

Critical review of changing trend relating to maintenance under personal laws in India.

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Introduction

Maintenance is an allowance, required by the law to be made to a wife, out of her husband's estate for her support either during the matrimonial suit or on its termination where fact of marriage is established and she proves herself entitled separate maintenance.

Maintenance can be claimed by wives under all matrimonial statutes except under the Dissolution of Muslim Marriage Act, 1939, as an ancillary relief in matrimonial proceedings. The right can be claimed only as subsidiary relief while claiming a primary matrimonial relief such as divorce, judicial separation, annulment of marriage, or restitution of conjugal rights. The Protection of Women from Domestic Violence Act, 2005 provides an additional avenue for women to claim maintenance and compensation from their husbands and live in partners. Under these provisions, maintenance can be obtained without the necessity of initiating proceedings for a primary matrimonial relief.

i. Objectives of provision for Maintenance

The provision of maintenance needs to be grounded within the Constitutional paradigm of ensuring social justice. As of now it is based on the social obligation of preventing destitution and vagrancy.

In the case of **Vimala v Veeraswamy**² the Supreme Court noted that by providing simple and speedy but limited relief, the provision seeks to ensure that the neglected wife and children are not rendered destitute and thereby, driven to life of vagrancy, immorality and crime, for their subsistence.

In **Chaturbuj v Sitabai**³, the Court explained the objective of the provision of maintenance in the following words, "The objective of Maintenance proceeding is not to punish a person for his past neglect but to prevent vagrancy, by compelling those who can provide support to those who are unable to support themselves, and who have a moral claim to support. It provides a speedy remedy for supply of food, clothing and shelter, to the deserted wife. It gives effect to fundamental rights and the natural duties of a man to maintain his wife, children and parents, when they are unable to maintain themselves.

As it is observed from judicial decision that provisions of maintenance though crucial and important for women are granted with the objective to prevent destitution and

vagrancy. There is a need to recognise the changing trend of the society. Right to maintenance need to be recognised as fundamental right of women to live with dignity. The women have been in disadvantageous position from centuries. In the patriarchal Indian society, she faces discrimination from her childhood. Women are not educated at par to their male siblings. Even if, facing all odds she gets educated and takes up her career, it is she who is compelled to give up her career to meet the demands of marital obligations.

During matrimonial dispute the trump card is invariably in the hands of their husbands who have control over finances. If conflict leads to divorce it is a woman who faces economic hardships. The non recognition of women's contribution as home maker to the marriage in monetary terms pushes her into the state of destitution when marriage breaks down. She is neither equipped and nor capable to enter highly competitive job markets. There is need of shift from the protectionist attitude to their rightful claim of right to live with dignity.

II. Maintenance:

The Law provides for the provisions of Maintenance under two heads:

- i) Interim Maintenance and
- ii) Permanent Maintenance

Interim Maintenance: It is firmly established that the husband is required to pay for the maintenance of the wife during the pendency of the proceedings in matrimonial cause as well as to pay her the expenses of the proceedings. This is called as interim Maintenance. The interim maintenance is payable from the date of presentation of the petition to the dismissal of the suit or passing of the decree.

Under the Hindu Marriage Act, 1955, the Parsi Marriage and Divorce Act, 1936 and Indian Divorce Act, 1869 interim Maintenance can be claimed by wife or husband and it is called "Alimony Pendente Lite".

Section 36 of The Indian Divorce Act, 1869 states:

Alimony pendente lite.-- In any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection, the wife may present a petition for alimony pending the suit. Such petition shall be served on the husband; and the Court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just: Provided that alimony pending the suit shall in no case exceed one-fifth of the husband's average net income for the three years next preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be⁴.

² *Vimala v Veeraswamy* (1991) SCC (2) 375

³ *Chaturbhuj v Sitabai 1* (2008) DMC 22 SC

⁴ Omitted by Act 51 of 2001

The provision in all the statutes is basically the same. The criterion and principle for fixing the amount of interim maintenance and expenses of the proceedings and the situation in which it can be claimed are virtually the same under all the statutes.

