

This Act has brought changes in Muslim law on different points. First, according to Muslim law, a girl becomes major for the purpose of marriage on the happening of either of the two events, (1) on the completion of her fifteen year, and (2) on her attaining the state of puberty at an earlier period. The burden of proof regarding a girl's achieving either of these two conditions for attaining majority for the purpose of marriage lies on those who claim to be her guardian or give her in marriage whose testimony is to be relied.⁶ Secondly, when a girl is a minor, it is permissible in Muslim law that her father or grandfather or other paternal relations, as guardian, can give her in marriage. But according to this Act, a Muslim girl who has not attained the age of eighteen years can not marry on her own accord, though she may have attained puberty. Again, a Muslim male who is below the age of twenty-one years can not marry, even though he has attained puberty. Thus this Act has imposed some restrictions on Muslim law in respect of the age of marriage. According to Islam, there is no minimum age of marriage. At any age marriage may take place provided that the parties themselves cannot contract marriage before their attaining puberty. Hazrat Muhammad (Peace be on him) married Hazrat Aisha (R) before her attaining puberty.

“Aisha reported that the Messenger of Allah married her while she was a girl of seven years. She was sent to him while she was a girl of nine years and he played with her. He died while she was a girl of 18 years.”⁷

This Act, therefore, has brought a remarkable change in the Muslim Shariya law by imposing limit on the age of marriage. That is, in case of a male the minimum age shall be 21 years and in case of a female the minimum age shall be 18 years for solemnizing marriage. Any violation of such minimum age-limit is punishable under Section 4, 5 and 6 of this Act.

⁶ R.B. Sethi, *Muslim Marriage and its Dissolution*, P. 5.

⁷ Fazlul Karim, *Al-Hadis*, Vol. II, P. 650v *Shah: Bokhari*, Vol. V, P.61.

Chapter-Twenty Two

The Dissolution of Muslim Marriages Act, 1939

(Act No. VIII of 1939)

An Act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by woman married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie. Whereas it is expedient to consolidate and clarify the provisions of Muslim law relation to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie; It is hereby enacted as follows:-

1. Short Title and Extent.-

- (1) This Act may be called the Dissolution of Muslim Marriages Act, 1939.
- (2) It extends to the whole of Bangladesh.

2. Grounds for Decree for Dissolution of Marriage

A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:-

- (i) that the whereabouts of the husband have not been known for a period of four years;
- (ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;
- (iia) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961;¹
- (iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;
- (iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three Years,

¹ Inserted by section 13(a) of the Muslim Family Laws Ordinance.

- (v) that the husband was impotent at the time of the marriage and continues to be so;
- (vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;
- (vii) that she, having been given in marriage by her father or other guardian before she attained the age of eighteen² years, repudiated the marriage before attaining the age of nineteen³ years:

Provided that the marriage has not been consummated;

- (viii) that the husband treats her with cruelty, that is to say,-
 - (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or
 - (b) associates with women of evil repute or leads an infamous life, or
 - (c) attempts to force her to lead an immoral life, or
 - (d) disposes of her property or prevents her exercising her legal rights over it, or
 - (e) obstructs her in the observance of her religious profession or practice, or
 - (f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;
- (ix) on any other ground which is recognised as valid for the dissolution of marriage under Muslim law,

Provided that –

- (a) no decree shall be passed on ground (iii) until the sentence has become final;

² Substituted for the word sixteen by section 2 of the Dissolution of Muslim Marriages (Amendment) Ordinance, 1986.

³ Substituted for the word eighteen, *Ibid.*

- (b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and
- (c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be important, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

3. Notice to be served on heirs of the husband when the husband's whereabouts are not known-

In a suit to which clause (i) of section 2 applies-

- (a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint,
- (b) Notice of the suit shall be served on such persons, and
- (c) such persons shall have the right to be heard in the suit:

Provided that paternal uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

4. Effect of conversion to another faith – The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not be itself operate to dissolve her marriage:

Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2:

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

5. Rights to dower not to be affected.- Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.

6. Repeat of s. 5 of Act XXVI of 1937, Muslim Personal law (Shariyat)⁴-Repealed by the Repealing and Amending Act, 1942 (XXV of 1942), s. 2 and First Sch.

Prior to the passing of this Act, the courts, following the Hanafi interpretation of the law, had denied to Muslim women the rights of dissolution available to them under the shariat laws. After a great deal of public agitation the late Qazi Muhammad Ahmad Kazimi introduced a bill in the central legislature on 17 April, 1936.⁵ Ultimately, the bill was passed by the Assembly with suitable modifications and became law on 17 March, 1939, as "the Dissolution of Muslim Marriages Act, 1939." It was published in the Gazette of India on 25th March 1939.

7. Section 5 of the shariat Act runs as follows: The District Judge may, on petition made by a Muslim married woman, dissolve a marriage on any ground recognised by Muslim Personal Law (*shariat*).

