

Chapter Eleven

Maintenance (*Nafaqa*)

1. Introduction

Islam is a complete and comprehensive code of life and as such it is the only accepted code of life to Allah.²⁸ All aspects of human life are covered in Islam. Solution of all problems which a man has to encounter from cradle to grave has been prescribed in Islam. In support of this view the Holy Quran states, "This day I have perfected your religion for you, completed my favour upon you, and chosen for you Islam as your religion."²⁹ Islam, therefore, has attained its perfection with the last Prophet, Hazrat Muhammad (peace be on him) on whom the Quran was revealed.

Sometimes and in some cases a person has to depend upon other for his maintenance. A poor father has to depend upon his son possessing affluence, minor children and unmarried daughters remain dependants upon their parents and a wife has to depend upon her husband. Islam prescribes specific obligations for providing maintenance to some persons who deserve this. Law of maintenance is not only one of the subject matters of the Quran and the sunnah but also an important concern for the state. Several enactments are there relating to maintenance, which are mainly in line with the provisions of the Quran and the sunnah. There are also a good number of decided cases on this issue.

2. Islamic provisions on maintenance

Maintenance defined—Maintenance is called in Arabic *nafaqah* which, in the language of law, signifies all those things which are necessary to the support of life.³⁰ It, therefore, comprehends food, raiment and lodging, though in common parlance it is limited to food.³¹ Maintenance includes food, cloths, lodging, toilet requisites, but it does

²⁸ Al-Quran, Sura-al Imran. Verse, 19 (3:19)

²⁹ Al-Quran, 5:3.

³⁰ Shetkh Burhan-ud-Din Ali, Hedaya, Translated by Charles Hamilton, P. 140.

³¹ Neil B.E. Baillie, Digest of Moohumadan Law, P. 441.

not include luxuries like hair-dye, lipstick etc.¹ Medical charges are not included nor what administers to mere delight and enjoyment, such as *Khuzab* and *Kohl*²; but the cost of education is included under maintenance. As the concept of social needs and social Justice alter, no such hard and fast rules can be laid down permanently as to what should be the standard of education to form part of maintenance. In the rapidly advancing society, the cost of education upto the higher secondary stage may be included under maintenance³, for, Islam imposes greater importance on the education of a man which, is necessary to be dutiful towards his creator and towards humanity at large. **Al-Quran** and **Sunnah** laid stress on acquiring knowledge through education.⁴

3. Persons entitled to maintenance

There are three causes for which it is incumbent on one person to maintain another—marriage, relationship and property.⁵ The highest obligations arise on marriage. The maintenance of the wife and children is a primary obligation, the second class of obligations arise when a certain person has 'means' and another is indigent. The possession of a surplus of 200 *dirhams* (60-80 taka) over a man's necessities was deemed sufficient to include him in possession of meals.⁶ Parents are, therefore, entitled to maintenance from their rich sons.

4. Maintenance of wife, when due

Under Muslim law, maintenance is due to the wife from the husband as a recompense for the matrimonial restraint⁷ and is one of the necessary and inherent conditions of the marriage contract. The holy **Quran** and the **sunnah** of the Prophet have commanded kindness to women. One specific consequence of this Divine command is his responsibility for the full maintenance of the wife, a duty which he must discharge cheerfully, without reproach, injury on condescendence.⁸ The

¹ Aziz Ahmad, Islamic law in Theory and practice, P. 293.

² Baillie, A Digest of Moohumadan Law, P.446.

³ Ahmadullah V Mofizuddin Ahmad, AIR, 1973.

⁴ Al-Quran, 39:9; Hazrat Muhammad (Peace be on him) said, "Acquire knowledge (education) even if you are to go to China." He also said, acquiring of knowledge (**) is compulsory for all Muslims, male and female. **Mishkatul Masabih** Vol. II, P. 20.

⁵ Abdullah, Durrul Mukhtar, P. 281.

⁶ Baillie, P. 465.

⁷ Hedaya, P. 140.

