ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

Issue I

August 2019

VIPS STUDENT LAW REVIEW

VIVEKANANDA INSTITUE OF PROFESSIONAL STUDIES

ISO 9001:2015 Certified Institution
(Affiliated to GGSIP University & Approved by BCI & AICTE)
The Institute is NAAC Accredited 'A' Grade, recognized by UGC under section 2(f)
& NBA Accredited for MCA Programme

TABLE OF CONTENTS

S.No Title of the Paper/Author **Page No.**

Implementation of Mediation in District Courts:
Issues, Challenges and Solutions..... 1
Sudhir Kumar Jain

Prolegomenon to Presumption as a Canon of Justice: The Judicial Perspective..... 8
V. Sree Vidya

Protective Legislation for Men in Matrimonial Violence - Need for Law in India..... 19
Virek Aggarwal

Performer's Right under Copyrights Act, 1957: Critical Analysis..... 25
Saksham Bhardwaj

Right to be Forgotten: Can it be for Real?..... 36
Archana Gadekar

Regulatory Challenges Faced by the Coal Sector in India vis-a vis needs..... 44
for an Independent Regulator : An Insight
Priya Bhatnagar

Crime of Rape and Laws: Need of Gender Neutral Approach..... 59
Ankita Kumar Gupta

Globalisation: An Analysis in The Context of Sustainable Justice..... 72
Kanchan Lavania

STUDENT SECTION

Child Labour in India: Unheard Screams..... 87
Neha Jain

Reservation in Private Sector and Right to Employment: Critical analysis..... 98
Diksha Dubey

The DNA Technology (Use and Application) Regulation Bill, 2019 and
its Effectiveness in Upholding the Principles of Privacy..... 114
Udhaya Karthika and Ms. Tanisha Verma

Case Comments

Dr. Subhas Kashinath Mahajan V. *State of Maharashtra* :
A Critique: AIR 2018 SC 1498 129
Indrajeet Dey

Shayara Bano v. *Union of India*: AIR 2017 SC 4609..... 135
Adarsh Pandey and Mr. Arunaditya Singh Parihar

DR. SUBHAS KASHINATH MAHAJAN V. STATE OF MAHARASHTRA: A CRITIQUE: AIR 2018 SC 1498

Indrajeet Dey*

Abstract

Section 18 of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, has created a great deal of controversy by disallowing anticipatory bail, and in pursuit of challenging this section it appears that a lot has happened. The Supreme Court was expected to have cleared many grey areas in the legislation; it has rather caused a greater degree of uncertainty in the areas of every day practice in connection with this Act. This Article aims at finding the implications of the dictum passed by their Lordships in view of this judgment.

Keywords*- Supreme Court, Cognizance, Magistrate, Special Courts, Anticipatory bail, 438 of the Code of Criminal Procedure, false implications, trial.*

INTRODUCTION

The Supreme Court vide its judgment and order dated March 20, 2018 in connection with Criminal Appeal 416 of 2018[1] seems to have stirred up the questions pertaining to the extremely harsh Section 18 of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, which puts a bar on anticipatory bail as envisaged under Section 438 of the Code of Criminal Procedure, 1973.

The facts of the case in short are that the complainant was an employee in the Government College of Pharmacy, Karad. Some persons made an adverse remark against him in the annual confidential report. Thus, the complainant chose to lodge a complaint against such persons. Upon filing of a Charge sheet, when the Magistrate went to take cognizance, he was prevented to do so, owing to the embargo under Section 197 of the Code of Criminal Procedure, 1973. The said sanction was refused by the said Dr. S. Mahajan. Thus, the

* Advocate, High Court of Calcutta

1 *Dr. Subhas Kashinath Mahajan Vs State of Maharashtra*, (2018) 6 S.C.C 454.

complainant felt aggrieved against Dr. Mahajan, who was the Director of Technical Education. Hence, upon registration of the said FIR, Dr. Mahajan wanted to apply for pre-arrest bail but was prevented owing to the restriction as per law.

