urmila Badshah Godse & anr* Crim. Misc. Petition No. 19530/2013 on 18 Oct. 2013.

<sup>14</sup> *Mallika & anr v. P kulandi* 2000 CriLJ 142.

<sup>15</sup> *Rajesh Bai v. Shantabai* AIR 1982 Bom 231.

## Comparison with CrPC

When we talk about the differentiation between the provisions of maintenance under Hindu personal laws and CrPC both are very different from each other. In Hindu Marriage Act, 1955 both husband and wife have the right to claim maintenance, on the other hand when we talk about CrPC only the wife has the entitlement to claim maintenance. Under the provisions of Hindu Marriage Act, 1955, the wife has to just prove that she's incompetent to maintain herself due to insufficient independent income whereas under the provisions of CrPC she has to prove that her husband is either neglecting to maintain her or refusing to maintain her completely.

In the case of *Shambhu Nath Pathak v. Kanti Devi*<sup>16</sup>, it was established that no women can take advantage of the laws by seeking maintenance under both the laws. She has to claim her right only under one of these laws.

## Maintenance under the Muslim personal law

Muslim personal law says that the wife has the right to maintenance from her husband if he divorced her during the period of Iddat. Maintenance has been defined under Hedaya as “Things which are necessary such as food, lodging and clothes and may be confined solely to food.” Fatwa-i-Alamgiri has defined “Maintenance that comprehends food, raiment and lodging as a common parlance which is limited to the first.”

So, in Muslim Personal laws, the husband is only obliged to maintain his wife and not a divorced wife. After divorce, he just has to look after her until the Iddat period and is only accountable to cover the expense of her food under the provisions of maintenance.

In a leading case of *Bai Tahira v. Ali Hussain*<sup>17</sup> It was decided that the dower amount is equivalent to the sum payable under Section 123(3)(b) of the CrPC, so any woman who has already received this amount cannot ask for maintenance under section 125 of CrPC. In the case of *Fazlunbi v. K. Khader Vali*<sup>18</sup> The court decided that only if the amount or Meher is found sufficient in the eyes of the law, the husband will be released from the liability to make any more payments.

<sup>16</sup> *Shambhu Nath Pathak v. Kanti Devi* AIR 2014 Pat 147.

<sup>17</sup> *Bai Tahira v. Ali Hussain* AIR 1979 SC 362.

<sup>18</sup> *Fazlunbi v. K. Khader Vali* AIR 1980 SC 1730.

In the landmark judgment of *Mohammed Ahmed Khan v. Shah Bano Begum*<sup>19</sup>, it was concluded that the Meher is not equivalent to maintenance. Meher is not an obligation and does not come under the provision of Section 127(3)(b) as it is a mere token of respect given to the wife whereas, a maintenance is the right of a divorced wife. Hence, in 1986 *Muslim Women (Protection of Rights on divorce) Act* was passed where reasonable and just provisions were enacted to ensure the payment of maintenance to the divorced wife within the Iddat period.

In the case of *Danial Latifi v. Union of India*<sup>20</sup> The petition was filed to challenge the constitutional validity and legality of the Act and was held constitutionally valid. The Act makes the husband liable to pay the maintenance within the Iddat period and the amount of maintenance must be sufficient enough to suffice her whole life. In the case of *Abdul Latif Mondal v. Anuwara Khatun*<sup>21</sup> it was observed that because section 125 CrPC is a speedier method to provide maintenance to aggrieved wife so Muslim women can reach the court under this provision also.

### **Comparison with CrPC**

There was a huge discussion on the rights of maintenance of a divorced Muslim wife. As there are no provisions for a divorced wife under Muslim personal laws, CrPC entitles a Muslim wife to seek maintenance under Section 125. The most controversial issue of whether dower amount is equivalent to the maintenance amount has been settled in the various landmark judgments.