For deciding the quantum of Interim Maintenance, the court has the discretion to fix the amount. Earlier the rule of 1/5 of husband's income was in place which has subsequently been abrogated from the Act and hence isn't applicable anymore.

Maintenance is a crucial right which flows from the contract of marriage. The right to maintenance is the right of subsistence and survival. This is the only provision for economic claims within marriage, and hence it is highly contested. In the event of separation or desertion, women are entitled to financial relief in the form of "Maintenance". However, the laws governing maintenance are structured in such a way as to inherently disadvantage women. For instance, she must satisfy the court that she is unable to maintain herself and prove any assertions concerning her husband's income. So, in reality provide little more than spurious protection.

I. Provisions under which maintenance can be claimed by wife.

Permanent Maintenance can be claimed u/s's :

37 of Indian Divorce Act, 1869

25 of Hindu Marriage Act, 1955

41 of The Parsi Marriage and Divorce Act, 1936 18 of Hindu Adoption and Maintenance Act, 1956

3 and 4 of The Muslim Women (Protection of Rights on Divorce), 1986

20 of Protection of Women from Domestic Violence Act, 2005. Provisions are substantially the same.

II. Maintenance under Hindu Law

Hindu Law provides a wife with an absolute right to claim maintenance from her husband as long as she does not deviate from the path of chastity. Her rights to maintenance are codified in the Hindu Adoption and Maintenance Act, 1956. In assessing the amount of maintenance, the Court takes into account various factors. It also judges whether the wife is justified in living apart from the husband and these justifiable reasons are spelt out in the Act.⁵

In the case of **Bharat Hegde v Smt. Saroj Hegde**⁶ the Court held that the following eleven factors have to be taken into account while deciding the amount of maintenance.

1. Status of the party

2. Reasonable wants of the claimants
3. The independent income and property of the claimant.
4. Number of persons the non-applicant has to maintain.
5. The amount should aid the applicant to live in similar life style as he/she enjoyed in the matrimonial home.
6. Non- applicant liabilities if any.
7. Provisions for food, clothing, shelter, education, medical attendance and treatment, etc of the applicant.
8. Payment capacity of Non-applicant
9. Some guess work is not ruled out while estimating the income of Non-applicant when all the sources or correct sources are not disclosed.
10. The non applicant to defray the cost of litigation
11. The amount awarded u/s 125 of Cr. PC is adjustable against the amount awarded u/s 24 of the Act.

Maintenance Pendente Lite (pending the suit) and even expenses of a matrimonial suit will be borne by the husband or the wife, if either spouse has no independent income for his or her own support, this same principle governs payment of permanent maintenance.⁷

In Case of **Sujit Kumar v Vandana**⁸, the Delhi High Court, Under section 24 has directed the non-applicant to pay Rs 65,000/- as maintenance pendent lite of which Rs 20,000/- per month was for the mother and 15,000/- each for 3 children.

I. Right to residence

In case of **Komalam Amma v Kumara Pillai Raghavan Pillai and ors**,⁹ The apex court ruled that maintenance necessarily encompasses a provision for residence and has therefore ordered that the woman be provided with a residential facility similar to that which she had been accustomed in the past.¹⁰

II. Whether a second wife is entitled to maintenance?

It is evident from recent judicial decisions that the Indian Courts have been progressively liberal in deciding cases pertaining to maintenance. The bone of contention however is whether a second wife can become entitled to receive maintenance merely from the factum of living with the previously married man, coupled with the dispute as to whether the bigamy is legally permissible. While the decision under the personal laws that the same may be possible, judicial decisions pertaining to section 125 of Cr P C continues to uphold the view that maintenance can be claimed by only lawfully wedded wife.¹¹

In **Narinder Pal Kaur Chawla v Manjit Singh Chawla**¹², the Delhi High Court, held, wherein the couple had lived together for 14 years and the man had concealed the fact that he had already been married. Furthermore, the woman had taken responsibility of running

the household as a housewife, treated the man as her husband and had borne and raised two of his children. The view taken by the court was that on account of the nature of relationship and the aforementioned facts, the women should not be deprived of her right to maintenance, under the personal law applicable to Hindus. The court further expressed that the denial of maintenance under such circumstances would amount to putting a premium on/ or rewarding the man for defrauding the woman by concealing his first marriage. It was further recorded that for the purpose of granting maintenance under the personal law, women placed in the position of a second wife, can be treated as legally wedded wives and entitled to maintenance.¹³