Some of the major guidelines that were given by the Supreme Court can be summarized as:

- That there is no absolute bar against the grant of anticipatory bail under the said Act if no prima facie case is made out or if it appears to the Court that the complaint is mala fide;
- The decisions in *Manju Devi's case*[2] and *Balothia's case*[3] have been clarified, where they said *Balothia's case* was ignorance of the Judgment of the Constitution Bench;
- Public servants can only be arrested after obtaining a sanction form their appointing authorities, if such a sanction is obtained then the Magistrate must scrutinize the reasons before authorizing further detention;
- To avoid false implication of any person, a preliminary enquiry may be conducted by the Deputy Superintendent of Police concerned to find out whether such allegations make out a case under the said Act and also, he is to look into the fact whether such allegations are not frivolous and motivated;
- Any violations of the said actions could lead to an action for contempt.

The judgment has dealt with various aspects including the scope of the Notice under Section 41A, read with the landmark *Arnesh Kumar's Judgment*[4], however in this regard a question arises is that when a notice under Section 41A of the Code is issued the arrest would not ordinarily take place unless there are compelling reasons to take him into custody. However, at the practical level very few persons would be willing to surrender before the Court and make his prayer for bail instead of being certain about his fate.

However, this is where the judgment of the Supreme Court comes into question, the real controversy arose when the Supreme Court while deciding on the position of Uttar Pradesh, where there is a statutory bar on Section 438 of the Code, observed that the powers under Article 226 of the Constitution cannot be used liberally in order to substitute Art 226.[5] This

2 *Manju Devi v. Onkarjit Singh Ahluwalia*, (2017) 13 S.C.C 439.
3 *State of M.P v. Ram Krishna Balothia*, (1995) 3 S.C.C 221.
4 *Arnesh Kumar v. State of Bihar*, (2014) 8 S.C.C 273.
5 *Hema Mishra v. State of U.P*, (2014) 4 S.C.C 453.

meant that the restriction under Section 18 of the Act could not be passed by the provisions of Art 226 or Section 482 of the Code. Now, in the present position of law where the words of their Lordship's are "if *no prima facie case is made out or when on judicial scrutiny the complaint is found to be prima facie mala fide*" would undoubtedly be a huge cause for affecting the autonomy of the Special Courts.

When any constitutional Court makes a very strong observation as to the merits of the case, the trial courts may not be keen on taking a different view. This an order of anticipatory bail would be effectively as good as a colorable use of the powers of quashing of a case by a High Court as read with Section 482 of the Code. Where one of the essential ingredients in the *Bhajan Lal's case*[6] is that mala fide intentions are a good ground of quashing of a FIR, such an observation, while granting the anticipatory bail may seriously affect the investigation and the trial. It is a sine qua non that while hearing of an application under Section 438 of the Code, the de facto complainant or the victim would not have access to the materials in the case diary.

Thus, when an observation is being made against him it would be of grave injustice to him. In other cases, while hearing of the application under section 438 or 439 of the Code the courts generally prefer to limit their observations only to the extent that whether such a person is entitled to bail or not, so that such an observation may be kept limited to the purpose of disposing of the bail application only. The other aspect that cannot be ruled out is that often the investigating officer, whether on purpose or not tends conducts an improper investigation. In such cases, any neutral person may be inclined to opine that no such prima facie case is made out. It is for this reason that the de facto complainant has the scope of preferring a protest petition under Section 190 of the Code. If, the constitutional Courts, who are also Courts of record were to opine that "no such prima facie case is made out", it may seriously prejudice the rights of the de facto complainant.

Their Lordships also said "Such reasons must be scrutinized by the Magistrate for permitting further detention." The amendment to the Act in 2016[7] makes it clear that as per Section 14 of the Act the Hon'ble High Court observed that "*In view of the above provision of the Act which inter alia provides that the Special Court may act as the Court of original jurisdiction and take cognizance of the offences under the said Act without the case being committed to it in terms of Section 193 of Criminal Procedure Code*"[8]. Thus, where such Special Court

6 *State of Haryana v. Ch. Bhajan Lal*, A.I.R 1992 SC 608.

