

But, to her. where the  
divorced woman



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But, a divorced woman's right to claim maintenance also for her children (under two years) does not affect the right of these children to claim maintenance from father. In *Siraj Sahebji Mujawar v.*

*Roshan Siraj Mujawar*, the Bombay High Court has held that children's right of maintenance from father is separate and independent of the divorced wife's (i. e. their mother's) right to claim maintenance. What amount is to be given to her as maintenance shall be determined by the Magistrate before whom the divorced woman makes application? The Magistrate shall fix the amount having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband.

**(2) Maintenance after the Iddat:**

The divorced woman who remains unmarried after the Iddat, and is unable to maintain herself, is entitled to get maintenance from her such relatives who would inherit her properties upon her death. In the absence of any of such relatives or, where they have no sufficient means, then, ultimately the liability to maintain her is cast upon the Waqf Board of the State in which she resides. Section 4(1) of the Act provides that where the Magistrate is satisfied that a divorced woman has not remarried and is not able to maintain herself after the Iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law, to pay a reasonable amount to her. Where the divorced woman has children, the Magistrate shall order on 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 the parents of such divorced woman to pay maintenance to her.

The Act further provides that if any of the parents is unable to pay his or her share for want of sufficient means, the Magistrate may order that his or her share in the maintenance ordered by him be paid by such other relatives who have means of paying the same. While ordering for the amount of maintenance to be paid to a divorced woman, the Magistrate shall take into account the standard of living enjoyed by such woman during her marriage and also the means of the relatives on whom the liability is cast upon. The liability of the relatives to pay maintenance shall be in proportions of their respective shares in her property. The Magistrate may specify also the duration up to which the relatives are required to pay maintenance to such divorced woman. Section 4(2) provides that where a divorced woman who is unable to maintain herself, has no relatives as mentioned above or, where such relatives (or any one of them) have no enough means to pay maintenance, the Magistrate may, by order, direct the State Waqf Board (established under the Waqf Act, 1954 or under any law for the time being in force in the State) to pay such maintenance as determined by him or, as the case may be, to pay the shares of such relatives who are unable to pay at such periods as he may specify in his order. It is significant to note that under the Muslim Women Act, 1986, the Waqf Board may be made liable to maintain a divorced Muslim woman only where she has no parents, children or other relatives or, where such persons are unable to maintain her.

Therefore the normal procedure is that order for maintenance be issued first

to the above-mentioned persons under Section 4(1) and on their being unable to maintain her, ultimately to the Waqf Board under Section 4 (2).

But, in *Secretary Tamil Nadu Waqf Board v. Syed Fatima Nachi*, 3] the Supreme Court has held that where the circumstances suggest that relatives mentioned above are unable to maintain the divorced woman, she is entitled to plead and prove in one proceeding, the inability of these relations by directing her claim against Waqf-Board in the first instance. The Court observed that she is not required to proceed first against her each relative successively ' in order to obtain negative orders justificatory to the last resort' and then finally to initiate proceeding against Waqf Board.

Note: Constitutionality of Section 4(2) of this Act was challenged on the ground that it is violative of Art. 26 of the Constitution of India. But, in *Syed Fazal Pookoya Thangal v. Union of India* the Kerala High Court has held that the provisions of Section 4(2) of the Muslim Women Act, 1986 directing Waqf-Board to pay maintenance to divorced Muslim women, is not violative of Art. 26 of the Constitution. The court observed that Waqf-Board is not a " religious denomination" for purposes of Art. 26, of the Constitution of India.

### **(3) Dower and other Exclusive Properties of Wife:**

The divorced woman is entitled to get her unpaid dower.

Besides dower she is also entitled to all such properties which were given to her before or after the marriage by husband, his relatives, friends or her relatives or friends. It may be noted that dower and other properties given to a Muslim wife as presentation (gift) is her exclusive property and, she continues to be its absolute owner even after divorce. She was entitled to <https://assignbuster.com/but-to-her-where-the-divorced-woman/>

her dower and other exclusive properties under the uncodified Muslim law even before the commencement of this Act. But the wife had to file a civil suit and she could get her properties only after going through the lengthy procedure under Civil Procedure Code as followed by these courts. It was an inconvenient dilatory process. Now under Section 3(2)(3) and (4) of the Muslim Women Act, 1986 the procedure followed by the Court is a 'Criminal Procedure' which is speedy and gives faster relief to aggrieved Muslim Woman. The Act has made the enforcement of these claims more effective. It is significant to note that now the period of limitation for filing a suit for the claim of dower or maintenance under Section 3(2) and (4) shall not be determined under Muslim law.