Commentaries

This Act has ever since been hailed as one of the most progressive enactments passed by the legislature. It achieved two main objects- (i) it restored to Muslim wives an important right accorded to them by the Shariat laws and (ii) it treated all Muslims alike. The Act, therefore, applies to every Muslim irrespective of any school of law he belongs. This Act is in force in India, Pakistan and Bangladesh.

The following is an extract from the statement of objects and reasons contained in the Bill⁶ in introducing the Muslim Marriage Dissolution Act:

"There is no provision in the Hanafi Code of Muslim Law enabling a married Muslim woman to obtain a decree from the courts dissolving her marriage in case the husband neglects to maintain her,

⁴ Section 5 of the shariat Act runs as follows: The District judge may, on petition made by a Muslim married woman dissolve a marriage on any ground recognised by Muslim personal Law (*Shariyat*).

⁵ Asaf A. A. Fyzee, *Outlines of Muhammadan Law* (Oxford University Press, 1964), P. 161.

⁶ Gazette of India, Part V, 1938, P. 36.

makes her life miserable by deserting or persistently maltreating her, or absconds leaving her unprovided for, and under certain other circumstances. The absence of such provision has entailed unspeakable misery to innumerable married Muslim women in British India. But the Hanafi Jurists have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the "Maliki, Shaffi or Hambali Law". Acting on this principle, the *Ulemas* have issued *fatwas* to the effect that in cases enumerated in clause 3, part A of this Bill, a married Hanafi Muslim woman may obtain from the Court a decree dissolving her marriage. As the Courts are sure to hesitate to apply the Maliki Law to the case of a Hanafi Muslim woman, legislation recognising and enforcing the principle referred to is called for in order to relieve the sufferings of countless Muslim women. Thus clauses 3 and 4 are meant to consolidate the provisions of Muslim Law relating to dissolution of marriage by judicial decree".

The preamble to the Act states that the Act was enacted-

- (1) To consolidate and clarify the provisions of Muslim Law relating to suits for dissolution of marriage by woman married under Muslim Law; and
- (2) to remove doubts as to the effect of renunciation of Islam by a married woman on her marriage tie.

The Act has consolidated Muslim law by bringing into harmony the rules of law as laid down by different schools of law. It has ironed out the different views of these conflicting schools. Now all Muslims belonging to any sect would be governed by the same provisions. It has also clarified many controversial points such as period of waiting for missing husband, age of option of puberty of wife, negligence of providing maintenance, imprisonment of husband, insanity and impotency of husband, cruelty of husband, renunciation of wife etc. Therefore, the main object of enacting this Act was to bring the law administered in the sub-continent in conformity with the authoritative texts.

The Dissolution of Muslim Marriage Act, 1939 is a unique one in safeguarding the interests of those married Muslim women who are deprived of their legitimate rights and are the victims of humiliation by their husbands. Thus it has been hailed as the most progressive piece of legislation, at least, for three reasons.⁷

(1) Firstly, the Act is an eloquent witness to the new problems and appreciate the pressing needs of the time and demands of society, (2) secondly, it restored to the Muslim views and the rights of dissolution of marriage available to them under their own laws, (3) thirdly, it treats all Muslims alike, regardless of their school or sub-school to which they belong.

Before the passing of this Act, if the marriage of minor whether a boy or a girl was contracted by the father or the grandfather, there was no option of puberty to either of them because the determination of parents in this matter could not be suspected to originate in sinister motive as their affection for their children is undoubted.⁸ The marriages contracted by them were binding upon the parties just as if they had themselves entered into the contract, and no option after puberty remains to them. Even a marriage contracted by a minor himself with the consent of the father would be binding on him and there would be no option of puberty.

A marriage contracted by the father may be cancelled if he has acted fraudulently, negligently and wickedly. Thus the father would be said to have acted fraudulently and negligently if the minor was married to a lunatic or the contract was to her manifest disadvantage.⁹ In an Allahabad case,¹⁰ Sulaiman J. Observed:

"If a minor shia girl has been given away in marriage by her father while of non-age, when it was impossible for her to have any voice in the matter, and on attaining puberty she considers the marriage to be repugnant to her religious sentiments and grossly disadvantageous or to herself, it would be contrary to all rules of equity or justice to force such marriage on her, and thereby compel her to live with a person who is adherent to her. When her religion says that such marriage is adherent she must be allowed the option to repudiate it, if any option can ever exist".

The marriage under the Muslim law is in the nature of a contract and therefore, it requires the free and unfettered consent of the parties to it. Ordinarily, a man and a woman conclude the contract of marriage. But

⁸ Sheikh Burhan-od-Din Ali, *Hedaya*, P.37.

⁹ *Fatima V. Yusuf Sulaiman Dawoodia*, AIR 1937, Rang. 361.