7 The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 (enforced in 2016).

8 *Biman Chakraborty v. State of West Bengal*, CRR 3923 of 2016, Calcutta High Court, Appellate Side.

is a Court of Sessions being presided by Judge who is of the rank of Additional District and Sessions Judge or District and Sessions Judge, the question that would arise is that how can a Magistrate play any role in allowing or disallowing detention. One may find inspiration form the Prevention of Corruption Act where the Judge plays different roles but in this Act there is no statutory provision or a judicial pronouncement by which we can say that the Judge presiding at the Special Court may act as a magistrate. The Act before the amendment of 2016, though had the concept of establishment of Special Courts yet the Full Bench of the Rajasthan High Court *Bhura Singh's case* observed that the process of commitment was required in this case just like any other penal provisions as prevalent in the Indian Penal Code.

The other interesting aspect is that the judgment is that the dictum states as: "*To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated*" It goes without saying that as per Rule 7 of the Prevention of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Rules 1995, states *"Investigating Officer: (1) An offence committed under the Act shall be investigated by a police officer not below the rank of a Deputy Superintendent of Police. The investigating officer shall be appointed by the State Government /Director General of Police/Superintendent of Police after taking into account his past experience, sense of ability and justice to perceive the implications of the case and investigate it along with right lines within the shortest possible time."* Thus, it becomes clear that officer other than a DSP may be the investigating officer, and moreover the DSP ipso-facto does not become the investigating officer but he is required to be specially appointed as in terms of Rule 7. The Hon'ble Apex Court, however decided to limit their dictum to only the term DSP. The real issue is that even the High Courts would not be able to interpret the meaning of DSP to be any officer investigating because of the fact that it is only the Supreme Court which can clarify or modify its judgment, by the powers as enshrined under Art 141 of the Constitution.

Moreover, the dictum states that the "*DSP may enquire*" hence it is completely a discretionary function of the state / investigating agency. The more confusing part arises because it is in contrast with the *Lalita Kumari's Judgment*, though the Hon'ble Division Bench while passing the judgment has considered it. The *Lalita Kumari's case*[9] clearly lays down where preliminary enquiry may lie and where there is no scope of preliminary enquiry. In such a circumstance, a bench comprising of a lesser strength may have effectively modified the

9 *Lalita Kumari v. Govt of U.P*, (2014) 2 S.C.C 1.

judgment of a five-judge bench. The other aspect that remains is that if an application under 156(3) of the Code is preferred, and the Court allows such an application then would there be any scope of preliminary enquiry. Though passing an order under 156(3) of the Code is different from taking cognizance, yet when such an order is passed the state has no other option but to lodge an FIR and proceed with the investigation, thus in such circumstances a conflict arises as to whether the preliminary enquiry is to be conducted or the FIR is to registered and the investigation is to commence.

One can never overlook the fact that even the Deputy Superintendent of Police is some police personnel who may indulge in either submitting a bloated Charge Sheet or even tutor witnesses, in order to get departmental credence or he may perform a perfunctory investigation, thus there is adequate scope of misuse of the power of the DSP to conduct the preliminary enquiry.

It is trite law in criminal jurisprudence that a delay in either recording of an FIR or even a delay in sending the FIR to Court or a delay in examining of a witness by the police can put serious aspersions to the prosecution case.[10] The reason behind the same is that it would give the investigating officer a scope of manipulating materials or even manufacturing materials against the accused persons. Where the delay is unexplained or not satisfactorily explained, the accused person becomes eligible for a benefit of doubt, however the irony of this judgment is that the investigating officer now has enormous scope of manipulating materials or even manufacturing materials against the accused persons and he can cover it all up by taking a plea of preliminary enquiry.

The other notable aspect is that this judgment has not given any directions as to informing the victim or the de facto complainant at the time of hearing of the anticipatory bail application. Generally, no such scope is offered to the victim or the de facto complainant but Section 15A of the Act makes it mandatory for the state to inform the victim, in order to give him a right of hearing, with regards to matters bail, discharge and acquittal. Thus, where the Act was not in a position to consider the right of hearing to the victim at the time of anticipatory bail, must be dealt with by the Courts, because there would be no point in allowing an application for anticipatory bail and then giving the victim a right of hearing at the time of hearing of the bail application, which would be a mere formality.

10 *State of Rajasthan v. Hakam Singh*, (2011) 15 *S.C.C* 171.

