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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

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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/.