While examining section 18 of the Act, Which reads as:

“Section 18 of Hindu Adoption and Maintenance Act, 1956 provides for right of maintenance for wife.- (1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,-

(a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish or of willfully neglecting her;

(b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;

(c) if he is suffering from a virulent form of leprosy; (d) if he has any other wife living;

(d) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(e) if he has ceased to be a Hindu by conversion to another religion;

(f) if there is any other cause justifying her living separately.

⁵ Mihaela Robila, Handbook of Family Policies Across the Globe, page number 301, Springer Science & Business

⁶ Bharat Hegde v Smt. Saroj Hegde 140 (2007) DLT 16

⁷ Romit Agrawal, 'Maintenance: Under Hindu, Muslim, Christian and Parsi Laws', <http://www.legalserviceindia.com/articles>

⁸ Sujit Kumar v Vandana 111(2016) DMC 251(DB)(Del)

⁹ Komalam Amma v Kumara Pillai Raghavan Pillai and ors AIR 2009 SC 636

¹⁰ Kamni Ahuja and Vasundhara Ravi, 'The concept of 'maintenance' under Indian law', International Bar Association

¹¹ *Id.*

¹² Narinder Pal Kaur Chawla v Manjit Singh Chawla AIR 2008 Delhi 7

¹³ Supra note 10

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion”.¹⁴

Sub-Section (2) of section 18 of the Act entitles a Hindu wife to claim maintenance against her husband even if he has other wife living. This gives an impression that even a second wife may have the right to claim maintenance. It is more so due to the fact that a 'Hindu wife' has not been defined under the Act. In the absence of any such definition given provided the Act, we have to interpret the expression with the spirit in which it appears in the statute. This is more so when as per the provision of Section 4 of The Hindu Marriage Act, no external aid (from other statutes) is to be brought to define Hindu wife, Section 4 clearly gives overriding effect to this Act.

Hindu adoption and maintenance Act was brought into force in the year 1956. As on that date Hindu Marriage Act, 1955 was already in force, which contains provision like Section 5 regarding void marriages. If the second wife, though her marriage is void under the Hindu Marriage Act, was to be denied maintenance, then the legislature would not have included provision like Clause (d) in Sub-section (2) of section 18 of the Act or would have clarified that this clause was added only to take care of those second marriages performed before the Hindu Marriage Act, 1955 was enacted when polygamy was permissible for male Hindus.

Though, the decision is remarkable and justice seems to have been done but the battle has been long. Narinder Kaur was married in the year 1977; she was thrown out of house in 1991, after 14 years of marriage. Trial Court did not provide any relief, in 2002 she was awarded interim maintenance of ₹ 400/- which was enhanced by a division bench to ₹700/- in 2003 and it was further enhanced to ₹ 1500/- in 2004 by the Supreme Court with provision for residence. Matter has been decided in 2008.

¹⁴ Hindu Adoption and Maintenance Act, 1956, § 18,

It has taken 27 years of legal battle for a petty sum of ₹ 1500 as maintenance in a city like Delhi where a person residing in posh locality couldn't even sustain a day on this amount. This woman has fought her case in person and brought a logical end to this case. But, how many women in India have the awareness, courage, means and support to fight such lengthy battles for petty allowances as maintenance.

iii. Whether the Wife of a person of Unsound Mind entitled to maintenance? Who is bound to maintain her? [Grey Area]

In the case of **Avtar Singh v Jasbir Singh**¹⁵ a very peculiar situation arose. In the case which was decided by Punjab and Haryana High Court in 2014 the plaintiff was the wife of a man of unsound mind, who had sought 1/4th share in the land belonging to the family, from her father-in-law as maintenance for herself and her minor son aged 6yrs on 19/05/1967. The said share had been provided to her by her father-in-law through family settlement before the Gram-panchayat, but the wife was later forcibly dispossessed of the land by the father-in-law and brother in Law.

