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CASE COMMENT ON SHAYARA BANO V. UNION OF INDIA AND ORS.

AUTHORED BY - SREELEKSHMI KISHORE

CITATION: AIR 2017 SC 4609

BENCH: S Abdul Nazeer, Uday Umesh Lalit, Rohinton Fali Nariman, Kurian Joseph, Jagdish Singh Khehar

ABSRACT

Triple talaq was a one of the modes of divorce which was prevalent among Muslim community which has been practiced in ancient era in India. As a result of judicial developments brought about by long chain of court decisions it is no longer recognised as an acceptable practice in a civilised society. The judgment in *Shayara Bano v. Union of India* [1] represents a significant turning point in the relationship between personal laws and constitutional rights in India. In its decision, the Court attempted to strike a balance between respecting religious freedom and safeguarding fundamental rights. The majority opinion underscored that personal laws cannot be absolved from being subjected to constitutional interpretation, particularly when they infringe upon principles of equality, dignity, and justice. By invoking the doctrine of manifest arbitrariness, the Court recognised that a practice allowing instantaneous and unilateral termination of marriage, without the scope for reconciliation, is inherently unjust. Beyond its legal reasoning, the judgment reflects the plight of Muslim wives as well as the agony of women affected by such practices. It signals a broader shift in judicial approach, where constitutional values take precedence over practices that perpetuate inequality. Consequently, the ruling not only invalidates an arbitrary form of divorce but also reinforces the commitment of the legal system to uphold individual rights within the framework of personal laws.

Key Words: Triple Talaq, Personal Laws, Divorce

[1] Shayara Bano v. Union of India and Ors AIR 2017 SC 4609

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BACKGROUND AND FACTS OF THE CASE

Shayara Bano, the petitioner has approached the court for declaring talaq e biddat pronounced by her husband, Rizwan Ahmed on 10 th October, 2015 which irrevocably dissolved their marriage as void ab initio. It was contended by the petitioner that the triple talaq abruptly made is inconsistent with Section 2 of Muslim Personal Law (Shariat) Application Act, 1937. Moreover it contravenes the fundamental rights enshrined under Article 14, 15 and Article 21 of the Constitution of India. According to the petitioner, Triple Talaq cannot be considered as a sacred practice as it is not in consonance with the principles of Mohammadan law. The marriage between Shayara Bano and her husband was solemnized on April 11th, 2001 and two children were born out of the wedlock. It was alleged by the petitioner that she was harrassed by her husband for dowry. As a consequence of his cruelty she left her matrimonial home and stayed in her paternal home. Meanwhile the respondent husband filed a petition for the restitution of conjugal rights. As the petitioner was not ready for reconciliation he divorced her by triple talaq. The divorce was immediately eventuated without affording a reasonable opportunity to hear the petitioner. Thus she approached Supreme Court of India to declare the inequitable practice of triple talaq, polygamy, nikah halala as unconstitutional. The Court asked to give written submissions for the unwarranted practices like Talaq – ebiddat, Polygamy and Nikah Halala from Shayara Bano, Union of India, various institutions that are instrumental in ensuring women's rights and AIMPLB (All India Muslim Personal Law Board) on 16th Feb 2017. The Union of India and Organisations specifically for Women's rights like BEBAK collective and Bhartiya Muslim Mahila Andalon (BMMA) gave support on the ground that these practices are unconstitutional as stated in Shah Bano's Plea. On the other hand, AIMPLB made a remark stating that through Art 25 of the constitution, it is protected that these are some of the essential features of the Islamic religion and uncodified Muslim Personal Law is not subjected to the concept of constitutional judicial review under Article 13(2).

ISSUES

1. Whether triple talaq infringes fundamental rights guaranteed under Articles 14, 15 and 21 of the Constitution?
2. Whether this practice of triple talaq protected under Articles 25(1), 26(b) and 29 of the Constitution?
3. Whether Triple Talaq is a mandatory religious practice?

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4. Whether the practice of triple talaq is acceptable in terms of Muslim Personal (Shariat) Application Act, 1937?

ARGUMENTS OF THE PETITIONER

The counsel representing the petitioner Mr. Amit Chadha, argued that the practice of triple talaq is unreasonable in the eyes of law. He pointed out that it is not recognised under the Muslim Personal Law (Shariat) Application Act, 1937, and was never encouraged by the Prophet. According to him, triple talaq developed over time as a custom due to a erroneous interpretation of Islamic teachings, and it does not find any religious sanctity in the Quran. It became an obsolute practice which requires legal consideration for its observance.

