



INABILITY OF THE HUSBAND AS GROUND OF DISSOLUTION OF MUSLIM MARRIAGE

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1. INTRODUCTION¹

Marriage is an important aspect of human life. It gets the sorrow, uneasiness and unpleasant things changed into happiness. It may be said that to get easiness and pleasure it is a must. Quran says² -

**“He created for you
Mates from among yourselves
That you may dwell in
Tranquility with them,
And he has put love
And mercy between your (hearts);
Verily in that are signs
For those who know”**

Thus, the creator, in order to keep the person in tranquility and love, the institution of marriage has introduced. That is why Allah has guided the men in the following verse.

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¹ I have written several papers on the grounds of dissolution of Muslim Marriage in which the introductory part and grounds of dissolution are common.

² Sura (Chapter denoted as S) 30 : Ayat (Verse or sentence denoted as A) 21



“On the contrary live with them

On a footing of kindness and equality”³

Abu Bakar Jasas Razi has, while commenting the above verse, said “Don’t talk with them in rough manner, do not ignore them in the home affairs⁴”.

Thus, talking in good manner, showing the love and affection so that they may feel happy, is necessary, as Allah has revealed in the above-mentioned verse. Allah further guides⁵

“They are your garments

And ye are their garments”

Meaning there by that like garments one is the need of the other at every time and not for temporary period or only sexual passion.

Since man is free in his acts, he can do the good work as well as bad work. Sometimes it happens that a man keeps his wife in complete misery. She is subjected to the excess of her husband. She has nothing to do except tolerating. But sometimes it becomes intolerable for her. In that extreme circumstances woman has right to get this pious tie broken. If a husband is feeling aggrieved, he can use the right of divorce. Where woman is aggrieved, she can get the marriage dissolved. But women are also cautioned in the use of their rights. Prophet (PBUH) has said⁶ –

“Every woman who ask her husband to divorce her without cause, the smell of paradise is forbidden to her.”

But when she is feeling that the continuance of tie will lead her in a life which is unfavourable for her in this world as well as hereafter she can use her right to reach the Qazi

³ Holy Quran S 4:A 19

⁴ Jasas 'Ahkamul Quran' –Vol . II p. 109

⁵ Holy Quran S 2 :A 187

⁶ Fatwa Qazi Khan Vol. I p. 123



to get the marriage dissolved. Before using the right, a woman is guided to choose the other solutions. Allah commands⁷-

“If a wife fear

Cruelty or desertion

On her husband’s part

There is no blame on them

If they arrange

An amicable settlement

Between themselves;

And such settlement is best”

And further if they are unable to reach on any amicable solution, they can appoint the arbitrators.

“If ye fear a breach between them twain,

Appoint (two) arbiters

One from his family,

And one other from hers

If they wish for peace

Allah will cause

There is reconciliation

⁷ Holy Quran S 4 : A 128



For Allah hath full knowledge

And is acquainted

With all things”⁸.

Not only women but also men are guided to use the right of divorce in extreme circumstances. Prophet (PBUH) has said –

“The most detestable among all permitted things in the sight of Allah is divorce”⁹

Dare Qutni reports that Prophet (PBUH) has said to Muadh (Raz) –

“Nothing has been created by Allah on the earth which is more detestable than divorce”¹⁰

But when it is the extreme need and the parties, instead of getting satisfaction from each other passing the life in jealousy and hatred and the family becomes the open scene of the hell, in such circumstances this detestable thing becomes a boon.

2. GROUNDS OF DISSOLUTION

The Hanafi jurists describe twelve¹¹ grounds of dissolution of marital tie but in India there are more grounds than that which are based on primary sources, other schools and legislations i.e.

- 1) Migration – when a woman comes in Islamic territory after embracing Islam immigrating from non-Muslim state while her husband remains in that state (non-Muslim state).
- 2) Improper marriage;
- 3) Marriage in contravention of status or Inequality of the husband (Kufu);
- 4) Dower if not in accordance with status;
- 5) Musahirat;
- 6) Acceptance of Islam by wife (barring the husband);
- 7) Acceptance of Islam by husband (barring the wife);
- 8) Fosterage (if the wife has fed her husband during childhood);

⁸ Id S 4 : A 35

⁹ “Ibne Umar says that the thing which is lawful, but disliked by Allah is divorce.” Abu Daud Vol. I p. 123

¹⁰ Abdul Samad Rahmani “Kitabul Fashkh waltafriq” (Patna: Imarate Sharia, 1400 AH) 2nd ed. p. 35citing Dare Qutni

¹¹ Id pp 37-38



- 9) Option of slavery (Khayare Ataq);
- 10) Option of puberty (Khayare Balugh);
- 11) If one of the parties becomes non-Muslim;
- 12) Relation of master and slave;
- 13) Untraceability of the husband;
- 14) Inability to maintain the wife;
- 15) Neglect of the husband;
- 16) Impotence of the husband;
- 17) Insanity of the husband;
- 18) Virulent or Venereal disease of the husband;
- 19) Cruelty of the Husband;
- 20) Enmity between the spouses.¹²

Amongst these I shall discuss inability of the husband as ground of dissolution.

