



THE CONCEPT OF DOWER IN MUSLIM PERSONAL LAW

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1. INTRODUCTION

Dower in the period of dowry is unique thing in Muslim Law attached to the marriage. Dower is the English translation of the Arabic word 'Mahr'¹. Instead of using this term, the Holy Qur'an has used the words 'Saduqa'²; Fariza³ and 'Ujur'⁴ etc. for this. The English term is somewhat misleading as it has some different sense⁵.

Tayabi says, that mahr is mentioned as being consideration for marriage but probably this is derived from English maxim that marriage is highest consideration. According to Islamic text in Pre-Islamic Arabia women were sold in marriage by their parents or guardians. At that time it was real consideration. But Prophet has prohibited such sales ordering that money should be given to the bride. Odium connected with price or consideration for sale of bride ought not to be attached to dower which not only prevented sale but provided for the woman who had before been treated as chattel.⁶ Grote, speaking of pre-historic Greece, says, "we find the wife occupying a station of great dignity of influence, though it was a practice for the husband to purchase her by valuable presents to her parents, a practice extensively prevalent among early communities and treated by Aristotle as an evidence of barbarism."⁷

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Which means consideration paid by the husband to the wife

² Holy Qur'an S, 4 A 4.

³ Holy Qur'an S, 2 A 236, 237.

⁴ Holy Qur'an S, 5 A 5.

⁵ Wilson - Digest on Mohammadan Law 1916, p. 52.

⁶ Tayyabji - 'Muslim Law' 1968, p. 108.

⁷ History of Greece Part - 1 Ch. XX Vol. ii, p. 112. Cited by Tayyabi p. 108.



2. DOWER IN REVEALED SCRIPTURE

The Islamic law establishes that on the occasion of marriage, some amount be paid by the husband to the wife as dower. The Holy Qur'an says,⁸ "And give the woman (on marriage) their dower as gift". Further⁹ "There is no blame on you If ye divorce women Before consummation 'Or the fixation of their dower; But bestow on them (A suitable gift)." Again¹⁰ - "And if ye divorce them Before consummation But after the fixation Of a dower for them Then the half of the dower (Is due to them) unless They remit it" Further¹¹ - "O ye who believe ! You are forbidden to inherit Women against their will. Nor should ye treat them With harshness that ye may Take away part of the dower Ye have given them, except Where they have been guilty Of open lewdness; ..." "But if ye decide to take One wife in place of another, Even if ye had given the latter A whole treasure for dower Take not the least bit of it back".

Further¹² -

"...Except for these, all others

Are lawful provided

Ye seek (them in marriage)

With gift from, your/ property ,

Desiring chastity, not fornication

Give them their dowry

For the enjoyment you have

⁸ Holy Qur'an IV - 4.

⁹ Yusuf Ali 'The Holy Qur'an' S. 2A 236.

¹⁰ Ibid A 237.

¹¹ The Holy Qur'an' S 4 A 19 & 20.

¹² Ibid A 24 & 25.



Of them as a duty;....."

And -

"Ye are one from another:

Wed them with the leave

Of their owners, and give them

Their dowers, according to what

Is reasonable: they should be

Chaste, not fornicators, nor taking

Adulterous: when they

Are taken in wedlock,...."

Further¹³ -

"O Prophet! We have

Made lawful to the

Thy wives to whom thou

Hast paid their dowers".

After analysis of Qur'anic dictum it may be said that Almighty Allah has prescribed the dower as gift to wife from husband.

¹³ Yusuf Ali 'The Holy Qur'an' S. 33 A. 50, also see S. 5 A6, S. 40 A.10 V: 6, LX : 10.



3. DOWER IN THE LIGHT OF HADIS

Ali S/o Abdullah Quotes¹⁴ from Sufyan (Raz), who heard from Hazira's father saying that he heard from Sahl (Raz) that, "While he was (sitting) among the people in the company of Allah's messenger (SAW) a woman stood up and said, "O Allah's messenger (SAW)! I have given myself in marriage to you; Please give your opinion about me". The Prophet (SAW) did not give her any reply. She again stood up and said, "O Allah's Messenger! I have given myself (in marriage) to you, so please give your opinion about me" (woman). The Prophet (SAW) did not give her any reply she again stood up for the third time and said, "I have given myself in marriage to you, so give your opinion about me". So a man stood up and said, "O Allah's Messenger! Marry her to me". The Prophet (SAW) asked him," Have you got any thing?" He said, "No". The Prophet (SAW) said, "Go and search for something, even if it were and iron ring". The man went and searched and then returned saying, " I could not find any thing not even an iron ring". Then the Prophet (SAW) said, "Do you know something of the Qur'an (by heart)?" He replied "I know (by heart) such and such sura." The Prophet (SAW) said, "Go, I have married her to you for what you know the Qur'an (by heart)¹⁵. Thus, this Hadis shows that dower is necessary in the marriage. Moreover the fixation of dower is not necessary that is why the companion (Raz) was asked to bring any thing including iron ring. Thus where the husband has nothing, the intangible thing transfer of knowledge, may be fixed as dower.