- **With regard to the permissibility of triple talaq**

He referred to earlier judgements that questioned this practice, especially *Shamim Ara v. State of Uttar Pradesh AIR 2002 SC 3551*[2], where the Court had enunciated the circumstances which constitutes a valid talaq. Triple talaq can be substantiated only when dissolution of mariage becomes the sole remedy and no other means are available despite repeated efforts of reconciliation. Instantaneous triple talaq which confers unbridled power on the husband to dissolve the marriage is prohibited. The Islamic "[3]law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously”[4] . Further more, it was submitted, the Constitution postulates through Article15, an absolute prohibition on discrimination, on the ground of sex. It was submitted, that ‘talaq-e-biddat’ violated the aforesaid fundamental right,which establishes equality between men and women. Based on these arguments, he urged the Court to nullify the divorce effected by way of triple talaq, stating that it goes against the concept of equality as adumbrated under Articles 14 and 15 of the Constitution. He further advocated that if this practice is struck down, the Dissolution of Muslim Marriages Act, 1939 would ensure fair and equal rights for all, regardless of gender.

[2] Shamim Ara v. State of Uttar Pradesh AIR 2002 SC 3551
[4] Yousuf Rawther vs Sowramma , AIR 1971 KER261

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Salman Khurshid , another counsel began his argument by stating that, according to the Quran, divorce is permitted only after multiple attempts at reconciliation have failed and there is a reasonable cause. He explained that the process of talaq is not instantaneous; rather, each pronouncement of talaq must be followed by a waiting period of three months (iddat), allowing time for rpossible reconciliation between the spouses. If, even after these intervals, reconciliation does not occur, the husband may pronounce talaq for the third time, making the divorce final and irrevocable. During the course of his submissions the learned senior counsel emphasised the fact that mere repetition of divorce thrice in one sitting would not result in a final severance of the matrimonial relationship between spouses. He further argued that a large majority of Muslims particularly those belonging to the Sunni community, which constitutes about 90% of the Muslim population do not recognize instant triple talaq as a valid form of divorce. On this basis, he contended that the practice should be declared void.

Indira Jaising , a senior counsel for the petitioner contended , that sofar as Muslim 'personal law' is concerned, it could no longer be treated as 'personal law', because it had been statutorily declared as "rule of decision" by Section 2 of the Shariat Act. It was therefore asserted, that all questions pertaining to Muslims, 'personal law' having been described as "rule of decision" could no longer be treated as private affairs between parties, nor can they be treated as matters of mere 'personal law'. It was submitted that subjects raising the question of dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, amongst Muslims cannot be regarded as a private matter . And as such, all questions/matters, falling within the scope of Section 2 aforementioned, were liable to be considered as matters of 'public law'. She asserted, that no one could restrain the legality of a challenge to 'public law' on the ground of being violative of the provisions of the Constitution. It was submitted, that even though matters of faith and belief are protected by Article 25 of the Constitution, yet law relating to marriage and divorce constitute matters of faith and belief, they were also liable to be tested on grounds of public order, morality and health, as well as, from the dimensions of the other provisions of Part III of the Constitution. Therefore, on a plain reading of Article 25, according to learned senior counsel, the right to freedom of conscience and free profession, practice and propogation of religion was subject to reasonable restrictions in the interest of public order, morality, health. And as such, according to learned counsel, the said rights must be so construed, that no 'personal law' negates any of the postulated conditions contained in Article 25 of the Constitution itself. It was submitted, that Articles 25 cannot supersede the rights guaranteed under Article 14 and Article 15 of the Constitution. It was contended, that the fundamental

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principle of interpretation of the Constitution was, that harmonious construction rule should be applied to avoid the conflict between the various provisions of Indian Constitution. It was therefore submitted, that Articles 14 and 15 on the one hand, and Articles 25 and 26 on the other, must be deciphered in such a manner so as to to prevent discrimination and evil practices against women.

ARGUMENTS OF THE RESPONDENTS

The respondents were represented by Kapil Sibal, who explained that the Shariat Act was never meant to fully codify Muslim personal law. Instead, it simply provides guidance in situations where customs or practices conflict with established principles. He emphasized that, in Muslim law, marriage is seen as a private contract between two individuals, and therefore it should not be easily interfered with by legislation. He also pointed out that the Constitution's definition of "law" does not extend to personal laws. Referring to Article 25 of the Constitution of India, he argued that while Parliament has the power to make laws for social reform in matters that are secular in nature, the Court can step in to examine such issues only when a law has actually been passed. On the issue of discrimination against women, he suggested that women are not entirely without remedies. According to him, they can take protective steps such as registering their marriage, setting conditions in the Nikahnama to limit the husband's right to pronounce instant triple talaq, or ensuring a higher dower (mehr) for their financial security.

- ***With regard to Judicial review and Personal laws***

It was pointed out, that while interpreting Article 13, the implications of the words "custom and usage" and the exclusion of the expression "personal law"needed to be taken consideration. It was submitted, that if the term 'personal law' was exempted from the definition 'law in force' as envisaged under Article 13, then matters of faith having a direct relationship to some religious denomination do not have to satisfy the rights enumerated in Articles 14, 15 and 21 of the Constitution. Thus, such matters of religious importance governed by Shariat Act is not subjected to judicial review In the above view of the matter, it was contended, that the challenges raised on behalf of the petitioners on the basis of the provisions contained in Part III Fundamental Rights, needed to be summarily rejected.