3. DISSOLUTION ON ACCOUNT OF INABILITY OF HUSBAND TO MAINTAIN HIS WIFE

The different schools have the different opinion regarding the husband's inability to maintain the wife as ground of dissolution of marriage. Those who support the dissolution inspire from the verse of the Holy Qur'an. The Hadis of Dare Qutni also corroborates the above verse that dissolution will be made. The views of Caliph Umar (Raz), Caliph Ali (Raz), Abu Huraira (Raz), Ibnul Musayyib (Rah) and Caliph Umar bin Abdul Aziz (Rah) are also in consonance with the above views.

The other group relies upon the verse of Surah Talaq where Allah has revealed— Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what he has given him After a difficulty, Allah will soon grant relief¹³. They quote the above verse in their defense against dissolution of marriage.

3.1. HANAFI VIEW

The Hanafischool says that a Qazi shall not dissolve the marriage between the couple merely because of husband's incapability to provide maintenance. The wife shall arrange for maintenance either from her own property or by borrowing in the name of her husband till her husband has easier time.

¹² Dr Badre Alam Khan, 'ADR for Muslim Personal Law' (Jaipur:UBH, 2018) ISBN 978-81-8198-952-4//

Dr Badre Alam Khan, 'Economic Rights of Women' (Delhi:APD, 1999) ISBN 81-7435-173-6 p 86

¹³ The Holy Quran S 65 : A 7



If the husband is incapable of providing maintenance to his wife no dissolution can be effected between them though the incapacity may arise due to poverty. In support of their contention they rely on the Qur'anic verse.¹⁴ The second argument of is that amongst the Companions of the Prophet (SAW) there were some who were in affluence and some who were in poverty but there is not a single instance during the period of the Prophet (SAW) where dissolution was effected due to poverty or non-providing of maintenance.

Where the husband is unable to maintain the wife, she will not be separated from him on any ground i.e., lodging, fooding or clothing. The Qazi will decide the quantum of maintenance and will make an order that she should take money from anybody as a debt saying him that when the husband will be having the means the debt will be returned¹⁵ It is submitted that it may be a good law in the time of Caliphs but it is not possible now a days. Considering the present time situation, the later Hanafis were deciding the matters through the Shafeyee Qazi. They also issued the religious decree that where the Qazi is Mujtahid he can dissolve the marriage in the above case.

3.2. MALIKI VIEW

Imam Malik(Rah) is of the view that in these situations she will be separated, and the marriage will be dissolved. Umar Bin Abdul Aziz (Rah) was approached in the similar matter who held that one month and maximum two months time will be given to the husband and if he fails to provide the maintenance, the marriage will be dissolved. Sayeed Ibnul Musayib (Rah) says that there will be dissolution of marriage in this situation. However, he accepts that where the woman is provided maintenance even substandard thing she will not be freed. But where she is denied, the marriage she will be dissolved.The Explanation of Balughul Maram also corroborates this view quoting the practice of Caliph Umar(Raz) and Abu Hurairah(Raz)¹⁶.

3.3. SHAFEEYEE VIEW

Nehayatul Muhtaj,¹⁷ a famous book on Shafeyee School, contains that where the husband is unable to maintain, the wife will have right to get the marriage dissolved. Not only this but where the maintenance is being given by the husband's ascendants, the wife is not bound to accept the same. She may approach to the Qazi for dissolution. But for this the institution of Qazi will be via media otherwise this ground can't be applied. Only Qazi can make an order of dissolution. The

¹⁴Id S 65: A7

¹⁵ Samad Rehmani 'Tafrique' p. 56.

¹⁶ibid

¹⁷ibid



husband will be called, and three days will be given to him to provide the maintenance. If he fails to provide within stipulated time she will be separated, and the marriage will be dissolved.¹⁸

The view of Hanbalis is similar to Shafeyees and Malikis.