Conclusion

Thus, where this judgment aims at protecting innocent people may actually be used as a means of convicting innocent persons, which is far worse than not having access to use the rights of anticipatory bail. Moreover, the very applicability of this judgment is questionable as it is evident that an offence under Section 3(1)(IX), however such penal provisions were replaced by the amendment of 2016[11], thus it is possible that their Lordships had not considered the amended Act. Hence, the judgment may suffer by being *per incuriam*. Thus, the Courts may not be bound by such a judgment.

11 *Supra* Note 11.

SHAYARA BANO v. UNION OF INDIA
AIR 2017 SC 4609

Adarsh Pandey* and Arunaditya Singh Parihar**

Abstract

Triple Talaq, also known as talaq-e-biddat or talaq-e-mughallazah, is a form of Islamic dissolution of marriage, which has been practiced by Muslims in India since a long time, peculiarly by followers of Hanafi Sunni Islamic schools of jurisprudence.[1] It permits any Muslim man to legally pronounce an irrevocable divorce against his wife by stating the word "talaq" three times, under any circumstances, in written, oral or more recently, electronic form, and it becomes binding and effective immediately. The practice though legally sanctioned pursuant to Section 2 of the Shariat Law[2] and followed by Sunni Muslims who constitute majority of India's Muslim population, does not finds its place in the Holy Quran. The issue faced a huge controversy and with the increasing rate of cases of such divorce, it became matter of national importance.

However, there was no finality to the fate of victims of this practice until one amongst themselves, Shayara Bano, instituted a Public Interest Litigation (PIL) in Supreme Court in 2016. On 22nd August, 2017, Apex court, by a majority of 3:2 declared triple talaq illegal, unconstitutional and void. The research work has been given a shape by deep study and analysis of news articles and precedents. It is a humble attempt to study the case law in light of various principles of Indian Constitution, Holy Quran and commentaries on the same. The aim was to clearly throw light on the whole journey of the Triple Talaq case and every attempt

* Student, BALLB(Hons.) with specialization in Criminal Laws, School of Law, University of Petroleum and Energy Studies, Dehradun, Uttarakhand

** Student, BALLB(Hons.) with specialization in Criminal Laws, School of Law, University of Petroleum and Energy Studies, Dehradun, Uttarakhand

1 Syed Mohammad, *Hanafi jurisprudence sanctions triple talaq*, The Times of India (Apr. 9, 2018, 09:29 PM) available at : https://timesofindia.indiatimes.com/city/hyderabad/hanafi-jurisprudence-sanctions-triple-talaq/articleshow/60182584.cms

2 Muslim Personal Law (Shariat) Application Act, 1937, No. 26, Acts of Parliament, 1937 (India).

was made not to leave any single stone untouched in giving a precise yet meaningful touch to the venture.

***Keywords**: Talaq-e-biddat, Sunnis, Quran, Equality, Constitution*

Introduction

"Triple talaq is a 1,400-year-old practice among Sunni Muslims."[3] Prior to Muslim Personal Law (Shariat) Application Act, 1937, the personal and religious matters of the community were administered by Anglo-Mohammedan Law which was enacted by British. Unless registered under Special Marriage Act, 1954, marriage is also considered to be a private matter governed by Muslim Personal Law.

The Ulama (Muslim legal scholars) of Hanafi Sunnis believed talaq-e-biddat binding provided that the proclamation was made in presence of Muslim witnesses and afterwards confirmed by a sharia court. But this was not the case with ulamas of Ahl-i Hadith, Twelver and Musta'li persuasions.

The issue of triple talaq came into light for the first time in 1985 in *Mohd. Ahmed Khan v. Shah Bano Begum and Ors*[4] (hereinafter referred as Shah Bano case). In addition to seeking alimony from her spouse who pronounced triple talaq against her, the victimised wife also challenged the long-established practice of triple talaq, halala nikah and polygamy.

However, the first noteworthy judgment concerning the issue saw its light in 2002 in case of *Shamim Ara v. State of UP*.[5] This case though not invalidated the practice of triple talaq but put certain restrictions on it. In the same year the Aurangabad Bench of Bombay High Court nullified the practice by giving reference from *Dagdu S/O Chotu Pathan, Latur Vs. Rahimbi Dagdu Pathan, Ashabi*[6]. In this case, court held that Muslim male cannot revoke his marriage at his will and is required to prove various grounds and stages for the same. These judgments aided in creation of framework of ruling that invalidated the long-run patriarchal practice of Triple Talaq.