RULING OF THE COURT

The Supreme Court of India, on 22 nd August 2017 articulated its landmark verdict on triple talaq, decided by a 3:2 majority that the practice is unconstitutional. The majority opinion was

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proclaimed by Justice Rohinton Fali Nariman on behalf of himself and Justice Uday Umesh Lalit, and was concurred with by Justice Kurian Joseph. On the other hand, the dissenting view was expressed by Chief Justice Jagdish Singh Khehar and Justice S. Abdul Nazeer.

The majority, after precisely examining religious doctrine and constitutional morality, concluded that instant triple talaq (talaq-e-biddat) is not an essential religious practice that is sacrosanct to the tenets of Mohamedan law. They observed that although the practice is followed in the Hanafi school of Sunni Muslims, it is regarded as sinful even within that tradition, and is not recognised at all in Shia Islam. Importantly, the Court noted that the practice goes against the core teachings of the Quran, and anything inconsistent with the Quran cannot be said to form part of true Islamic law (Shariat). Relying on its earlier decision in *Shamim Ara v. State of U.P*, the Court reaffirmed that triple talaq lacks both theological and legal validity. It emphasised that mere prevalence of a practice does not make it lawful or constitutionally acceptable. On this basis, the majority declared the practice unconstitutional and set it aside.

The judgment also made it apparent that the scope of Article 25 of the Constitution of India. It held that only those practices which are indispensable to a religion are protected under this provision. Practices that are non-essential can be subject to State regulation and judicial review. The fact that many Islamic countries have already abolished triple talaq further reinforced the view that it is not a inseparable part to the faith. While Article 25 guarantees freedom of religion, it is subject to limitations such as public order, morality, health, and other fundamental rights.

In this context, the majority found that triple talaq violates Article 14 of the Constitution of India, as it gives Muslim men plenary, unqualified and arbitrary power to dissolve a marriage without any scope for reconciliation or participation by the woman. Justice Rohinton Fali Nariman and Justice Uday Umesh Lalit observed that such a practice is manifestly arbitrary and therefore unconstitutional.

However, the minority opinion took a different view. Chief Justice Jagdish Singh Khehar reasoned that since triple talaq has been followed for a long time by a significant section of the Muslim community and carries the sanction of a religious denomination, it should be treated as an essential religious practice. On this basis, he held that the practice is protected under

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Article 25 and is therefore constitutionally valid, even though he acknowledged that it may be undesirable.

AFTERMATH OF THE JUDGEMENT

The present case represents a drastic development in the judicial approach to interpreting personal laws in light of constitutional principles. It reflects a more prudent application of constitutional provisions to personal law practices, indicating a departure from earlier judicial positions in similar matters. For instance, in *Jiauddin Ahmed v. Anwara Begum 1978 Supreme (Gau) 13*[5] and *Rukia Khatun v. Abdul Khalique Laskar1981 (1) Gau LR 375*[6], the Gauhati High Court had upheld the validity of such forms of talaq. In contrast, the present judgment clearly and unequivocally declares the practice of instant triple talaq to be unconstitutional and legally impermissible.

The Court not only invalidated the practice which gives unfettered power to terminate the marriage also but directed the State to take appropriate steps to prevent its continued occurrence. After a while, the legislature enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019, which penalises the pronouncement of instant triple talaq and makes it a criminal offence. Section 3 of the Act declares talaq to be void and illegal and Section 4 precribes punishment for talaq as follows: Any Muslim husband who pronounces talaq referred to in section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.[7] This legislative intervention was considered necessary in view of the oppression of the interests encountered by Muslim women, particularly their limited access to equitable remedies in matrimonial disputes.

However, despite its constitutional restraint and statutory prohibition, it cannot be definitively stated that the practice has been completely eliminated. Certain instances of its continued occurrence, especially in rural and socio-economically disadvantaged areas, reveal a lacunae in legislative enactments and absence of effective machinery. Such circumstances often go unreported due to lack of awareness, social stigma, and ignorance to legal institutions. This highlights the urgent need for greater legal awareness and education among women about their rights and the protections available under the law.

[5] Jiauddin Ahmed v. Anwara Begum 1978 Supreme (Gau) 13
[6] Rukia Khatun v. Abdul Khalique Laskar 1981 (1) Gau LR 375
[7] The Muslim Women (Protection of Rights on Marriage) Act, 2019

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The efficacious enforcement of these legal safeguards is closely linked to the broader empowerment of women. Education, financial independence, and social awareness play a crucial role in enabling women to assert their rights. It is therefore incumbent upon the State to adopt affirmative measures aimed at improving access to education, expanding employment opportunities, and promoting the socio-economic upliftment of women, particularly those from marginalized communities.

The judgment has also drawn attention to related practices like nikah halala, which continue to raise serious concerns. Such practices, due to their potentially exploitative nature, may require closer legal and critical scrutiny in the future.