4. NATURE OF THE DOWER

Holy Qur'an considers the dower as a free gift,- 'And give the dower to the women with happiness'¹⁶. Further- 'It is termed as reward in chapter IV verses 25.' The schools of Muslim jurisprudence consider the dower as essential part of the marriage.

The jurists in India consider it as gift; mark of respect and consideration. In Abdul Qadir V. Salima¹⁷ Justice Mehmood held, ' Dower can be regarded as the consideration for connubial

¹⁴ Sahih Bukhari Vol. VII P. 59.

¹⁵ Sahih Bukhari

¹⁶ The Holy Qur'an S 4 A 4 explained in Tafsir Ibne Kabir Vol. III p. 145.

¹⁷ Badre Alam Khan, " Maintenance of Divorced Muslim Women." Sir Syed Magazine Aligarh, 1996, pp. 12-18.



intercourse by way of analogy to price under the contract of sale. It is not the exchange or consideration, as understood in the technical sense in the Contract Act given by the man to the woman for entering into the contract but an effect of the contract imposed by the law on the husband as token of respect for the woman. If dower were treated as the bride-price a post-nuptial agreement, to pay dower would be void for want of consideration, but such an agreement is alid and enforceable.

Justice Sulaiman observed, " It is quite obvious that the analogy of sale cannot be carried too far. The marriage can not be regarded as purely a sale of the person by the wife in consideration for the payment of dower".

But Justice Mitter while reviewing the judgment¹⁸ of justice Mukharji who did not allow the plaintiff Saburunnessa to retain the property given in dower, upheld the judgment and appeal was rejected. The division bench comprising justice Mitter and McNair J. held," It appears from the plaintiff's own statement in the plaint, that her husband made a gift of immovable property in exchange for the dower. The character of such transaction has been regarded as a kind of sale in a decision of that Court which is governed by S. 54, Transfer of Property Act and the consideration money being admittedly over one hundred could not be made except by a registered instrument".

It has been contended on behalf of the appellant that a dower is not really a consideration for the marriage and it is in the nature of a gift and therefore the deed did not require registration. It appears clear from the statement which has been quoted that it is not a gift pure and simple, but a hibabelewaz¹⁹ as understood by the Mohammedan Law, It is in reality a sale, and has all the incidents of a contract of sale. Justice Mitter further held that the marriage under Mohammedan Law is a Civil contract and is like a contract of sale. Sale is a transaction of property for a price. In the contract of marriage the wife is the property and the dower is the price.

But this decision is in the category of obiter dicta and has no legal sanctity that is why it is neither followed by the courts nor the jurists took this decision for their comments. Even the Wilson's 'Digest of Mohammadan Law', S. Amir Ali, Prof. Tahir Mahmood etc. do not have reference of this case in their books. Tayyabji has vehemently criticized this observation.

¹⁸ Suburunnessa V. Subdu Shaikh AIR 1934 Cal. 693.

¹⁹ 'Hiba' means gift and 'Ewaz' means consideration.



The Patna High Court has held that the dower money is not a charge upon the husband's property. It is an interest restricted in its enjoyment to her personality within the meaning of section 6(d) of T.P.A²⁰. The Allahabad High Court considers the dower as a mark of respect. In Nasra Begam V. Rijwan Ali²¹ it was held that under the Mohammadan Law dower means money or property which the wife is entitled to receive from the husband in consideration of the marriage. However, the expression, consideration is not to be understood in the sense in which it is used in the Indian Contract Act. In effect dower is an obligation imposed upon the husband as a mark of respect for the wife. Thus the dower is neither the Sale price nor consideration in the commercial sense but is a necessary incident in the marriage in the form of gift.

5. QUANTUM OF DOWER

There is no fixed scale of dower in Muslim law. The Holy Qur'an says – "... Even if you have given her a whole treasure for dower, take not the least bit of it back"²². Caliph Umar once announced the fixation of dower. Considering it contrary to the Muslim law an old woman stood up and said that how Caliph Umar (Raz) dared to do which is not done by the Prophet. She further told, quoting the ayat 20 of sura 4 that what Allah grants them (i.e women as dower) they (Caliph Umar Raz. & others) are trying to check. In this way Caliph Umar (Raz) became shy and said, "Every body has better knowledge than Umar even if that is an old and infirm woman."

