CHAPTER VII

PARSI WIFE'S RIGHT TO MAINTENANCE UNDER THE
PARSI MARRIAGE AND DIVORCE ACT, 1936: A
CRITICAL EVALUATION OF THE NEWLY INSERTED
SECTIONS 39 AND 40 BY THE 1988 AMENDMENT ACT.

The Parsis in India are descendents from Parsa, and
came and settled in India as a result of their persecution
in their native land. They can largely from Persian Province
'Perse or Pars' from which the word Parsi is derived. Dr.
Diwan is of the opinion that the word 'Parsi' has both a
religious connotation and a racial significance. The India
Parsis belong to the Zoroastrian faith, and that sense, in
India the word Parsi and Zoroastrian are synonyms.

The Indian Parsi community started its efforts to
have laws suitable to their social requirements as far back
as in 1835, but all in vain. Therefore, the Parsi
matrimonial law before its condification was based on Hindu
customs and English Common Law. The first step toward
condification of Parsi matrimonial law took place in 1855
with the establishment of the Parsi Law Association for
the purpose of drafting special bills applicable to Parsi
community relating inter-alia to the law of marriage and
divorce. Consequently, the Parsi Marriage and Divorce Act,
1865 was passed in India. This Act was mainly based on the
Matrimonial Causes Act, 1857 of England. The Parsi community
was of the opinion that this Act of 1865 did not conform to
their social needs. Conceding to the demand of the Parsi

2. Ibid p.4.
community and to bring their matrimonial law in conformity with the current conditions, in 1936, the new Parsi Marriage and Divorce Act was passed.

1. **Parsi Marriage and Divorce, Act, 1936 ViS-A-ViS the Amendment Act of 1988.**

Since, the passing of the Hindu Marriage Act in the year 1955, the provisions of the Parsi Marriage and Divorce Act, 1936, more particularly relating to divorce and maintenance were considered out dated and did not adhered to


2. The unamended sections 39 and 40 of the Act run as under;

   Section 39 " Alimony pendente lite:- In any suit under this Act if the wife shall not have an independent income sufficient for her support and the necessary expenses of the suit, the Court, on the application of the wife, may order the husband to pay her monthly or weekly during the suit such sum not exceeding one fifth of her husband’s net income as the court, considering the circumstances of the parties, shall think reasonable.

   Section 40 " Permanent alimony: (1) The Court may, if it shall think fit at the time of passing any decree under this Act or subsequently thereto on application made to it for the purpose, order that the husband shall while the wife remains chaste and unmarried and

   (a) to the satisfaction of the Court, secure to the wife such gross sum or such monthly or periodical payment of money for a term not exceeding her life as, having regard to her own property, if any, her husband’s ability and the conduct of the parties, shall be deemed just and for that purpose may require a proper instrument to be executed by all necessary parties and suspend to pronouncing of its decree until such instrument shall have been duly executed, or

   (b) make such monthly payment to the wife for her maintenance and support as the husband may think reasonable. In any case any such order shall not be obeyed by her husband, it may be enforced in the manner provided for the execution of decrees and orders under the Code of

   Cont. next p.
the present notions of marriage divorce and maintenance
Now, recently, the Parsi Marriage and Divorce (Amendment) Act, 1988 (Act No. 5 of 1988) is passed and radical charges have been brought in the provisions relating to divorce and maintenance. It seems that now maintenance provisions of the Parsi Act are brought at par with maintenance provision contained in Section 24 and 25 of the Hindu Marriage Act, 1955. Importantly, some of the expressions used in Section 24 and 25 of the Hindu Marriage Act which are causing difficulties in the interpretation have been replaced with more appropriate terms.

First of all, it would be beneficial to point out the two basis characteristic of unamended Section 39 of the Parsi Act, which deals with 'alimony Pendente lite', that;

- Only wife could claim maintenance and not the husband.

- The rule of 1/5 was embodied The wife could have been granted the maintenance amount not exceeding 1/5 of her husband's net income as the Court, considering the circumstances of

Civil Procedure, 1908 and further the husband may be sued by any person supplying the wife necessaries during the time of such disobedience for the price of such necessaries.

(2) The Court, if satisfied that there is a change in the circumstances of either party at any time, may at the instance of either party vary, modify or rescind such order in such manner as the Court may deem just.