¹⁰ *Aziz Banu V. Mohammad Ibrahim*, 1925 Allahabad, 720.

in the case of minors who have not attained the age of puberty as recognised by Muslim law, the contract may be entered into by their respective guardians. As pointed out earlier, under Muslim law marriage entered by father or grand-father can not be repudiated by the wife (their daughter) concerned after attaining her puberty. But the enactment of this statute has changed the Muslim law to the extent that even marriages arranged by father or paternal grand-father have been rendered revocable and the age limit upto which option of puberty could be exercise has been extended.¹¹

Under section 2 (vii) of the Act, a wife is entitled to the dissolution of the marriage if the following conditions are fulfilled,

- (i) The marriage was contracted by the guardians of the minor girl,
- (ii) The marriage has not been consummated,
- (iii) The marriage took place before she attained the age of "eighteen" years and
- (iv) She has repudiated the marriage before her attaining the age of "nineteen" years.

The right of repudiation of a marriage by a girl ceases as per section 2 ((vii) of the Act if the marriage has been consummated. But the consummation must take place between the age of 18 years and 19 years of the wife concerned. Thus consummation between the husband and the wife before the attainment of puberty does not stand on the way of exercising the right of the option of puberty. Puberty, under Muslim Law, is presumed on completion of the age of 15 years in the absence of evidence. But according to the latest amendment of this Act, marriage contracted before the age of eighteen years may be repudiated before the attainment of the age of nineteen years even though puberty has been attained by the wife concerned earlier than eighteen years; for example, if it is attained at the age of 16 years. Thus the Act eliminated the fight over the proof of puberty.¹² Considerable change has been brought by this Act in the Muslim law with respect to the time when the option of puberty may be exercised by a married girl. Under this

¹¹ PLD, 1952, Dhaka 272; 4 DLR 619.

¹² *Daulan V. Dosa*, PLD, 1956 Lahore 712.

Act, on the one hand, the power of the father or grandfather of the married girl has been curtailed, and on the other, the power of exercising the right of option of puberty of the girl has been increased.

Under the Hanafi law, dissolution of a marriage on the basis of the husband's cruelty to the wife or for failure to maintain her is not allowed. This causes great hardship to the wife. The Act now allows the dissolution of marriage on the above grounds. Again, according to Hanafi law, the wife of a missing husband had to wait for at least ninety years¹³ from the day of his missing before contracting a second marriage. Under Maliki law, the period of waiting is four years only. The Act has adopted the latter view to save the wife from obvious hardship. Further, there was great difference of opinion amongst the Muslim jurists about the effect of the conversion of a Muslim wife to any other religion. Under section 4 of this Act, the marriage would not get dissolved in case of conversion to any religion or renunciation of Islam by a married Muslim woman. Under Muslim law, a man marries up to four wives at a time. This has been stated in the Holy Quran as, "And if you fear that you cannot act equitably towards orphans, then marry such women as seem good to you, two and three and four; but if you fear that you will not do justice (between them), then (marry) only one."¹⁴ But if a husband takes an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961 as has been inserted under clause (iia) of section 2 of this Act, then the former wife or wives shall be entitled to obtain a decree for the dissolution of her marriage. This inserted clause is a clear violation against the clear provision of Muslim Law. This statutory change in Muslim law has empowered the wife to seek dissolution of her marriage by limiting the power of the husband for adopting polygamy. However, in spite of introducing some changes in the Shariya (Law), the Dissolution of the Muslim Marriages Act, 1939 is a landmark in the field of legislation. It has consolidated the laws regarding the grounds for the dissolution of a marriage of a woman married under Muslim Law.

¹³ Hedaya, P. 216.

¹⁴ *Al-Quran*, 4:3, See K-N Ahmad, *Muslim law of Divorce*, P. 338.

Chapter-Twenty Three

The Muslim Family Laws Ordinance, 1961

(ORDINANCE NO. VIII OF 1961)

An Ordinance to give effect to certain recommendations of the Commission on Marriage and Family Laws.

Whereas it is expedient to give effect to certain recommendations of the Commission on Marriage and Family Laws;

Now, therefore, in pursuance of the Proclamation of the seventh day of October, 1958, and in exercise of all powers enabling him in that behalf, the President is pleased to make and promulgate the following Ordinance: -

1. Short title, extent, application and commencement-

- (1) This Ordinance may be called the Muslim Family Laws Ordinance, 1961.
- (2) It extends to the whole of Bangladesh, and applies to all Muslim citizens of Bangladesh, wherever they may be.
- (3) It shall come into force on such date as the Government may by notification in the official Gazette, appoint in this behalf.

2. **Definitions** - In this Ordinance, unless there is anything repugnant in the subject or context,-

- (a) "Arbitration Council" means a body consisting of the Chairman and a representative of each of the parties to a matter dealt with in this Ordinance:

Provided that where any party fails to nominate a representative within the prescribed time, the body formed without such representative shall be the Arbitration Council;

- (b) "Chairman"¹ means-

Amended by the Muslim Family Laws (Amendment) Ordinance, 1985 (Ord. No. XIV of 1985).