⁸ Hammudah Abdatat, Islam in Focus, P. 117.

holy command, "Let him provide her (wife) maintenance according to his ability".⁹ It has further been commanded, "Provide for them (wives), the well-to-do according to his means and the straitened according to custom. This is an obligation for those who act kindly."¹⁰

It is incumbent upon the husband to supply his wife with food, clothing and lodging if she surrenders herself to him although she be a Muslim or infidel, poor or rich, grown-up or young.¹¹ Muslim husband, therefore, is legally bound to provide maintenance to his wife so long as she is faithful to him and obeys his reasonable orders. A wealthy husband will provide maintenance to the servant of his wife, provided the wife is free and not slave. But according to Aboo Yusuf, two servants of the wife are to be provided if the husband is in opulent condition. Aboo Hanifa is of opinion that a poor husband is not required to maintain the servant of the wife¹², and this is an approved doctrine, as it is supposed that the wife of a poor man will serve herself. In case of more than one wife, the husband must behave equally in respect of maintenance.¹³ A wife must be provided with a separate apartment. It has been stated in *Hedaya* as follows:

"It is incumbent upon a husband to provide a separate apartment for his wife's habitation, to be solely and exclusively appropriated to her use, so as that none of the husband's family, or others may enter without her permission and desire, because this is essentially necessary to her and is, therefore, her due the same as maintenance, for the word of Allah appoints her a dwelling-house as well as a subsistence, and as it is incumbent upon a husband to provide a habitation for his wife, so he is not at liberty to admit any person to a share in it, as this would be injurious to her by endangering her property, and obstructing her enjoyment of his society."¹⁴

A woman is entitled to maintenance during her sickness in her husband's house.¹⁵ If a man divorces his wife, her subsistence and lodging are incumbent upon him during the period of *Iddat*, whether the

⁹ Al-Quran, 65: 7.

¹⁰ Al-Quran, 2:236.

¹¹ Syed Ameer Ali, *Muhammadan Law*, V. II, P. 405.

¹² *Hedaya*, P. 142.

¹³ Baillie, P. 444.

¹⁴ *Hedaya*, PP. 143-144.

¹⁵ *Hedaya*, P. 141.

divorce be of the reversible or irreversible kind. This is the opinion of Abu Hanifa. But according to *Shafei*, no maintenance is due to a woman repudiated by irrevocable divorce, unless she be pregnant.¹⁶

5. When wife is not entitled to maintenance

Though the wife is entitled to maintenance from the husband, still under the following circumstances she cannot claim it as a matter of right.

(i) A rebellious or *nashizah* wife is not entitled to maintenance. It has been observed in the **Digest of Muhammadan Law** as follows:

"If a woman be a *nashizah* or rebellious, she has no right to maintenance until she returns to her husband's house. By this expression is to be understood a woman who goes out from her husband's house (*munzil*) and denies herself to him, in contradistinction to one who merely refuses to abide in her husband's apartment, which is not necessary for the purpose of restraint. When she ceases to be a *nashizah* or rebellious, she is again entitled to maintenance."¹⁷

The right of the wife to maintenance is subject to the condition that she is not refractory or does not refuse to live with her husband without lawful cause.¹⁸

(ii) A minor wife is not entitled to maintenance even though she is under the custody of the husband. This is the opinion of Aboo Hanifa. But according to *Shafei*, a minor wife is entitled to maintenance.¹⁹ If the husband be an infant incapable of generation, and the wife is an adult, she is entitled to her maintenance at his expense, because in this case delivery of the person has been performed on her part, and the obstacle to the matrimonial enjoyment exists on the part of the husband.²⁰ In this case, maintenance shall be provided by the father of the infant, for, it has been stated in the **Quran**, "The maintenance of the woman who suckles an infant rests upon him to whom the infant is born (that is upon the father)".²¹

¹⁶ *Hedaya*, P. 145.

¹⁷ Baillie, P. 442.

¹⁸ Ameer Ali, V. 2, P. 442.

¹⁹ *Hedaya*, P. 141.

²⁰ *Hedaya*, P. 141.

²¹ Al-Quran, 2:233.

(iii) A wife cannot claim maintenance if she has been imprisoned for any offence or has eloped with somebody or has been taken away forcibly by another man.²² But maintenance does not cease on the husband's imprisonment. If the rich husband refuses to pay maintenance as per decree of the Court, the Judge (*Quadi*) may order him to be imprisoned like an ordinary debtor.²³

(iv) If a wife is imprisoned for debt, her husband is not required to support her, because the objection to matrimonial custody does not in this case originate with him.²⁴

(v) A wife who apostatized is not entitled to maintenance from the husband.²⁵

(vi) A wife is not also entitled to maintenance from her husband if she deserts her husband without any lawful cause.²⁶

(vii) A man is not liable for the maintenance of a woman whom he has married by illegal contract, or of one who has become unchaste.²⁷ In the like manner, a wife bringing scandalous charges against her husband cannot claim maintenance from him.