(3) Where an order for alimony or maintenance in favour of a wife has been made either under the provisions of the Parsi Marriage and Divorce Act, 1865, or under the provisions of this Act, the Court, if satisfied that the wife has remarried or has not remained chaste shall vary or rescind the order.
he parties, shall think reasonable. It is 
important to note that under the Indian 
Divorce Act while determining the quantum of 
maintenance 1/5 of the husband's net income 
for the three years next preceding the date of 
order will have to be taken into account. 
Under old Section 39 of the Parsi Act, there 
was no such condition.

Under, the unamended Section 40 which deals with 'Permanent 
Alimony'.

1. The Court could order permanent alimony only 
to the wife.

- Under Section 40(1) of the Parsi Act, it was 
specifically laid down that court could order 
maintenance 'while the wife remains chaste and 
unmarried'. The Hindu Marriage Act and the 
Divorce Act are silent on the point at the 
time of making an order of maintenance.

- 'On the Courts satisfaction, the husband shall 
secure to the wife

- such gross sum
- such monthly
- periodical payment of money.

for a term not exceeding her life, as the 
Court shall deem fit.

A Division Bench of the Bombay High Court has 
held in Tehmi Vs. Dinyar2 that the Court has

1. Sheru Vs. Gustadji, 1977 HLR 694, wherein it was held by 
Justice A.D.Desai of the Gujrat High Court that 
discretion has been left to the court in an absoluti
manner to grant permanent alimony. Therefor, the function of 
determining the grant of alimony or amount of alimony 
under Sec. 40 of the Parsi Act is left to the Court, that 
is, the presiding judge and the question has not been 
left to the delegates to determine alimony or the amount 
thereof.

2. AIR 1976 Bom. 246, the Learned Bench also observed on the 
base of its own High Court's earlier decision in Miss. 
B. Somerset Taylom Vs. Charles (reported in AIR 1915 
Bom. 50) which was decided under Section 37 of the 
Divorce Act, observing that the provision of Section 40 
of the Parsi Act are similar to the provisions of Section 
37 of the Divorce Act. In Miss B.Somerset, the Court has 
upheld the payment of lumpsum as alimony amount.
the power or jurisdiction to direct the payment of a lumpsum amount towards permanent alimony.

- Husband's ability was also to be taken into consideration.

- Under Section 40(1), the parties could have been asked to execute a proper instrument for the payment of maintenance.

The Parsi Marriage Divorce (Amendment) Act, 1988 has totally changed the maintenance provisions of Section 39 and 40 of the Act. Thus, it will be enlightening to reproduce the provisions of newly inserted Section 39 and 40, which run as follow:

Section 39 "Alimony Pendente Lite: Wher in any suit under this Act, it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the suit, it may, on the application of the wife or the husband, order the defendant to pay to the plaintiff, the expenses of the suit and such weekly or monthly sum, during the suit, having regards to the plaintiff own income and the income of the defendant, it may seem to the Court to be reasonable".

Section 40: "Permanent Alimony and Maintenance: Any Court exercising jurisdiction under this Act may, at the time of passing any decree or any time subsequent thereto, on an application made to it for the purpose by either the wife or the husband, order that the defendant suoport, 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 moveable or immoveable property of the defendant."
The Court, if it is satisfied that there is change in the circumstances of either party at any time after it had made an order under sub-section 1, may, at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just.

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".


From the reading of above newly inserted Section 39 and 40 of the Parsi act, it is evidently clear that the Parliament has adopted the provisions of section 24 and 25 of the Hindu Marriage Act as such, no doubt, with some minor modifications. These modifications were necessitated due to the conflicting judicial approach on the interpretation and construction of some terms used in sections 24 and 25 of the Hindu Marriage Act. Before we analyse the provisions of new Sections 39 and 40 of the Parsi Act, it is most important to note that under the new sections, the husband has been given right to claim maintenance. Earlier, under the Parsi Act, only the wife could claim maintenance.

Let us first critically examine the amended provisions of Section 39 of the Parsi Act vis-a-vis Section 24 of the Hindu Marriage Act;

- The use of the terms petitioner and respondent in Section 24 of the Hindu Marriage Act are causing difficulties and controversies among different High Courts, which we have already
discussed under the heading 'Respondent Petitioner' in Chapter III-3.

