

It paid by her former
husband for a



**ASSIGN
BUSTER**

It is apparent that the Act nowhere stipulates that any of the rights available to the Muslim women at the time of the enactment of the Act, has been abrogated, taken away, or abridged. Sub-section (1) of Section 3 lays down that a divorced Muslim woman is entitled to: (a) A reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband; (b) Where she herself maintains the children born to her before or after her divorce, a reasonable, and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children; (c) An amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and (d) All the properties given to her before or at the time of her marriage or after her marriage by her relatives or the husband or any relatives of the husband or his friends.

In case, on divorce, the husband has failed to make provision for any of the above, the wife or her authorised agent may sue the husband by making an application before the Magistrate for necessary orders. In case the Magistrate is satisfied that compliance to the aforesaid have not been done by the husband, he will make an order, within one month of the date of the filing of the application directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of life enjoyed by her during her marriage and the means of her former husband. Imprisonment under this section also does not discharge liability.

Sub-section (4) stipulates for action against the defaulting husband. The Magistrate may issue a warrant for levying the amount of maintenance or mahr due in the manner provided for levying fine under the Code of Criminal Procedure, 1973, and may sentence such person for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made. It should be noticed that Section 3(1) begins with non-obstante clause, and lays down that a divorced woman is entitled from her former husband inter alia: (a) A reasonable and fair provision, and (b) A reasonable and fair maintenance. It should be noticed that no period is specified in regard to divorced wife's "provision" and "maintenance".

“ Within” the period of Idda:

Section 3(1) (a) of the Act lays down that the husband has to make a reasonable and fair provision and maintenance for the divorced wife “ within” the period of idda. What is the meaning of the word “ within”? Does it specify the duration which only the wife is entitled for maintenance? Or, does it qualify the period within which the husband must make a reasonable and fair provision and maintenance for the wife? That the word “ within” means the period within which the husband must discharge his obligation is evident from the tenor of the provision. Broadly, the duration of idda is three months. If the husband fails in his obligation, then the wife or her authorised agent may make an application to the Magistrate, and the Magistrate must ordinarily decide the application “ within” a period of one month. The Magistrate is required to satisfy himself that: (c) Husband has sufficient means, and (d) Husband has failed or neglected [the same words have been

used in Section 125(1) of the Code of Criminal Procedure] to make or pay the wife within the period of idda a reasonable and fair provision and maintenance to her. In fixing the reasonable and fair provision and maintenance, the Magistrate will have regard to: (a) The need of the divorced woman, and (b) Standard of life enjoyed by her during her marriage. It may be emphasised that no period is specified during which wife will be entitled to provision and maintenance.

This question came before the Gujarat High Court, in A. A. Abdulla v.

A. B. Mohamna Saiyadbha, Shah, J., after quoting dictionary meaning of the word "within", in our submission, rightly observed that the word mean "on or before", "not beyond", "not later than" and cannot mean "during", and one is not permitted to construe the same contrary to the natural meaning of the word. Thus, the word "within" would mean that on or before the expiration of iddat period, the husband is bound to make and pay a reasonable and fair provision and maintenance to the wife. If he fails to do so, then the wife is entitled to recover it by filing an application before the Magistrate as provided in sub-section (2) of S.

3 and nowhere Parliament has provided that reasonable and fair provision and maintenance is limited only for the iddat period or that it is to be paid only for the iddat period and not beyond it. In our submission, that this is so is made clear by the entire tenor of the Act. The Act provides a time frame within which the husband is required to make provision and maintenance for his wife. It has to be done within the idda period. In other words, divorced wife is entitled to have a reasonable and fair provision and maintenance to

be made and paid to her within the iddat period by her former husband.

Under Section 3(3), where under the Magistrate is required to pass an order for maintenance, there is no limitation on him that he should limit his order for the duration of idda.

The objective criterion laid down by Parliament, i. e., the Magistrate should take into consideration the needs of the divorced woman would undoubtedly indicate that the future needs of the divorced woman are required to be taken into consideration. The future needs would, by no stretch of imagination, mean her past needs during the iddat period. As an application under Section 3(2) may also be filed by the divorced wife after the iddat period if the husband fails to provide a reasonable and fair provision and maintenance within the iddat period, there was no necessity to provide that the Magistrate should consider the needs of the divorced woman because that application is most likely to come for determination before the Magistrate after the iddat period is over. In sum, the following two propositions are laid down: (a) A fair and reasonable amount of maintenance has to be provided by the husband to the wife during the period of Idda. (b) A fair and reasonable provision is to be made by the husband for the divorced wife after the period of Idda.