In *Shahnaz Bano alias Shahnaz Khan v. Parvez Ahmad Khan*, it was pleaded that suit for the claim of dower and maintenance should be dismissed as being time-barred because it was filed after the expiry of three years from the date of dissolution of marriage. But, the Patna High Court held that since Section 3(2) of the Muslim Women Act does not prescribe any time-limit for filing of a suit, it may be said that there is no limitation for filing such suit. Accordingly, the suit for the claim of dower and maintenance was held not time-barred and the court accepted it for the relief.

#### **(4) Option of Section 125 Cr.**

##### **P. C:**

This Act does not totally bar the application of Sections 125 to 128 of the Criminal Procedure Code, 1973. The Muslim Women Act, 1986 has now made

the operation of Sections 125-128 of the Criminal Procedure Code optional in respect of the Muslim women.

Section 5 of the Act provides that, on the date of the first hearing of the application if the divorced woman and her former husband declare by affidavit or any other declaration in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128 of the Code of Criminal Procedure, 1973, and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly.

**(5) Cases Pending Under the Criminal Procedure Code:**

Section 7 of this Act lays down that every application by the divorced woman under Section 125 or 127 of the Code of Criminal Procedure, 1973, pending before a Magistrate on the commencement of this Act, shall be disposed of by such Magistrate in accordance with the provisions of this Act, provided the parties have not opted, under Section 5 of this Act, that they want their case to be decided under the Criminal Procedure Code. However, in *Usman Khan Bahmani v. Fatimunissa Begum*, the Andhra Pradesh High Court has held that operation of provisions of Section 125 or 127 of Cr.

P. C. are excluded on the commencement of Muslim Women Act, 1986. The court observed that ‘ the applications (filed under Sec. 125 or 127 Cr. P. C.

) pending before the Magistrate shall be disposed of in accordance with the provisions of the Act of 1986. Explaining the meaning of ‘ pending applications’ in *Hafiza Bi Suleman Darwajhar v. Suleman Moh. Darwajkar*, the Bombay High Court has held that pending applications include also such ‘

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revisional applications' which were pending before the Magistrate on the Commencement of the Act (i. e. on 15-9-1986). Application for revision is deemed to be continuance of proceedings and such applications would also dispose off under Muslim Women Act.

#### **(6) Orders Already Passed Under Cr.**

##### **P. C:**

The orders already passed for maintenance under Section 125 of the Cr. P. C. are not affected.

The Muslim Women Act, 1986 is not retrospective. Thus, the maintenance allowance granted to a divorced Muslim woman under Section 125 Cr. P. C.

before commencement of the Muslim Women Act shall continue even beyond the period of Iddat. In A. A. Abdulla v.

A. B. Mahmuna Saiyad Bhai the Gujarat High Court held that maintenance is given to a divorced woman under Section 125 Cr. P. C. after contemplating her future needs and the maintenance is not limited only up to Iddat period. Therefore, the orders already passed by Magistrate under Section 125 Cr.

P. C. are not to be nullified on coming into force of the Muslim Women Act, 1986. Similarly, the Guahati High Court too has held that orders for maintenance passed before coming into force of the Muslim Women Act, 1986 shall remain unaffected. In Hazrah v.

Abdul Rahman the Punjab and Haryana High Court also held that the orders of maintenance which had already become final under the Cr. P. C before

coming into force of the Muslim Women Act, do not come within the ambit and scope of the 1986 Act and remain unaffected. It may be concluded therefore, that it is a well known judicial opinion that the Muslim Women Act, 1986 is not applicable to orders of maintenance already passed and would not bar execution of the maintenance orders already passed under the Cr. P. C.

**(7) Revision or Modification of Orders Already Passed:**

As regards revision or modification in the already passed orders of maintenance, the opinion of the courts is divided.

According to Kerala High Court, after the commencement of Muslim Women Act, 1986, there cannot be any modification in maintenance order. In Abdul Ghafoor v. A. U. Pathumma Beevi, the court held that after coming into force of the Muslim Woman Act, 1986, a Muslim divorcee, who had obtained a maintenance order under the Cr.

P. C., could not invoke Section 127 Cr. P.

C. so as to seek enhancement of the amount of maintenance. But, according to Allahabad High Court such orders may be revised or otherwise modified subsequently. In Shafaat Ahmad v.

Fahmida Sardar, the Allahabad High Court held that the Muslim Women Act, 1986 does not exclude the application of the Criminal Procedure Code.

Therefore, Cr. P. C. has to be given effect and any order passed by Magistrate (even) under Section 3 of the Muslim Women Act becomes revisable in view of the provisions of Cr.

P. C. This means to suggest that according to Allahabad High Court the provisions of Sections 125 to 128 of the Criminal Procedure Code were still alive in so far as the maintenance of divorced Muslim woman is concerned.