However, before parting with the case, the Judge made the following observations with regard to legal position of Hindu wives:

“Before parting with judgment, it would be appropriate to mention that no provision has been brought to my notice by learned counsel for the parties that if husband is insane or of unsound mind, the daughter-in-law who is not having any source of maintenance can claim maintenance for herself. When she has to maintain her mentally ill husband, her condition is worse than being a widowed daughter in law.¹⁶ In such a situation, the wife should be deemed to be dependent upon father in law and entitled to maintenance as provided under section 19 of the Hindu Adoption and Maintenance Act.

Copy of this order to be sent to the Union Ministry of Law and Justice and Law Commission of India for taking appropriate measures for amendment in the Act.”

Law Commission of India in its 252 report on Right of Wife recommends, right to the daughter-in-law to have maintenance from her father-in-law in case of inability of the husband to maintain her.

It has taken nearly 47 years for a woman to get maintenance. A woman who would be in her 20s when the case was filed got relief when she is in her 70s.

iv. Matrimonial Fault and Sexual Purity

The important ingredients of maintenance are the husband's 'obligations' and the wife's 'need', but the situation revolves around issues such as 'Matrimonial fault' and 'sexual purity'.

¹⁵ Avtar Singh v Jasbir Singh RSA NO 29/1988(O&M)

¹⁶ <http://livelawsite.vocalwire.com/columns/how-law-protects-rights-of-widows-145619>

India follows English Common law tradition, and historically, only virtuous women were entitled to maintenance. If a husband obtained a divorce on the ground of wife's adultery, cruelty, or desertion, she was denied maintenance. In **Dailey v Dailey**¹⁷, it was held that a wife who was guilty of adultery, desertion, cruelty, or any other matrimonial misconduct, was not entitled to receive maintenance. The best, she could be awarded is a compassionate allowance to save her from utter destitution. Endorsing this view of the ecclesiastical court that the 'wife who had violated their vows shall be fed with bread of affliction and with water of adversity.' it was held in **Sardari Lal v Veshano**¹⁸ that a women once divorced on the ground of unchastely conduct should be left to the resources of her immorality. Similar views are held in many cases justifying the denial of maintenance.

A compassionate approach towards woman who is accused of matrimonial fault is seen in **T Raja Rao v T Neelammam**¹⁹, it was held that the ground of adultery in divorce proceedings ipso facto does not disentitle the wife from claiming maintenance.

V. Maintenance under Muslim Law

The Muslim women (Protection of Rights on Divorce) Act, 1986 protects rights of Muslim Women who have been divorced from their husbands and provides for matters connected therewith or incidental thereto.

This Act under sections 3 and 4, provides that a divorced Muslim woman shall be entitled to:

- a) Reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband.
- b) While she herself maintains child born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of 2 years from the respective dates of birth of such children.
- c) An amount equal to the sum of Mehr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to the Muslim law and
- d) All property given to her before or at the time of marriage or after her marriage by her relatives or friends or by husband or any relatives of the husband or his friends.

In addition to this, the Act also provides that where a divorced Muslim is unable to maintain herself after the period of iddat the Magistrate shall order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law, and to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regards to the needs of the divorced woman, standard of life enjoyed by her during the marriage and means of such relatives, and such maintenance shall be payable to such relatives in proportion to the size of their inheritance of her property and at such period as he may specify in his order.

¹⁷ Dailey v Dailey (1947) All ER 847

¹⁸ Sardari Lal v Veshano AIR 1970 J&K 150

¹⁹ T Raja Rao v T Neelammam 1990 Cri. L.J 2430 AP

Where such woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the magistrate shall order parents of such divorced woman to pay maintenance to her. In absence of such relatives or where such relatives are not in position to maintain her, the Magistrate may direct State Wakf Board established under section 13 of The Wakf Act, 1995 functioning in the area in which woman resides, to pay such maintenance as determined by him.