Now, the Parliament has corrected the wording and used the terms 'plaintiff' and 'respondent' in Section 39 of the Parsi Act. It is submitted that it would have been more appropriate if the Parliament had used the word 'Applicant' instead of 'Plaintiff'. It is an application which a spouse is required to file for maintenance. The spouse is not required to file a suit for maintenance.

- The Parliament has wisely retained the term 'expenses of the suit' in Section 39 of the Parsi Act, instead of expenses of the proceedings' used in Section 24 of the Hindu Marriage Act. It is more so because it is in consonance with the spirit of the substantive relief provisions.

- The only basic difference between the wording of Section 39 of the Parsi Act and the wording of Section 24 of the Hindu Marriage Act relates to the use of the Phrase.

'Such Weekly or Monthly sum'  

In Section 24 of the Hindu Marriage Act the words used are  

'Monthly during the proceeding such sum'  

But, from the comparison of the use of these expression, it is better to have the word 'such weekly or monthly sum' because it gives more judicial discretion to the Court.

- The most important departure from old section 39 is the omission of the 1/5 rule in the new section 39 of the Parsi Act.

From a critical reading of the provisions of the new Section 40 of the Parsi Act, it is abundantly clear that there remain no difference between the provisions of Section 25 of the Hindu Marriage Act and Section 40 of the Parsi Act. Even, the marginal note of Section 40 has been changed from 'Permanent Alimony and Maintenance' to the bring it on a per
with the marginal note of Section 25 of the Hindu Marriage Act.

Except that in Section 40 of the Parsi Act, the words 'Plaintiff and Defendant' are used instead of 'applicant and respondent' as used in Section 25 of the Hindu Marriage Act, otherwise, the provisions of Section 40 of the Parsi Act are verbatim reproduction of the provisions of Section 25 of the Hindu Marriage Act. It can be suggested that Parliament should have used the word 'applicant' instead of 'plaintiff' in Section 40 of the Parsi Act.

Thus, the Parliament has brought radical changes in the Parsi matrimonial jurisprudence of maintenance. Husband has been allowed to claim maintenance. Rule of 1/5 stands deleted. The clause of ability of the husband is also omitted. New instead of execution of instrument, the Court can create charge on the moveable as well as on the immovable property of the defendant. On the point, there is improvement even in comparison to Section 25 of the Hindu Marriage Act. Under this Act, Court can create charge on immovable property whereas under Parsi Act, change can be created on movable as well as on immovable property. The specified pre-conditions in respect of chastity and remarriage in the old Section 40(1) stand deleted now.

Therefore, it may be concluded that the jurisprudence of maintenance under the Hindu Marriage Act and Parsi Act is exactly the same now and the critical evaluation of the provisions of maintenance and judicial approach under Hindu Marriage Act, undertaken earlier could
be taken as guiding factors for the construction and interpretation of Section 39 and 40 of the Parsi Act.

3. INSERTION OF THE WORD GUARDIAN: The desirability of inserting the word guardian deserves consideration. While under the Hindu Marriage Act, there is no provision for payment of alimony to the wife's trustee, Section 41 of the Parsi Act still retains provision for such payment to the trustee. Moreover, the 1988 Amendment to the Parsi Act has made one more addition. Besides trustee the Court can now appoint guardian also to receive the alimony on behalf of the wife.

Now, the new provision of Section 41 reads as under:

"Section 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), if for any reasons it shall appear to the Court expedient so to do. It is, however, quite intriguing to note that the Parliament deemed it necessary to insert the word 'guardian' in Section 41 of the Parsi Act. All the more so in view of the amendment in Section 3(c), enacted by the Parliament by the same Act No. 5 of 1988, which reads as follow:

Section 3: Requisites of validity of Parsi Marriage:

i) No Marriage shall be valid if.....
   a)...
   b)...
   c) In the case of any Parsi (Whether such Parsis changed his or her religion or domicile or not), who, if a male, has not completed twenty-one years of age, and if a female has
not completed eighteen years of age". (7) From the reading of this Section 3(c), it is manifest that for a valid marriage among Parsis, the male and the female must have completed 21 years and 18 years age respectively. Obviously, therefore, there was no need to insert the word 'guardian' in Section 41 of the Parsi Act. Rather it runs contrary to the spirit of Section 3(c) of the Parsi Act.

1. The unamended clause(c) of Section 3 was: "in the case of any Parsi (whether such Parsi has changed his or her religion of domicile or not) who has not completed the age of twenty one years the consent of his or her father or guardian has not been previously given to such marriage". 