(viii) Maintenance is not due to a wife after her husband's death, because her subsequent confinement is not on account of her right to her husband, but of the law. A pregnant widow is entitled to maintenance as against the whole of the state of her deceased master.²⁸

6. Scale of maintenance of wife

At the time of fixation of maintenance of wife, under Hanafi law, regard is to be had to rank, status and condition both of her husband and herself.²⁹ Hence if both husband and wife are wealthy, he must provide maintenance in opulent manner, but if both are poor, he is required only to provide for her accordingly, but if he is rich and she is poor, he is to afford her a moderate subsistence. The *view* is supported by the *Quran*

²² Ameer Ali, V. 2, P. 407.

²³ Bailie, P. 449.

²⁴ Hedaya, P. 141.

²⁵ Hedaya, P. 146.

²⁶ Muhammad Ali, Vs. Ghulam Fatima, AIR 1955, Lahore, 902.

²⁷ Ameer Ali, Vol. II, P. 407.

²⁸ Bailie, P. 456.

²⁹ Hedaya, P. 140.

which states as "Let him support her according to his ability."³⁰ Following the above verse of the *Quran*, Imam Shafi-e is of opinion that the status and condition of the husband alone is to be regarded. On one occasion Hinda, daughter of otba, came and complained to the Prophet Muhammad (peace be on him) that her husband Abu Sufiyan was a miser, and did not support her and her child properly. At this prophet said "Take from the property of your husband whatever may suffice for the subsistence of yourself and your child in the customary (moderate) way."³¹

Actually, the amount of maintenance may be fixed considering the overall situation, that is, the rank, status, economic condition of both the husband and the wife. Cost of living and standard of living must also be taken into consideration in respect of scale of maintenance of wife. The *Qadi*, on application made by the wife, may fix up the monthly maintenance and the rate may vary depending upon circumstances. Hence it is not proper to fix up the amount in a rigid manner. The Criminal Procedure Code, 1898, under section 488, has fixed up the maximum monthly amount of maintenance to taka four hundred which, it is submitted, is too meagre in the present economic context.

7. Maintenance of children and decendants

A father is bound to maintain his sons until they attain puberty and daughters until they are married.³² He is also responsible to maintain his widowed or divorced daughter.³³ The father, of course, is not bound to provide separate maintenance for a minor who refuses to live with him without reasonable cause. Both father and mother are jointly responsible for providing maintenance for their adult unmarried daughters and adult crippled or insane sons to their proportions, i.e two-thirds by father and one-third by mother.³⁴ The father, of course, is not bound to provide separate maintenance for a minor who refuses to live with him without reasonable cause. But a father is not bound to provide maintenance to an

³⁰ Al-Quran, 2:236.

³¹ Ameer Ali, P. 406. See Also Bukhari.

³² According to the Indian Majority Act, 1875, one shall be treated as major who has completed the age of 18 years. But under Muslim Law, the lowest age of puberty, according to its natural signs, is twelve years in the case of males and nine years in the case of females. But in case of absence of signs, both sexes are held to have attained puberty or majority after the completion of 15th year. See Hedaya, P. 529.

³³ Asaf A.A.Fyze, Outline of Muhammadan Law, P. 214.

³⁴ Hedaya, P. 148.

infant child who possesses property sufficient for his maintenance.³⁵ A father is not bound to provide maintenance to an illegitimate child.

If the father is poor and as such is incapable of earning, the mother shall provide maintenance to her children if she is in easy economic condition.³⁶ But if both father and mother are poor and cannot maintain their children, it is the duty of the grandfather to maintain the children provided he is in easy circumstances. However, the word of Allah, "The subsistence of children rests upon those to whom they are born"³⁷, must be borne in mind by a Muslim father.