3 Outlook News Scroll, *SC strikes down 1400-yr-old Islamic practice of 'triple talaq'*, OutlookIndia (Apr. 7, 2018, 9:48 PM) available at: https://www.outlookindia.com/newsscroll/sc-strikes-down-1400yrold-islamic-practice-of-triple-talaq/1129346.

4 *Mohd. Ahmed Khan v. Shah Bano Begum and Ors* 1985 SCR (3) 844.

5 *Shamim Ara v. State of UP* 2002 (7) SCC 518.

6 *Dagdu S/O Chotu Pathan, Latur v.. Rahimbi Dagdu Pathan, Ashabi* 2003 (1) BomCr 740.

Facts of the Case

The historic battle against triple talaq, though was supported by plethora of women rights activists and media, but it was finally triggered by the victims of the tradition themselves. Shayara Bano, a 36-year-old native of Kashipur, Uttarakhand, emerged as a spark, as defining persona in the legal battle against the patricentric tradition which ruined the lives of thousands of muslim women.

"Ms. Bano was the original and main petitioner in the case after she knocked the doors of the court in 2016 demanding that the talaq-e-biddat pronounced by her husband be adjudicated as void, after her 14-year marriage terminated abruptly in October 2015. *"She also contended that such unilateral, abrupt and irrevocable form of divorce be declared unconstitutional, arguing that the practice of triple talaq violated the fundamental rights of Muslim women."*[7]

Rizwan Ahmad, the husband of Shayara Bano, pronounced "*Talaq, Talaq, Talaq*" in the presence of two witnesses and delivered "*Talaqnama*" dated 10-10-2015 to her by speed post.

The primary writ petitions which led to this landmark judgment were the ones filed by Shayara Bano and Ishrat Jahan, respectively. They and the other petitioners had questioned the constitutional legitimacy and therefore the validity of continuation of '*talaq-e-biddat*', '*nikkah halala*' and polygamy which are purportedly permitted under Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937. The challenge was based on Articles 14, 15, 21 and 25 of Indian Constitution. The Apex Court decided to only deal with the issue of triple talaq, considering the factual aspect of the case. *On this, CJI Khehar, observed that the other issues "would be dealt with separately".*[8]

Consequently, constitutional legitimacy of talaq-e-biddat was called into question before a Constitution bench comprising of 5 judges of Supreme Court.

Views of Judges

Then Chief Justice of India, Jagdish Singh Khehar and Justice S. Abdul Nazeer, together

7 Omar Rashid, *who is Shayara Bano, the triple talaq crusader?* The Hindu (Apr. 7, 2018, 10:04 AM) available at: http://www.thehindu.com/news/national/who-is-shayara-bano-the-triple-talaq-crusader/article19611402.ece.

8 Dr. Sandhya Ram, *Judicial Dichotomy: Analysis of The Majority Judgments in Triple Talaq Case,* LiveLaw (Apr. 7, 2018, 10:09 AM) available at: http://www.livelaw.in/judicial-dichotomy-analysis-majority-judgments-triple-talaq-case/.

held the dissenting view. In formulating the judgment, they held that the, practice of triple talaq, was a customary practice and it is backed by the sanction and favour of the religious denomination which practiced it and there could be no ambiguity as to the referred practice being a part of their personal law. According to them, the restricted purpose of Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 was to prevent the superseding effect of usages and customs over the Muslim personal law. Shariat Act recognizes the Muslim 'personal law' as the 'rule of decision' similarly as Article 25 recognizes the supremacy and enforceability of personal law of all religions and faiths.

The judges were of the view that fundamental rights enlisted under Articles 14, 15 and 21 are available against State actions. Muslim 'personal law'- 'Shariat', is a matter pertaining to 'personal law' of Muslims, to be discovered from ancient sources, it could not be tested on parameters of being act of state. Talaq-e-biddat is practiced by Sunni muslims, a practice which was part of the religious belief of those pertaining to that school and therefore their personal aspect and hence there was no question of its being violative of the tenets of Constitution, more precisely, the provisions relied upon by the Petitioners to assail the long-followed practice of talaq-e-biddat. The judges however agreed that the practice of triple talaq has been corrected by legislation in many Islamic states and therefore were in favour of drafting a similar legislation.