VI. Maintenance under Parsi Laws

The Parsi Marriage and Divorce Act, 1936, recognises the right of wife to maintenance – both alimony pendente lite and permanent alimony.

Section 40 and 41 of The Parsi Marriage and Divorce Act, 1936 states:

40. Permanent alimony and maintenance.—

1) Any Court exercising jurisdiction under this Act may, at the time passing decree or at any time subsequent thereto, on an application made to it for the purpose by either the wife or the husband, order that the defendant shall pay to the plaintiff for her or his maintenance and support, such gross sum or such monthly or periodical sum, for a term not exceeding the life of the plaintiff as having regard to the defendant's own income and other property, if any, the income and other property of the plaintiff, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the movable or immovable property of the defendant.

2) The Court if it is satisfied that there is change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify, or rescind any such order in such manner as the Court may deem just.

3) The Court if it is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he had sexual intercourse with any woman outside wedlock, it may, at the instance of the other party, vary, modify or rescind any such order in such manner as the Court may deem just .

41. Payment of alimony to wife or to her trustee. —In all cases in which the Court shall make any decree or order for alimony it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court [or to a guardian appointed by the Court] and may impose any terms or restrictions which to the Court may seem expedient, and may from time to time appoint a new trustee [or guardian] the Court expedient so to do.

The maximum amount that can be decreed by the court as alimony during the time a matrimonial suit is pending in court was one fifth of the husband's net income earlier but now it is left to the discretion of the court. . In fixing the quantum as permanent maintenance, the court will determine what is just, bearing in mind the ability of husband to pay, wife's own assets and conduct of the parties. The order will remain in force as long as wife remains chaste and unmarried

VII. Maintenance under Christian Laws

The Indian Divorce Act, 1869 inter alia governs maintenance rights of Christian wife. The provisions are the same as those under the Parsi Laws and the same considerations are applied in granting maintenance, both *pendente lite* and permanent.

In case of **Debnam v Debnam**²⁰, a case under Divorce Act, the wife's claim for interim maintenance was opposed by the husband who had petitioned for divorce on the ground of wife's adultery. He asserted that the spouse guilty of matrimonial misconduct could not be given interim maintenance. The Court observed that in an application for maintenance *pendente lite*, only consideration was whether applicant had no sufficient means to support herself; no other consideration was relevant.

Section 37 of Indian Divorce Act provides for power to order permanent alimony. It states: Where a decree of dissolution of the marriage or a decree of judicial separation is obtained by the wife, the District Court may order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties.

Power to order monthly or weekly payments:

— In every such case the Court may give an order to the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable.

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the Court seems fit.

Commented [J1]: Next paragraph deleted since it was repeated

²⁰ Debnam v Debnam AIR 1949 Mad 877

Conclusion

In India we follow the English Common Law tradition of separate property regime. Marriage does not impact property relations and the courts do not have the power to order division of all matrimonial assets. The notion of community of property or joint matrimonial assets has not yet been awarded statutory recognition. Marriage Law Amendment Bill-2010 was a positive step towards the global trend, which has failed.

Jayanti Natrajan report of 2011 regarding the amendment Bill, rightly pointed out, " Liberalization of the Laws of divorce should essentially be accompanied with appropriate recognition of the legitimate rights of women on the matrimonial property at least".

An equal right to matrimonial property does exist under the principle of equality (Article 14) and non discrimination (Article 15) which are enshrined as fundamental rights under Indian Constitution. However, in the absence of a legislation thereon, Indian Courts continue to follow the common law regime of "Separation of property", whereby ownership is governed by title. Therefore, if at the time of marital breakdown property is not registered in the woman's name, as is so often the case, it is almost impossible for her to exert a legal claim over it.

The failure of law to recognize women's matrimonial property rights is emblematic of India's patriarchal social structure. It is difficult to reconcile constitutional guarantees with the reality that many women are left empty handed and completely depended on their natal family.

The rationale behind equal division of property would rest on the legal recognition of a women's contribution within the home which according to the survey conducted by the Indian Statistical Organisation (1998-1999) is enormous and multi-faceted.

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