8. Maintenance of Parents

It has been stated in the holy **Quran** "And that you be kind to your parents."³⁸ Following the above verse, it has been accepted without any difference of opinion that it is incumbent upon a Muslim to provide maintenance for his father, mother, grandfathers, grandmothers, if they are in necessitous circumstances.³⁹ The difference of religion creates no impediments for providing maintenance to parents. The Quran command, "Make good behaviour with them (parents) in this world."⁴⁰ The spirit of this verse is to provide maintenance to the parents even if they are infidels.⁴¹ Of course, difference of religion forbids the obligation to the maintenance of any relation except a wife, parents, or children.⁴²

Regarding the obedience and maintenance to parents the Prophet Muhammad (pace be on him) said, "Your father is your middle door. Now it is upto you to protect it or destroy it" He also said that the pleasure of Allah depends on the pleasure of your father, and the displeasure of Allah depends on the displeasure of your father. He further said that both your father and mother are either your paradise or hell. The spirit of these *hadith* is that any body can achieve paradise by providing maintenance and good treatment to his parents.⁴³ If any Muslim neglects to provide maintenance to his parents inspite of his ability to do so, he

³⁵ Hedaya, P. 147.

³⁶ Fyzee, P. 214.

³⁷ Quoted in Hedaya, P. 148.

³⁸ Al-Quran, 17 : 23

³⁹ Hedaya, P. 147.

⁴⁰ Al-Quran, 31 : 15.

⁴¹ Mufta Shafi, Mariful Quran Tr. Muhiuddin Khan, Vol. V, P. 521.

⁴² Hedaya, P. 147.

⁴³ Mariful Quran, Vol. V, P. 520.

then, of course, creates their displeasure, which will lead them to hell. It is, therefore, incumbent upon a son to provide maintenance to his parents whether they are Muslims or not.

The eminent Muslim Jurists have formulated the following principles regarding the maintenance of parents:

(i) Sons and daughters who are not poor are bound to maintain their parents who are poor even though they are not necessitous.

(ii) A poor son is bound to maintain his mother who is poor even though she may not be infirm.⁴⁴

(iii) A son who earns, even though poor, is bound to provide maintenance to his father who is poor and earning nothing.

(iv) The liability of all sons and daughters to provide maintenance to their parents is equal.⁴⁵

(v) When a son is able to maintain only one of his parents, the mother has the better right, that is, in this case, mother shall be preferred over father.⁴⁶

9. Important case law on maintenance

Hefzur Rahman vs. Samsun Nahar Begum 47 DLR (HCD) 1995; 54, 51 DLR (AD) 1999,172.

Brief Fact and decisions:

Mr. Hefzur Rahman, a typist in the ministry of Finance, divorced his wife Samsun Nahar in August 1980. Being divorced, the wife filed a suit in the Family Court Comilla claiming unpaid dower money and maintenance for her and her minor son Tk. 1000 per month for each.

The Family Court declared decree directing the husband in the following calculation:

Cause	Money
For unpaid dower to Samsun Nahar (SN)	Tk. 48000
For maintenance for 3 month, <i>Iddat</i> Period	Tk. 3000 Per month
For the minor, monthly maintenance	Tk. 1000 per month

⁴⁴ Baillie, P. 466.

⁴⁵ B.R. Verma's Islamic Law (Allahabad: India), P. 309.

⁴⁶ Baillie, P. 466.

Then Hefzur Rahman filed an appeal to the Comilla District Judge Court. After hearing, the learned District Judge reduced the amount of maintenance for the minor from Tk. 1000 to 600 per month and the amount of maintenance for the divorced wife remained unchanged.

The appellant (husband) again filed a revisional petition to the High Court Division for further reduction of the rate of maintenance. The HCD observed in the following way:

The learned District Judge Court acted illegally in reducing the amount of maintenance without assigning any reason. The Court further held that both the wife and the minor son were entitled to Tk. 1000 per month because as a typist the husband has means and status to provide the amount.

Here it can be mentioned that the District Judge Court reduced the amount of maintenance only for the minor son but not for the divorced wife. Analytically speaking, the HCD did not consider the matter substantially and separately for the divorced wife and the minor son in the matter of reduction of maintenance by the District Judge Court.

In addition the HCD *suo motu* raised question whether the divorced wife could have claimed maintenance from her ex-husband for a period beyond *Iddat*. On interpreted the verse 2:241, the Division Bench held: "..... a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of *Iddat*, that is to say, till she loses the status of divorcee by remarrying another person"

The HCD of the Supreme Court of Bangladesh followed the same track that the Indian Supreme Court followed in the leading *Shah Banoo* case supporting Post Divorce Maintenance.