The majority view held by Justices Kurian Joseph, U.U. Lalit and Rohinton Fali Nariman was antithetical to the aforementioned one.

Justice Joseph and Justice Lalit were of the concurring view that to freely profess, practice and propagate one's religion is a fundamental right sanctioned under the Indian Constitution. But on the other hand, State is also having the power under Article 25(2) of the Constitution, to make law in two eventualities in spite of the freedom granted under clause 1, and hence the practice of talaq-e-biddat suffers disqualification under Article 25(2). The judges also analyzed that the practice of triple talaq could not be discovered in Quran. Merely because a practice had seen its continuance for a long duration of time, that by itself could not make it sound if it had been overtly declared to be impermissible. Complete objective of the Act of 1937 was to proclaim Shariat as the Rule of decision and to terminate anti- Shariat practices concerning subjects mentioned in Section 2, which included talaq. Therefore, in any condition, after the inception of the 1937 Act, no practice against the principles of Quran was permissible. Hence, such practice could not get any Constitutional protection under the umbrella of Article 25(1) also.

Justice Nariman was also of the similar view. He stated that after the emergence of Islam,

divorce was allowed to a man only in conditions if his wife by her indocility or substandard character disturbs the piousness of marital life. *"Indeed, Prophet had declared divorce to be one of the most disliked of lawful things in the eyes of God."*[9]

"Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place."[10] This form of dissolution of marriage was arbitrary in the sense that marital bond could be broken at the whims and caprices of the muslim man without any attempt at compromise or reconciliation so as to preserve it. He therefore, concluded this form of Talaq to be held to be violative of the fundamental right enumerated under Article 14 of the Constitution. Also 1937 Act was held to be within the meaning of the expression 'laws in force' under Article 13(1) and therefore must be demolished as being void to the extent it acknowledges and enforces practice of Triple Talaq.

Ratio Decidendi

The ruling of 397 pages, on one hand saw two judges upholding the validity of Instant triple Talaq whereas on the other hand the rest three declaring it void, illegal, unconstitutional and against the basic tenets of Quran, hence finally barring the practice by 3:2 majority. The bench issued directions to the union government under Article 142 to draft appropriate legislation within 6 months governing the practice of marriage and divorce in Muslim community and till then, an injunction would be there against muslim males pronouncing instant triple talaq.

Critical Analysis of Issues

Issue 1: Is talaq-e-biddat Islamic in nature?

"A distinctive feature of talaq-e-biddat is that it is immediately effective and is irrevocable."[11] Furthermore, it can be only pronounced by a husband against his wife and not vice versa. According to Ameer Ali, this form of talaq was introduced by the Omeyyade monarchs. Since then it was prevalent among the Sunni Muslims.

9 *Ibid*.

10 LiveLaw News Network, *This Is What Supreme Court Said in Triple Talaq Judgment*, LiveLaw (Apr. 7, 2018, 10:45 AM), http://www.livelaw.in/supreme-court-said-triple-talaq-judgment-read-judgment/.

11 Prof. Kusum, Family Law – I, pg. 390 (4th Ed. 2015).

There are four sources of Islamic Law, namely, Hadith, Quran, Qiyas and Ijma. Quran which is believed to be the word of god, is the most fundamental and primary source of law, supplementary to which is Hadith, which are the traditions of Prophet, and the latter two are not of much relevance. *There is no mention of talaq-e-biddat in the holy Quran***.** It can only be found in Hadith. ***"****Such talaq is although sinful but lawful in Hanafi law, but in Ithna Ashari and Fatimi laws it is not permissible."*[12]

In words of Prophet Mohammad, *"Talaq is the most detestable before god of all the permitted things"*[13] Quran only permits talaq under exceptional and justifiable conditions and that too *talaq-e-hassan* and *talaq-e-ahsan,* which are revocable. No verse in Quran validates instantaneous triple Talaq.[14]

Justice Kurien's judgement hugely relies upon the aforementioned relationship of Quran and triple talaq. This is specifically interesting as it does not dwell upon constitutional legitimacy of triple talaq but rather throws light upon its Quranic legitimacy.