According to the Section 5 of The Muslim Women (protection of rights on divorce) Act, 1986 it gives a right to the Muslim women to choose whether she wants to claim maintenance under secular laws of CrPC or under the Muslim Personal Laws.

The provisions of CrPC are considered more suitable alternatives as they not only provide maintenance to a married wife but also to a divorced wife. Under the maintenance provisions of CrPC the reimbursement sum is far more just and fairer than the personal laws where the payment of Mehr is considered satisfactory to the law. Under CrPC the amount of maintenance is decided

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<sup>19</sup> *Mohammed Ahmed Khan v. Shah Bano Begum* AIR 1985 SC 945.

<sup>20</sup> *Danial Latifi v. Union of India* AIR 2001 SC 3958.

<sup>21</sup> *Abdul Latif Mondal v. Anuwara Khatun* (2002) 1 CLJ 186.

keeping in mind to maintain the wife for her entire life whereas under personal laws the amount is awarded to maintain the wife until the Iddat period.

### **Maintenance under the Christian and Parsi Personal Laws and the Special marriage Act, 1954**

Section 40 of the Parsi Marriage and Divorce Act, 1936 is an absolute transcript of Section 25 of Hindu Marriage Act, 1955 where the husband as well as wives can claim their right to maintenance.

According to the Section 37 of the Indian Divorce Act, only where there are cases relating to judicial separation or dissolution of marriage the court allow the wife to seek maintenance and resist vice versa. Section 38 of the Indian divorce Act and Section 41 of the Parsi Marriage and Divorce Act are replicas and stipulate that the sum of alimony can be paid to anyone amongst the wife herself or her trustees.

Under the Special Marriage Act, 1954 the Provisions of maintenance are gender specific in nature. Section 37 of the Act says that only the wife can claim maintenance.

### **Comparison with CrPC**

The main difference between the Provisions of CrPC and the provisions of Parsi Marriage and Divorce act is about the specification on gender neutrality when it comes to maintenance rights. Under CrPC laws the husband cannot claim maintenance but under Parsi personal laws, a husband also has the right to claim maintenance. Oblivious of the fact that CrPC is secular and extends to all castes and religions, Indian Divorce Act, 1869 is only for Christians and Special Marriage Act, 1954 deals with inter-religious weddings.

### **Grounds for refusal of Maintenance**

1. *Adulterous Relationship of the wife:* If it is revealed that the wife is having a relationship outside her marriage with another man, she loses her right to any interim allowance and even the right to seek expenses occurring out of the proceedings.
2. *Refusal to live with her husband:* If the wife refuses to live with her husband without any sufficient reasons then the court has the right to dismiss her plea to seek maintenance.

3. *Mutual consent to live separately*: If the couple has mutually decided to live separately then the wife has no right to seek maintenance.

4. *Earning wife*: If the wife is able to earn her living and maintain herself, she loses the right to seek maintenance under the law.

In the landmark case of *Bhagwan v. Kamla Devi*<sup>22</sup> the court observed that the wife should be able to live a dignified life in comparison to her family and should not wait to destitute herself before applying for the maintenance.

### **Conclusion**

We have concluded that there are numerous dissimilarities between the secular law and the personal laws. If we consider Hindu personal laws with secular laws, Section 125 CrPC is a better recourse as it not only gives status to a divorced wife unlike personal laws but it is also a speedier way out for the trial.

In cases of Muslim personal laws, women should definitely approach the court under provisions of CrPC. Unlike Muslim personal laws they provide a reasonable amount of compensation recognizes the status of divorced Muslim women and also provides lifetime maintenance whereas the Muslim personal law only favors maintenance until Iddat period.

Thus, we can conclude after numerous discussions about the personal laws and secular law, that Provisions of the secular law are more efficient, just, economical and speedy to be opted by any divorced woman who wants to exercise her right to maintenance.

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<sup>22</sup> *Bhagwan v. Kamla Devi* AIR 1975 SC 83