On further appeal by Hefzur Rahman, the Appellate Division overturned the High Court Division ruling on Post Divorce Maintenance with an observation that the judgment was based on no sound reasoning and against the principles set up by the Muslim Jurists of the last fourteen hundreds years. The issue of granting her maintenance for life after *Iddat* is *ultra petita* (without petition). According to the observation of the AD, it can be said that giving the plaintiff a substantative relief

beyond the frame of the suit is a sad case of judicial excess and of extreme judicial indiscretion. Moreover, the Appellate Division's Judgment was based on the accuracy of the translation of the word *Matta* and *Nafaqa* (meaning maintenance) and for wrongfully holding that a divorced woman is entitled to maintenance till she remarries. The Judgment of the Appellate Division (F.B) in the *Hefzur Rahman V Shamsun Nahar* case on maintenance that the divorce is only entitled to maintenance during *Iddat* period is based on Islamic principles.⁴⁷

Whether *Mataa* is Maintenance or not

Generally, the commentators who support the PDM give the term *Mataa* the same meaning, purport and legal implication as in the term 'Maintenance'. The same view keeping in mind, they interpret the verse 2:241 of the Holy Quran.

"For divorced woman maintenance (should be provided) on a reasonable scale. This is a duty on the righteous." In the translation and commentary of the Glorious Quran by Abdullah Yusuf Ali, the term *Mataa* has been translated into 'Maintenance'. And the HCD has taken this meaning in supporting the PDM. But in the revised and edited translation of the Holy Quran; the verse 2:241 has been translated in the following way:

"For divorced women it is a suitable gift. This is a duty on the righteous" In this connection, the Chief Justice A.T.M Afzal (in the *Samsun Nahar* case) mentioned that *Mataa* can not be equated with the maintenance as the HCD did. He observes: "Whatever be the meaning of *Mataa* it is certainly not maintenance". His honour relied on the verse 2:236 where the same phrase *mataaun bil maaroof* occurs which is translated as 'a suitable gift'. Since the HCD did not interpret 2:241 in the context of 2:236, the Appellate Division rejected the interpretation with the following observation.

"A verse of the Quran has to be understood not in isolation, and less with a shallow knowledge of language and certainly not with interpretative techniques of man made laws"

Finally, the court took the view that *Mataa* means consolatory gift or indemnity or 'provision' and not maintenance. The appropriate

⁴⁷ Al-Quran, 2 : 241.

Quranic term for maintenance is *nafaqa*. Therefore, *Mataa* is basically different from the regular maintenance. The court went on saying:

“ ‘Provision’, the court took the view that *Mataa* means consolatory gift or indemnity or ‘provision’ and not maintenance. It was never the meaning of *Mataa* in any of the named *Ayats*, nor *Mataa* means maintenance If this meaning is given, it will run counter to *Ayats* 233, 236 and 237 of the Sura al Baqarah (2) and *Ayats* 2 and 3 of Suara Al-Talaq (65). it is plainly inhuman, unjust, inequitable and unfair to impose on a man the burden of a divorced woman whom either he has not even touched or from whom 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*.⁴⁸”

10. Statutory Provisions on Maintenance

At present in Bangladesh there are three statutes which contain the provisions on maintenance. some sections of these Acts/Ordinance deal with the law of maintenance of wife and children only. Competent courts of law have passed judgment from time to time relating to maintenance on the basis of these statutes. These Acts/Ordinances⁴⁹ are: (1) The Code of Criminal Procedure, 1898, (2) The Muslim Family Laws Ordinance, 1961 (No. VIII of 1961) and (3) The Family Courts Ordinance, 1985 (Ordinance No. XVIII of 1985). We shall examine the application of the relevant sections of these statutes dealing with maintenance and compare it with the Islamic provisions.

11. The Code of Criminal Procedure, 1898

Section 488 of the code deals with maintenance. The section runs as follows:— “If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, a magistrate of the first class may upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding four hundred Takas in the whole, as such Magistrate thinks fit

⁴⁸ 51 DLR (AD) 172 (1999).

⁴⁹ This Act Ordinance no. VIII) has also been adapted in Bangladesh.

and to pay the sum to such person as the Magistrate from time to time directs.”