Issue 2: Whether talaq-e-biddat comes under the protection of Article 25?

In order to get the most precise answer to this question, the essentiality test needs to be applied. The test determines if a particular practice is crucial part of a religious faith or not. "*In the case at hand, both the minority and the majority judgments reside on this issue and rely on different judgments to reach their conclusions."*[15] In the light of *Sardar Syedna Taher Saifuddin Saheb v. The State of Bombay,*[16] CJI Khehar recited that essentiality of a religious practice must be assessed from the belief of members belonging to that community. On the other hand, Justice Nariman relying upon one of the landmark judgements on Article 25 in *Commissioner of Police v. Acharya Jagdishwarananda Avadhuta*[17]**,** stated that "*essential practice is the one on which core beliefs of the religion are founded; a cornerstone upon which the superstructure of the religion is built, without which the fundamental character of the religion would change*".[18]

12 Asaf A.A. Fyzee, Outlines of Muhammadan Law, pg. 122 (5th Ed. 2012).

13 Dr. Mohammad Najmi, Mohammadan Law, pg. 73 (3rd Ed. 2012).

14 Ismat Ara, *What Does the Quran Actually Say About Triple Talaq?*, Feminism in India (Apr. 8, 2018, 10:16 AM), https://feminisminindia.com/2017/08/23/quran-triplee-talaq/.

15 Vedant Churi, *Case Commentary on Shayara Bano v. Union of India*, Magazine Committee of Government Law College (Apr. 8, 2018, 11:16 AM) available at: http://glcmag.com/2017/09/13/case-commentary-on-shayara-bano-vs-union-of-india/#_ftn1.

16 *Sardar Syedna Taher Saifuddin Saheb Vs. The State of Bombay* 1962 SCR Supl. (2) 496.

17 *Commissioner of Police Vs. Acharya Jagdishwarananda Avadhuta* 2004 (12) SCC 770.

18 *Supra* Note 10.

If view of Justice Nariman is taken into consideration, then Triple Talaq is unambiguously outside the purview of Article 25. However, abiding by interpretation of essentiality test as laid down by CJI Khehar, a question arises whether talaq-e-biddat can be regarded as an essential part of their religion by Muslim community in India. A large population of Muslim community in India is Hanafi Muslims and respondents in the case too were the same and they themselves asserted that such a practice is considered to be sinful and AIMPLB has issued directions to curb such practice. Thus, it may be concluded that the operation of talaq-e-biddat is not regarded as an essential part of their religion by Muslim community in India.

Further if it is assumed to be a religious practice, it triple talaq suffered the disqualification from the protection of Article 25 on the grounds of it being violative of other fundamental rights enshrined in Part III of constitution and morality. Article 25 of our constitution being basis of secularity of India, it does not guarantee unrestricted freedom to religion for it could have worst consequences. Such freedom is subject to public order, morality, health and other provisions of Part III of constitution.[19] The practice of triple talaq in addition to violating other fundamental rights was an eclipse on morality. Muslim males were using even mobile texts to terminate the sacred bond of marriage within few seconds without assigning any reason and most of the times for contracting another marriage. Their impulsive decision ruined the entire life of female, leaving her under the bare sky and annihilating the future of children born of such marriage.

Issue 3: Whether Muslim Personal Law (Shariat) Application Act, 1937 bestows statutory status to the subjects governed by it or is it still sheltered under "Personal Law" which is not within the meaning of word "law" under Article 13 of Constitution?

As per the interpretation of Section 2 of Shariat Act, 1937 given by Justice Nariman, customs and usages which are erratic with Shariat are invalidated and rest other are valid. Just literal understanding of the section does not provide much to conclude about it. This is where opinions of Justice Nariman differ with that of CJI Khehar as Justice Nariman, by his interpretation puts emphasis on the object of the Act and concludes that Muslim Personal Law should be made applicable over the whole country while CJI emphasizes legislative debates to get the true intention of legislature behind the act. Here, it may be concluded that it was inconsistency between drafting the objects of the legislation that led to bifurcated and varied conclusion by the judges.

