

such a decree.²⁹⁷ Decree for restitution of conjugal rights is discretionary with courts. The plaintiff, in order to succeed, must come to the court with clean hands. In order to entitle a husband to a restitution of conjugal rights, it is necessary to prove that the marriage is valid. The existence of a valid matrimonial relationship is, therefore, an essential condition for a decree in such suit. Restitution will not be allowed if the marriage is irregular or void. If a marriage is *fasid* on the ground of its having been contracted during *iddat*, the husband would not be granted a decree even though the marriage had been consummated.²⁹⁸

The law regarding remarriage in case of irregular marriage is that the wife can remarry after *iddat* on separation. In the case of an unlawful conjunction, remarriage cannot be contracted with one of the unlawfully conjoined women, until the *iddat* of the others or other has expired. But if the *iddat* of others has expired, the fact that the woman who is sought to be married is in her *iddat* would not matter. The following illustrations will make the point clear.

- (a) A man marries two sisters and separates from them, he may not marry one of them till the *iddat* of both expires.
- (b) In the above case if the *iddat* of one has expired, he may marry the other who is still in *iddat*.²⁹⁹
- (c) 'A' marries two sisters 'M' and 'N'. The marriage with 'M' alone has been consummated. He may marry 'M' on separation, but he cannot marry 'N' until the expiration of the *iddat* of M.³⁰⁰

²⁹⁷ Faiz Badruddin Tyabji, *Muhammadan Law*, P. 49.

²⁹⁸ Ahmadunnisa V. Ali Akbar, 1942, Pesh. 19.

²⁹⁹ Baillie, *A Digest*, P. 33.

³⁰⁰ *Ibid.*

Chapter Seven Dower or Mahr

1. Definition of Mahr and its Importance

Mahr (Arabic word) is translated in English as dower or marriage portion. It is one of the incidents of *Nikah* or marriage. In pre-Islamic period the term *mahr* was used to signify gifts (*sadaka*) given to the parents of the wife but *sadaq* was a gift to the wife. Islam approved *sadaqa* or *Mahr* to be paid to the wife in case of regular marriage. *Mahr* is a real settlement in favour of the wife, a provision for a rainy day and socially, a check on the capricious exercise by the husband of his almost unlimited power to divorce.¹ The term *mahr* has neither been defined in the Al-Quran nor in the Hadith. But the jurists, scholars and judges have defined it in their own language.

Tyabji defined *Mahr* or dower as a sum that becomes payable by the husband to the wife on marriage, either by agreement between the parties, or by operation of law.² D.F Mulla defined it, "Mahr or dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage".³ Justice Mahmood defined, "Dower is a sum of money or other property promised by the husband to pay or deliver to the wife in consideration of the marriage and even where no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife as a necessary effect of marriage".⁴ Some jurists treat *mahr* as a consideration of the obligation imposed upon the husband as a mark of respect to the wife. *Mahr*, in fact, is payable by the husband to the wife both as consideration and a mark of respect.

The obligation and importance of the payment of mahr is found in Holy Quran and the Hadith. The Quran states, "Give women (wives) their dower with no stings attached. If they themselves (wives) give some of it back to you (waive it), then consume it (dower) with good

¹ Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, P. 133 (1993), Delhi.

² Faiz Badruddin Tyabji, *Muhammadan law* (1866), P. 170, Lahore.

³ D.F Mulla, *Mahomedan law*, P. 245 (1993), Bombay.

⁴ Abdul Qudir vs. Salima 8 all 149 (1886)

cheers.”⁵ It further states, “ Since you have thereby sought enjoyment with them, give them dower as is stipulated. Yet it will not be held against you should you come to terms even after what has been stipulated.”⁶ The prophet (peace be on him) said, “ Pay *mahr* to your wife even it is a ring made of iron.”⁷

Islamic law thus provides that *mahr* is to be paid by husband to the wife either in cash or in kind or both or even teaching the holy Quran to the wife at the time of marriage or later on as the case may be, The husband must pay *mahr* to the wife as it is the command of Almighty Allah and His Apostle. Payment of *mahr*, therefore, is the duty of the husband and receiving of it is the right of the wife.

2. Classification of Mahr

Jurists divide Mahr into two kinds:-

- (i) Specified (*Al mahrul Musamma*)
- (ii) Unspecified or proper dower (*Al- Mahrul Mishal*)

(i) Specified dower:

Specified dower is that dower which is fixed at the time of marriage or later on. There are provisions under section 13, 14, 15 and 16 of the *Kabinnama* Form-E prescribed according to the Muslim Marriages and Divorces Rule 1975, specifying the amount of *mahr*. When a husband agrees to pay to his wife a residential building and one lakh taka as *mahr*, it is an example of specified *mahr*. According to Sunni law, a father, making a contract of dower for his minor son, is not personally liable to pay the specified dower but it is binding on his minor son.⁸ The husband will be bound to pay the whole of specified dower whatever excessive it may be subject to condition of economic capability of the husband. There is a growing tendency in Bangladesh that a high rate of dower is fixed in the *Kabinnama* without considering the financial capability of the husband. In most of the cases the husband does not pay the dower as stipulated rather takes dowry from the wife or wife's relative. Consequently, the wife goes to the family court to recover the *mahr* in case of dissolution of marriage.