This section gives effect to the natural and fundamental duty of a man to maintain his wife and children so long as they are unable to maintain themselves. Its provisions are applicable and enforceable whatever may be the personal law by which the persons concerned are governed,⁵⁰ that is, it is applicable to Muslim wife and Muslim children as well. The object of this section is to avoid vagrancy by providing that a Magistrate, may upto limited extent, see that a wife and children are maintained by a husband or father who is able to maintain them.⁵¹

A wife or a child has both civil and criminal jurisdiction in securing maintenance. Under civil law, a decree may be obtained for an amount commensurate with the status or means of the party liable. In *Sh. Azmatullah Vs. Mist-Imtiaz Begum*⁵² it was held that the wife is entitled to maintenance, after divorce, during the period of *Iddat* and in *Safura Khatun Vs. Osman Gani Mollah*⁵³ it was held that the period of *Iddat* extends to three months. But if the wife deserts her husband without sufficient cause and refuses herself to return to her husband's house, she is not entitled to maintenance.⁵⁴ The right of a wife and of children, therefore, to be maintained by the husband and by the actual father, as the case may be, is statutory.

12. The Muslim Family Laws Ordinance, 1961

Section 9 of this Ordinance runs thus: “If any husband fails to maintain his wife adequately or where there are more wives than one, fails to maintain them equitably, the wife or all or any of the wives may, in addition to seeking any other legal remedy available, apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration may issue a certificate specifying the amount which shall be paid as maintenance by the husband”. This section of the Ordinance deals with the maintenance of the Muslim wife only and not for the children. The amount fixed by the Arbitration Council is

⁵⁰ Muhammad Mazhar Hassan Nizami, Criminal Procedure Code, P. 409, Section 488 has been omitted by decision of Supreme Court.

⁵¹ Ibid.

⁵² 11 DLR (1959), W.P. P. 75.

⁵³ 9 DLR (1959), P. 455.

⁵⁴ Majida Khatun Vs. Paghlu Mohammad, 14 DLR (1962), P. 465.

recoverable as arrears of land revenue. Of course, an agrieved party may prefer an appeal to the court of Assistant Judge whose decision is final and no appeal shall lie in any court of law.

In *Sarder Muhammad Vs. Mist Nasima Bibi*⁵⁵ case Muhammad Afzal Cheema, J., following the Muslim Family Laws Ordinance, 1961 contended—“The maintenance of a wife is the bounded duty of a husband, irrespective of his minority; illness or imprisonment or richness of the wife, so much so that the obligation devolves on the father of a minor husband with a right of recovery against him when he is in a position to repay the amount.” The court have thus the jurisdiction to grant adequate maintenance subject, of course, to consideration of limitation and the relevent circumstances of each case. Thus section 9 of the Muslim Family Laws Ordinance is not alternative in nature, but has been made available in addition to a similar remedy provided in section 488 of Criminal Procedure Code,⁵⁶

13. The Family Courts Ordinance, 1985 (Ordinance No. XVIII of 1985)

Section 5 of the Family Courts Ordinance, 1985 runs as follows:—“Subject to the provisions of the Muslim Family Laws ordinance, 1961 (VIII of 1961), a Family Court shall have exclusive jurisdiction to entertain, try and dispose of any suit relating to, or arising out of, all or any of the following matters, namely:—

- (a) dissolution of marriage;
- (b) restitution of conjugal rights;
- (c) dower;
- (d) maintenance;
- (e) guardianship and custody of children.

This Ordinance came into force on the 15th day of June 1985.⁵⁷

After the establishment of the Family Courts, all matters relating to the above are tried by this court. In *Abdul Khaleque Vs. Selina Begum*,⁵⁸ Abdul Bari Sarker. J. in exercising criminal revisional

⁵⁵ 19 DLR (1967) W.P. P. 50

⁵⁶ 19 DLR (1967) W.P. P. 50.

⁵⁷ Government Notification no. S.R.O. 239—L/85.

jurisdiction of the High Court Division held, “The purpose of the Family Courts Ordinance is to provide for speedy disposal of family matters by the same forum. There will be anomaly and multiplicity of proceedings if, in spite of the establishment of Family Courts, 1985 the Magistrate continues to entertain cases for maintenance under section 488 of Cr. P.C.

It was, therefore, held that the provisions made in the Family Courts Ordinance, 1985 have ousted the jurisdiction of the Magistrates to entertain application for maintenance which is a family court matter. The jurisdiction of section 488 of Cr. P.C. to try for maintenance has been ceased to exist from the 20th June, 1990, the date of delivery of judgment in the above mentioned case.