4.MODERN LEGISLATION¹⁹

Laws in connection with effecting dissolution on the ground of inability to provide maintenance to wife have been enacted in several Muslim countries. In Iraq a wife has been given the right of presenting²⁰ a petition for dissolution to Qazi in the event of husband's not-providing maintenance to her without any legal cause. The Qazi shall order the husband to provide maintenance to his wife within a period of sixty days. Under the current Egyptian law, if a husband is unable to provide maintenance to his wife within a period of one month, the Qazi shall pass order for dissolution, provided the husband apparently has no property from which the wife may meet her maintenance expenditure. Under Section 91 of Huququl Act in the event of non-providing maintenance for a year, the Qazi shall pass order for dissolution. In Syria²¹ a wife has been given the right of dissolution in the event of the husband being available and his avoiding to provide maintenance without any cause to her. If, however, he satisfies the Qazi of his inability to do so, the Qazi shall grant him three months' time during which it shall be necessary for him to provide the maintenance. In case of his default, dissolution shall be effected. It has been explained under the said law that such dissolution shall be in the category of a revocable divorce. If the husband can arrange for the maintenance during her Iddat and provide maintenance to her, he shall have the right of having recourse to his wife. In Sudan²² if a husband has no known property out of which a maintenance order can be executed, his wife can demand dissolution of her marriage, which shall be granted forthwith. But if the husband is destitute, the Qazi a period of respite shall first give him. If a husband, who has no known property from which a maintenance order can be executed, goes away leaving his wife without maintenance, she may demand dissolution of her marriage. In such a case, if the husband can be contacted, he shall be asked by the Qazi to arrange for her maintenance within a specified period; if he fails to do so without any excuse, the Qazi may dissolve the marriage. On the other hand, if he cannot be contacted or has disappeared completely or is of unknown where about (Mafqudul khabar), the marriage may be dissolved without delay. The Qazi's order under these provisions dissolving a marriage shall effect a revocable divorce. The

¹⁸ Huququz Zauzain SAA Maududi (Delhi: M.M. Islami, 1989) p. 112

¹⁹ Tahir Mahmood, 'Statute of Personal Law in Islamic Countries' (NDelhi:India and IslamicResearch Council1995) 2nd ed.

²⁰ Under section 45 of the Qantum al-Ahwal al-Shakhsiya of Iraq

²¹ Under section 110. Of the Qanun-al-Ahwal al-Shakhsiyah of Syria

²² Under Circular No. 17 of 1916, articles 1 to 9 of Sudan



husband can revoke it during the period of Iddat if he is prepared to provide maintenance. Under the law of Morocco²³, for want of maintenance it has been provided that the wife may demand from the Qazi, the dissolution of marriage when her husband is present but unable to maintain her. In such cases, where there is no known property and the husband, who is not destitute, persists in not maintaining his wife, dissolution of marriage shall be granted forthwith. If the husband establishes that he is unable to provide maintenance to the wife, the Qazi shall give him a period of respite not exceeding three months, and after the expiry of that period, if the husband still cannot provide maintenance, he shall dissolve the marriage. It has been further provided that dissolution of marriage granted under this article shall constitute a divorce revocable by the husband during the period of Iddat if he expresses his willingness for, and is capable of, providing maintenance to the wife. The Iranian Law, dealing with the wife's right to maintenance, provides that if an order of the Qazi directing the husband to provide maintenance to the wife, issued on her application, cannot be executed, she may demand dissolution of marriage by the Qazi.

5. INDIAN LEGISLATION

A²⁴ Muslim wife has been given the right of claiming the maintenance, when the husband refuses or neglects to provide maintenance to her for the period of two years. The application of the clause is, however, subject to the general provisions of the Muslim law. Thus, a wife is not entitled to invoke this clause when she herself is at fault. A wife who is nashizah or refractory under the Muslim law is not entitled to maintenance and so her marriage cannot be dissolved on the ground that the husband has failed to maintain her for the prescribed period.

Section 2 (ii) of the Act of 1939, reads "the marriage may be dissolved on the ground that the husband--- has failed to provide for her maintenance for a period of two years;" The Court while explaining the clause held that period of 2 years must be continuous and not in part²⁵. When the period is proved the Court will award the decree of divorce²⁶. However, as stated above, when she leaves the marital home of her own and becomes nashizah, she is not entitled to the benefits of the clause.

6. CONCLUSION

Wife in patriarchal order has no responsibility of maintaining husband. Islam provides this order and husband is liable to maintain her. Where he is unable, she will be free to get her marriage dissolved. The modern legislation has also incorporated this aspect under its concern. Be that India or any other country this is a sound ground for dissolution of Marriage.

²³ Art. 51 (1)

²⁴ Section 2(ii) of the Dissolution of Muslim Marriage Act, 1939

²⁵ AIR 1946 Sind 48

²⁶ AIR 1983 Ker 283