This view has the support of a division Bench of Kerala High Court which rendered Judgment in *Ali v. Sufaura*. But a contrary view has been expressed by a full Bench (by two-one majority) of the Andhra Pradesh High Court in *Usman Khan v.*

Fathimunissa, Sardar Ali Khan, J. interestingly quotes all the textbook writers (such as Ameer Ali, Faizi and Mulla) who, interpreting Islamic law (including obviously the Koran which is the fundamental source of Islamic law) took the view that under Muslim law husband has no obligation to maintain his wife, then quotes Tahir Mahmood who says “ the assumption by the Supreme Court of the function to interpret the holy Koran was absolutely uncalled for”, (only Mulla and Tahir Mahmood have the privilege of interpreting the Koran, it seems. Tahir Mahmood goes wrong when he says “ would any modern court anywhere in the world attempt to interpret the Rigveda?” In fact the Indian courts have all along interpreted the Vedas and the Smritis) and concludes by saying that a Muslim husband has no obligation to maintain his divorced wife after the period of idda. In Shah Bano, Chandrachud, J., after interpreting certain verses of Koran, said that under Muslim law also the husband has the obligation to maintain a divorced wife (apart from Section 125 Cr. P. C.

). This is the law laid down by the highest court and is binding on all courts (even if some so-called scholars and protagonists of Muslim law do not agree with this formulation). But Khan, J.

amusingly says that pre-1986 Act, law did not impose any obligation on the husband to maintain his divorced wife. The learned Judge adds that “ to hold that while maintenance may be payable during the period of idda, a fair and reasonable provision shall be made by her husband forecasting her future needs, would amount to negation of the very object for which the Act of 1986 has been promulgated”. Then the learned judge falls into his own trap when he says, “ It would give rise to a new concept of liability on the part of

<https://assignbuster.com/it-paid-by-her-former-husband-for-a/>

the husband which would be difficult to be translated in concrete terms as it would be almost impossible to visualize the future needs of a divorced Muslim woman which would be depending upon several factors like her remarriage, change in the circumstances or in the life-style, etc.” Under the matrimonial statute of all other Indian communities’ permanent alimony and maintenance may be ordered by the Court. It is either a periodical payment or lump sum payment. What is the difficulty under Muslim law in following the same course? The learned judge reached to the following conclusion: “ we are of the opinion that the liability to pay reasonable and fair provision and maintenance on the part of the former husband is confined only for and during the period of Iddat’. Dissenting from his view, Bhaskar Rao, J.

uses the same reasoning as was given by Shah, J. of the Gujarat High Court. The learned Judge said that divorced woman’s right to maintenance was never in doubt. On the wake of Shah Bano decision which crystallized the right of fair and reasonable provision of divorced woman after idda was under a threat of erosion and needed protection.

Section 3(l) (a) and Section 5 of the Act do so. The former casts a liability on the husband to make a reasonable and fair provision apart from the payment of maintenance within the idda period, the latter gives option to the parties to choose to be governed by Sections 125 to 128 of the Code of Criminal Procedure or by the Act. Danial Latifi rightly says that one may add that the view held by Bhaskar Rao. J. is totally in consonance with the classic view of Muslim law taken by the great jurist of the Sunni law, Imam Shafei, as recorded by the famous commentator, Ibn Katheer, who died at Damsacus in the year 1373 after Christ.

Imam Shafei's opinion becomes particularly relevant and important in view of the statement of Muslim law unanimously adopted by the legislature in 1939 and set forth in the following statement of objects and reasons of the Dissolution of Muslim Marriage Act, 1939. The Hanafi jurists have however clearly laid down that in cases in which the application of the Hanafi law causes hardship, it is permissible to apply the provisions of the 'Maliki', 'Shafei', or 'Hanbali' law. Incidentally Danial Latifi challenged the constitutional validity of the Act in *Danial Latifi v.*

Union of India. The Supreme Court agreed with the views expressed by the Gujarat, Bombay and Kerala High Courts upheld the constitutional validity of the Act by saying that it is not anti-woman. The Court has held that a Muslim husband is liable to make reasonable and fair provision for the future of his divorced wife and this reasonable and fair provision also includes maintenance during the period of iddat. Further reasonable and fair provision has to be made for the period of iddat and also for the period which extends beyond the iddat period. Still further the Court has held that liability of a Muslim husband towards his divorced wife arising under section 3(1) (a) of the Act to pay maintenance is not confined to iddat period. It has been reiterated by the Supreme Court in *Iqbal Bano v.*

State of Uttar Pradesh, that the liability of Muslim husband to pay maintenance to his wife is not confined to iddat period. He has to make fair and reasonable provision for future as well for his divorce wife within the period of iddat. Under section 4, a divorced Muslim woman who has not remarried and who is unable to maintain herself after iddat period can proceed against her relatives who are liable to maintain her in proportion to

the properties which they inherit on her death. In case such relations are not able to pay maintenance the State Wakf Board established under the Act are liable to pay such maintenance.