Analyzing the judgment which Justice Nariman gave, he held 1937 Act to be within the

19 Constitution of India. Article 25(1)

meaning of expression "laws in force" under Article 13 of constitution, thereby void to the extent of inconsistency with provisions of Part III. "*This may open a completely new door to litigation against the regressive and oppressive practices continuing under the shelter of Muslim Personal Law as such practices will have to satisfy Part III, now.*"[20]

Recent Developments

As per the directions issued in the case at hand, on 28th December, 2017, The Muslim Women (Protection of Rights on Marriage) Bill, 2017 was passed in Lok Sabha. The Bill made triple talaq in any form void and illegal, with up to three years of imprisonment for husband and included several other remedial provisions. An ordinance of 2018, Bill of 2018 and ordinance of 2019 were also passed in the meanwhile, but none could survive for long and it all lapsed with the dissolution of the 16th Lok Sabha.

The newly elected NDA government re-introduced the Bill in the Parliament and the Bill was passed by Lok Sabha on 25th July, 2019 and further by Rajya Sabha on 30th July, 2019 and is now awaiting the assent of President and after that would replace 1986 Act. Amongst huge dissent by opposition on the legality and rationality of the Bill nationwide, it finally managed to take its place as a formal law.

Conclusion

Indian society, since the ancient times has witnessed plethora of gender discriminatory practices targeted against females. The ancient Hindu practice of *Sati* serves as a best example of the same. But with the advancement of time and enhancement of education amongst the population, many of these unjust norms have been done away with, triple talaq now being the one of them.

22nd day of August, 2017 was the landmark day in the history of India which saw conclusion of an unjust patriarchal practice which destroyed the life of thousands of Muslim women. Triple Talaq or talaq-e-biddat wasn't even permitted by the holy book of Quran but was being exploited by Muslim male to end up their marital tie any time at their whims and caprices without assigning any reason. This practice was gradually advancing towards its more pathetic state with divorce being pronounced by mobile texts, letter and anytime even in state of anger or intoxication and it became binding and effective immediately and wasn't revocable too. In words of All India Muslim Personal Law Board (AIMPLB), *"Sharia*

20 *Supra* Note 10.

grants right to divorce to husbands because men have greater power of decision-making."[21] It was none other than the victim of the practice itself, Shah Bano, who initiated the battle and finally led it to the doors of success.

The 5-judge constitutional bench heard the controversial case of Triple Talaq, a matter of religious belief of Hanafi Muslims, and declared the practice as unconstitutional. The bench gave directions to the union government to draft an appropriate legislation for the same.

"The judgment has been widely celebrated throughout the country, as many consider it the beginning of a long overdue overhaul of archaic and discriminatory personal laws."[22] But one thing is for sure - This is a minor victory, the fight for gender equality still has a long way to go.

21 Times of India News Network, *Centre seeks apology from AIMPLB for filing 'misogynistic' affidavit in Supreme Court*, The Times of India (Apr. 8, 2018, 10:59 AM), available at: https://timesofindia.indiatimes.com/india/centre-seeks-apology-from-aimplb-for-filing-misogynistic-affidavit-in-supreme-court/articleshow/58689813.cms.

22 Malcolm Katrak, *Shayara Bano v. Union of India: A Watershed Moment in the Battle for Women's Rights in India*, Feminist Law Professors (Apr. 8, 2018, 10:50 AM), http://www.feministlawprofessors.com/2017/09/shayara-bano-v-union-of-india-a-watershed-moment-in-the-battle-for-womens-rights-in-india/.

CONTACT US:

The Editorial
VIPS Student Law Review
Vivekananda Institute of Professional Studies
AU Block, Outer Ring Road, Pitampura, Delhi 110034
Email: VSLR@vips.edu / rashmi.salpekar@vips.edu
Website: www.vips.edu
Telephone Nos. +91-11-27343401, 27343402, 2313403



THE EDITOR
VIPS STUDENT LAW REVIEW
VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES
AU Block (Outer Ring Road) Pitampura, Delhi-110034
E-mail: VSLR@vips.edu, Website: www.vips.edu