In another case of *Rustom Ali Vs. Jamila Kahatun*⁵⁹ relating to maintenance of wife for past maintenance, Naimuddin Ahmed J. held, following the Family Courts Ordinance, 1985, section 5 (a) (b), that the wife is not entitled to past maintenance. Maintenance can be allowed to her only from the date of institution of the suit before that Family Court till three months after the decree for dissolution of the marriage. Neither the child nor the person who maintains it can claim past maintenance from the father unless the same is previously fixed. It was held that maintenance can only be allowed to her (wife) from the date of institution of the suit before the Family Court till three months after the decree for dissolution of the marriage i.e. during the period of *Iddat*⁶⁰. This view is also supported in *Ballie's Digest* as “when a woman sees her husband for maintenance for time antecedent to any order of the judge of mutual agreement of the parties, the judge is not to decree maintenance for the past.”⁶¹

14. Summary

Maintenance or *Nafaqa* is an important issue of Islamic law. It is the duty of some category of persons to provide maintenance to some other or in other words, it is the right of some persons to have maintenance from others. Providing of maintenance is not only legally

⁵⁸ 42 DLR (1990), P. 450.

⁵⁹ 43 DLR (1991), P. 301.

⁶⁰ *Ibid*, P. 302.

⁶¹ *Ballie, Digest of Muhammad Law*, P. 447.

sanctioned but also it is an act of devotion or **Ibadat**. Islam has prescribed specific laws on maintenance based on the **Quran** and the **Sunnah**. On the basis of **Shariyah** or substantive law, competent Civil courts used to pass decree for providing maintenance in the absence of statutory laws.

According to Islamic law, it is incumbent upon a husband to provide maintenance to his wife, upon a son to his parents, upon a father to his minor children and sometimes to near relations. As pointed out above, in Bangladesh we have three statutes which, amongst other subjects, deal specifically with maintenance. The Code of Criminal Procedure, 1898 (Section 488) deals with the maintenance of wife and children, the Muslim Family Laws Ordinance, 1961 and the Family Courts Ordinance, 1985 deal with maintenance of wife only. There is no statute to deal with the provision of maintenance of parents or near relations. In the absence of such statute to protect the right of parents; innumerable Muslim parents are leading inhuman life due to the fact that their sons are not providing adequate maintenance to the parents. Government of Bangladesh may legislate Act like the Family Courts Ordinance, 1985 to safeguard the rights of the poor Muslim parents.

It is the moral duty of a man to provide maintenance to the old parents and poor relatives. But moral duty is not enforceable unless it is clothed by the law to make it a legal duty. Existing **Sharia** law has asked the wealthy sons, though not in strong terms, to provide maintenance to their old and poor parents. But nothing has been said about the violation of this instruction. In absence of this, people may find plea not to abide by instruction. It is submitted that the lacuna left by the old traditional law can be filled up by providing appropriate provisions in the statutes.

Chapter Twelve

Gifts (HIBA)

Section- 1

1. Significance of gift

A Muslim may validly transfer his property either in whole or part to another person by way of gift. Generally, a gift may be made *intervivos*, i.e. from one living person to another living person without any restriction. According to the provision of Islam, a Muslim can make gift of his entire property during his lifetime.¹ The motive of gift is either to manifest affection towards an individual donee or to win the affection of the donee.²

Ranee khajooroon Nissa v. Mst Roushan Jehan case states the purpose and significance of gift as follows: "The policy of the Mohammedan laws appears to prevent a testator interfering by will with the course of devolution of property according to law among his heirs, although he may give a specified portion as much as a third to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms."³

The intention of the donor must be honest and not merely to achieve any ulterior object. A gift will be invalid if it is made to disinherit some of the heirs. But all the cases of disinheritance of some of heirs are not invalid.⁴ A gift is invalid only where the disinheritance is the object but not merely the result of the gift.⁵ Islam encourages the making of mutual gift with the intention of transferring wealth from one person to another leading to cordiality and affection. Besides, making of the gift closes the relationship between the donor and the donee. Here lies the importance and significance of the gift. The Prophet Hazrat Muhammad (peace be on him) encourages the making of the gift.

¹ Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, P. 217.

² R.K. Wilson, *Ango-Muhammadan Law*, P. 323.

³ (1876) 3 1A 291 at 307 (P.C)

⁴ PLD 1955 Lah. 181.

⁵ PLD 1950 Pesh. 45.