⁵ Al Quran-4: 4

⁶ Al Quran-4: 24

⁷ Miskatul Masabih, Bangla tr.Imdadia Library, P.257, (1987), Dhaka

⁸ D.F. Mulla, P.24

3. Prompt and Deferred Dower:

Specified dower has been divided into prompt or *mu'azzal* and deferred or *Mu'ajjal*.

Literally speaking, prompt dower means hastening or proceeding. It, therefore, means that which has been hastened or given priority in point of time. Prompt dower is payable after the marriage, whenever it is demanded by the wife. *Muajjal* or deferred dower means that dower which is payable on the dissolution of marriage either by death or divorce.

If the dower was not divided into prompt or deferred, and then according to *sunni* law, it should be split into prompt and deferred. But *Shia* law presumes that the whole amount is prompt.

The wife has a right to refuse conjugal rights if the prompt dower is not paid on demand. In such a case, the wife can effectively resist the suit for restitution of conjugal rights of the husband provided that no consummation took place. But if consummation has taken place, she can refuse this right on condition of payment of prompt dower. If there is no mention in the *Kabinnama* about prompt dower, then court may consider half of the total dower as prompt dower.⁹ Of course, the court may rebutte it depending on the circumstances of the case, the status of the wife, the economic condition of the husband and the total amount of dower.

(ii) Unspecified or proper dower (*Mahrul Mishal*):

If the amount of dower was not fixed at the time of marriage or later on, the wife is entitled to proper dower, though the marriage was contracted on the condition that the wife cannot claim any dower. Proper dower varies according to the social position of the woman's family, the wealth of her husband, her own personal qualifications and circumstances of time and social conditions surrounding her. According to *Hedaya*, a renowned book on Islamic law, proper dower is to be determined depending on the personal qualifications of the wife like her age, beauty, fortune, understanding and virtue. The amount of dower

⁹ Nasiruddin Shah VS Amatul Mughni Begum ILR (1947) Lah. 565.

fixed of other female members of the wife's family, like her sister and paternal aunts is also to be considered. Above all, social position and economic capability should be taken into consideration at the time of determining proper dower. Factors to be considered for the determination of proper dower are summarized:

- (i) The personal qualifications of the wife - beauty, virginity, personality, age, education and wealth.
- (ii) The status of her family.
- (iii) The amount of *mahr* settled upon the female members of her father's family like her sister and paternal aunts.
- (iv) The financial capacity of the husband.

4. Amount of Dower:

According to *Hanafi* law, the lowest minimum amount of dower is ten *dirhams*. But there is no upper limit and the husband may settle an amount in accordance with his means. Under *shia* law, there is no lowest or highest limit of dower. It can be fixed by mutual consent. In Bangladesh the amount of dower is sometimes fixed at a higher rate in consideration of the fact that the husband will not divorce his wife for fear of payment of dower. Besides, the husband takes, in most of the cases, dowry from the wife or wife's side, though taking and giving of dowry is prohibited by the Dowry Prohibition Act 1980. Fixation of higher amount of dower beyond the capacity of the husband is in violation to the provision of Al-Quran. Because, the *mahr* or dower is a debt which is to be paid irrespective of its amount, big or small. The husband remains accountable for non-payment of *mahr*. So it is to be fixed in such an amount which can be paid by the husband easily and comfortably.

Dower, once fixed, can be increased by the husband and decreased by the wife.¹⁰ A wife who has attained the age of majority and full understanding can only make this reduction. There shall be written instrument for the validity of such remission.¹¹ No coercive force can be applied by the husband for decreasing the amount of dower.

¹⁰ Al-Quran 4:4

¹¹ AIR, 1942, Pat. 210.

5. Mode of payment of *mahr*:

Mahr must be paid (i) if the marriage has been consummated or (ii) by valid retirement (*khilwatus shahih*) and (iii) death of either of the party. Consummation or valid retirement confirms the dower in full. So also the wife is entitled to her full *mahr* as stipulated in case of death. She is also entitled to her full proper dower if no dower was fixed before death.