The minimum amount, fixed by Hanafi school, is ten Dirham. Imam Malik is of the view that the lesser amount of dower must not be less than three Dirhams or one fourth Dinar²³. To Shafeyees the quantum of dower is not fixed. The Hambalis also have similar view like Shafeyees.

In Haleema V. Moin²⁴ it was observed that,"A Mohammadan husband may settle any amount that he likes by way of dower debt upon his wife though it may be beyond his means and

²⁰ Zobair Ahmad V. Jainandan Prasad AIR 1960, Pat. 147

²¹ AIR 1980, All. 119

²² The Holy Qur'an S 4 A 20

²³ Bidayatul Mujtahid, vol. ii p. 14 cited in Darse Tirmizi Vol. III p. 394

²⁴ AIR 1971 Pat. 389



though nothing may be left for his heirs after the payment of the amount; but he cannot in any case settle less than ten dirhams."

6. NATURE OF THE DOWER AMOUNT

The widow's unpaid dower is unsecured debt. She is also to be kept in the list of other unsecured creditors. The right of widow is actionable claim. In *Maina Bibi V. Wasi Ali*,²⁵ it was held that the woman's right of dower has no priority over other creditors. In *Sayed Ahmad V. Mst. Bunyadi*²⁶ it was held that dower is a debt within the terms of the Succession Certificate Act 1889. Where the succession property is held by the widow this is called the widow's lien for dower, and this is the only creditors lien under the Muslim law, which has received recognition in the British Indian courts²⁷.

The opinion of the courts regarding property in lieu of dower is different. The Allahabad and Andhra Pradesh H.C.s are of the view that it is both transferable and heritable²⁸.

A Muslim widow is entitled to transfer her husband's property of which she is in possession, in lieu of dower, without transferring her dower debt²⁹. And thus this will be absolute transfer without any encumbrance. *Patna*³⁰ and *Bombay*³¹ H.C.s are of the view that the property is heritable.

²⁵ In *Maina Bibi V. Chaudhri Vakil* the Privy Council expressed a doubt whether a widow can transfer either the dower debt or the right to hold possession. All that can now be said with certainty is that the right to hold possession is heritable. Although there is conflict of opinion, yet in view of the Supreme Court observations in *Kapoor Chand* case, it seems more probable that this right is not transferable.

²⁶ (1919) 41 All. 538

²⁷ *Hamaira Bibi V. Zubaida Bibi* 43 I.A. 294

²⁸ *Aqil Ahd's Mohammadan Law*, Iqbal Ali Khan ed. (Allahabad: CLA 1999) 19th ed. p. 154

²⁹ *Abdullah V. Shamsul Haq and Others* A.I.R. 1921, All. p. 262

³⁰ *Patna H.C.* is of the view that "when a Muhammadan lady is in possession of her husband's property and she still claims dower debt then her right to retain property exists till dower debt is discharged. Such right to retain possession can also be exercised by her heirs after her death.

³¹ The *Bombay H.C.* is of the view that where a Mohammadan widow who is in possession of her husband's property, still claims her dower debt her right to retain possession of the property till the dower debt is discharged exists and it is immaterial in what character whether as a creditor for dower debt or otherwise she came into possession of the property, provided possession is lawfully and without force or fraud. Such right to retain possession can also be exercised by her heirs after her death.



7. CONCLUSION

Since the amount of dower belongs exclusively to the wife that must be given to her when she demands it. It is immaterial that dower is prompt or deferred. In the Holy Qur'an there is no mention of deferred dower. On the other hand the commandment of Almighty Allah makes it clear that one is to give the dower with happiness. Again the verse where Allah forbids making excesses against the wife to force her to return the dower amount hints that dower is to be given in the continuance of marriage. The tradition, where the Prophet (SAW) asked Ali (Raz) to pay dower before approaching Fatima(Raz) also corroborates the prompt dower. In short nowhere it has been mentioned that the dower may be paid at the time of dissolution or after death of the husband. Moreover the wife should be given the amount which is equal to the purchasing value of the dower amount. So there should be consensus of opinion of jurists that the amount is to be assumed in terms of gold at the time of marriage. If it is not done, it may amount injustice to widow/wife.

It is submitted that the deferred dower is not proved by the express provisions of Islamic source books. If it is followed in India the amount of dower to be paid at the death of the husband, at divorce or dissolution should be commensurate or at par with the purchasing value of the dower amount at the time when it was fixed i.e. at the time of celebration of marriage. As has been observed some persons deliberately delay the payment of the dower so that the purchasing value of the currency be lessen. To avoid the interest or riba aspect it is suggested that dower must be in the form of gold or equalent to gold.