If divorce or dissolution takes place before consummation or valid retirement, the wife receives half of the specified dower even if the dower was prompt.¹² But she is entitled to only three sets of customary dress when separation takes place before consummation or valid retirement when no dower was fixed.¹³ Dower is confirmed when cause of dissolution arises due to husband, for example, if he divorces his wife or separation takes place on the ground of his impotency. But the husband is not liable to pay dower if the cause of separation lies with the wife, for example, if she exercises her right option of puberty.¹⁴

6. The widow's right of retention:

Islam considers dower as a debt, which must be paid by the husband during the subsistence of marriage-tie. If dower is not paid during marriage tie, then the property of the husband after his death shall be distributed among his heirs after payment of debt, if any, including unpaid dower. Islamic law, therefore, gives the widow a special right to enforce her demand about unpaid dower. This right is known as the widow's right of retention. A widow can legally retain the possession of her deceased husband's estate until her dower debt is paid. But this right of retention does not create any right of the widow on the property. She is entitled to appropriate the usufruct to realize her dower debt. But she has no right to alienate the property by sale, mortgage, gift or otherwise.¹⁵

¹² Al-Quran 2:236; Valid retirement is that which the husband and the wife are alone together in a secluded place in which nobody overlook them without their knowledge and where the husband is free to have physical connection with his wife without let or hindrance.

¹³ Hedaya, P. 45.

¹⁴ Neil Ballie, P.97.

¹⁵ Zaibunissa V. Nazim Hasan, AIR (1962) All.

The right of retention of possession over the property of the deceased husband by the wife arises on two grounds—as heir of the deceased and (2) as entitlement of her unpaid *mahr*. Thus the right of retention is extinguished if the *mahr* is paid. Dower is a debt which must be paid by the heirs of the deceased in proportion to their shares. She will inherit, as sharer as well as she will receive the dower from the property left by her deceased husband. An illustration is given for proper understanding of the position of the widow.

A Muslim died leaving a widow, a mother, and a father. The widow's dower debt is Tk. 4000.00. The valuation of the property of the deceased is Tk. 10,000.00. The heirs have the right to recover their shares on payment to the widow the amount of *mahr* proportionate to their shares.

Here Mother gets $\frac{1}{4}$ as sharer ($1 - \frac{1}{4} = \frac{3}{4}$; $\frac{1}{3}$ of $\frac{3}{4} = \frac{1}{4}$)

Widow gets $\frac{1}{4}$ as sharer

Father gets $\frac{1}{2}$ as residuary

The widow, therefore, will contribute $\frac{1}{4}$ of 40000.00 = 10000.00

Mother's contribution is $\frac{1}{4}$ of 40000.00 = 10000.00

and Father's contribution is $\frac{1}{2}$ of 40000 = 20000.00

After deduction to *mahr* (10000.00+10000.00+20000.00) Tk. 40000.00,

There remains tk. 60000.00 (10000.00- 40000.00)

Now wife gets $\frac{1}{4}$ of 60000.00=15000.00+40000.00(*mahr*)=Tk. 55000.00

Mother takes $\frac{1}{4}$ of Tk. 60000.00 = Tk. 15000.00

Father $\frac{1}{2}$ of Tk. 60000.00 = Tk. 30000.00

7. Dower debt- unsecured debt:

Mahr or dower is a debt just like an ordinary debt which the widow is entitled to recover from the property of her deceased husband. But in the absence of any charge under a special agreement, a widow is like an ordinary creditor and is entitled to recover the debt in an ordinary way i.e. by filing a suit in the court of law.¹⁶ In this sense it is said that dower is an unsecured debt.

¹⁶ Muhammad Sadiq Ali Khan V. Fakher Jahan Begum, AIR (1934) Oudh. 307.

Dissolution of Marriage

I. Introduction:

A Muslim marriage is a contract between a male and a female. Ordinarily, this contract is made for lifetime and it is dissolved by death of either husband or wife. This is natural dissolution over which no party has any control. But a marriage-tie can also be dissolved in the case of necessity. The dissolution of marriage contract, except by death, has been condemned by the holy Prophet (peace be on him). He said, 'With Allah, the most detestable of all things permitted is divorce'.¹ On the basis of this Hadith it can be said that marriage is not only a civil contract but also a sacrament. Islam regards marriage a strong covenant. So marriage is the combination of civil contract and sacrament. Marriage-tie, therefore, should not be dissolved on flimsy ground like emotion, sentiment, temperament etc.

If, for some reasons or other, the relationship between the husband and the wife deteriorates and there is no way to improve it, then and then only divorce or dissolution of marriage contract is permitted. Islam has made the provision of *talaque* or divorce so that both of them can lead a better life.² Divorce disintegrates the family unity and therefore it is a social evil in itself, but sometimes it becomes a necessary evil. Under the circumstances, it is better to wreck the future happiness of the parties by binding them to a companionship that has become odious.³ Islam makes the provision of *talaque* or separation on the one hand and on the other, it dislikes *talaque*. Islam, therefore, imposes check and balance on the right of the parties.

¹ Muhammad Ali, Manual of Hadith, P.284 (N.D.)

² Syed Qutub, Fizilalil Quran., Tr.Al-Quran Academy London, Bangladesh Center Vol. 4, P.95.

³ AA. Asaf Fyzee, outlines of Muhammadan law, P.148.