ISSN 2582 - 211X

LEX RESEARCH HUB JOURNAL

On Law & Multidiciplinary Issues

Email - journal@lexresearchhub.com

VOLUME I, ISSUE III
JUNE, 2020

https://journal.lexresearchhub.com

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TRIPLE TALAQ - A CASE ANALYSIS

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ABSTRACT

The landmark case of Shayara Bano v. UOI is related to the constitutional validity of the triple talaq. As triple talaq was a practice in the Muslim community which made the position of the Muslim women deteriorated in the society. Due to this the triple talaq was challenged in the apex court through Article 32 of the Indian Constitution which give every citizen the right to move to the SC in case of the infringement of the fundamental right.

Keywords: triple talaq

INTRODUCTION

According to the Muslim practice Talaq-i-biddat gives the husband right to give divorce to his wife only by uttering talaq three times in a single sitting. The consent of the wife is immaterial.[1] Nikah-halala is a practice where a divorced woman who wants to remarry her husband would have to marry with other male and thereafter she has to give divorce to him and then only she can remarry her first husband. Polygamy means the practice of man having more than one wife. And this case i.e. **Shayara Bano v. UOI and Ors** deals with the constitutional validity of these terms.

FACTS OF THE CASE:

On 22nd August 2017, the Constitutional Bench of 5 renowned judges has declared that the practice of instantaneous Triple Talaq also known as Talaq-i-biddat with the majority of 3:2 as unconstitutional. The judgment was made up of three separate opinions; one by Chief Justice Jagdish S. Khehar and Justice Abdul Nazeer (dissenting); one by Justice Kurian Thomas (concurring view) and one by Justices Rohinton F Nariman and Uday U. Lalit (majority) .[2]

[1] Noshirvan H. Jhabvala, The Principles of Muhammadan Law 61 (31 ed. Rushabh P. Shah 2020).

[2]Triple Talaq, Centre for Law and Policy Research, https://www.scobserver.in/court-case/triple-talaq-case .

Shayara Bano was married to Rizwan Ahmed for 15 years. She was survivor of domestic violence and harassment since long time. In the year 2015, her husband divorced her through instantaneous triple talaq. Shayara Bano filed a writ petition under Article 32 of the Constitution of India seeking a writ or order in the nature of mandamus declaring the practice of Talaq-e-biddat, Nikah-Halala and polygamy under the Muslim personal Laws as illegal, unconstitutional for being violative of Articles 14, 15, 21 and 25 of the Constitution.

Shayara Bano the petitioner filed the case against Rizwan Ahmed along with the Union of India, Ministry of Law and Justice, Ministry of Women and Child Development, Ministry of Minority Affairs, National Commission for Women and All India Muslim Personal Law Board. Jamait-Ul-Hind; Centre for Study of Society and Secularism; Jamait Ulama-i-Hind; Zaika Soman; Bhartiya Muslim Mahila Andolan and Forum for Awareness of National Security were the interveners in the case. The well-known Advocate Amith Chadha and Salman Khurshid as amicus curiae were on the petitioner side and Adv. Mukul Rohatgi, Kapil Sibal and Manoj Goel were the respondent advocates.[3]

On 11 May 2017 the 5 judge bench started hearing the triple talaq case and the judgment was delivered by this constitutional bench on 22nd August 2017 under the Judgeship of Chief Justice of India Jagdish S. Khehar.

ISSUES:

The following were the key issues were raised in the case.

1. Whether the practice of talaq-i-biddat an essential practice of Islam?
2. Whether the practice of Triple Talaq violates Article 14, 15, 21 and 25 of the Indian Constitution?

[3]Triple Talaq, Centre for Law and Policy Research, https://www.scobserver.in/court-case/triple-talaq-case .

PARTY'S ARGUMENT

On day one, Mr. Amith Chadha representing the petitioner began by arguing that triple talaq was not a form of divorce recognised by The Muslim Personal Law (Shariat) Application Act, 1937. He also contended that this form of talaq does not have Quranic sanction. He also urged the court to strike down triple talaq as it gives unfettered power to the Muslim men and violates Article 14 and 15 of the Constitution of India.

Firstly he responded to the arguments to the All India Muslim Personal Law Board. He firstly argued that the Shariat Act 1937, Muslim personal laws are statutory laws covered by the 'law in force' covered in Article 13. He quoted the case of Bombay High Court decision in *State of Bombay v. Narasu Appa Mali*[4] as it excludes only non-codified/ non-statutory personal law from Part III of the Constitution and hence does not apply to this case. Next he argued that the practice of talaq-i-biddat, is denounced internationally, and further, a large number of Muslim theocratic countries, have forbidden the practice of talaq-i-biddat, and as such, the same cannot be considered sacrosanctal to the tenants of the Muslim religion. He also argued that the right to religion in Article 25 of the Indian Constitution is subject to other provisions in Part III which includes Articles 14, 15 and 21.

Mr. Anand Grover, representing the Bharatiya Muslim Mahila Andolan (intervenor) pointed out that under Islamic law; divorce is primarily of three types: talaq at the instance of husband, khula, at the instance of wife and third is mubarat, which is mutual consent divorce. Further he pointed out that talaq has three types: talaq ahasan and talaq hasan which are approved by the Quran and third type of talaq was talaq-i-biddat which was never recognized by the Quran nor the Hadith. He also contended that it was made by the people to fulfill their own needs when men were in war etc. And lastly he said that the Section 2 of the Shariat Act, 1937 that makes the Sharia law applicable to all Muslim does not include triple talaq.

Ms. Indira Beg, representing the Bebaak Collective and Centre for Study and Secularism (intervenor), argued that personal laws codified or uncodified are subject to Article 13 of the Indian Constitution and is therefore void if it violates the fundamental rights. Further she argued that it makes distinction between male and female as it gives more privilege to the male in this form of

[4] AIR 1952 Bom 84

talaq. She also pointed out that as the Muslim marriage is a civil contract it cannot be dissolved unilaterally.

The counsel for defence argued that the respondent-husband had pronounced 'talaq' in consonance with the prevalent and valid mode of dissolution. It was also said that the respondent had fulfilled all the requirements of a valid divorce, under the Hanafi sect of Sunni Muslims and it is in consonance with the Shariat Act. And it was also said that the present writ petition filed by the petitioner under Article 32 of the Constitution is not maintainable as the questions raised in the petition are not justifiable under Article 32 of the Indian Constitution.

The Sr. Adv. Salman Khurshid, who was appointed as amicus Curiae, started his arguments by revisiting the concept and forms of divorce under Muslim law. He clarified that under the Quran after the husband pronounces talaq for the third time, the divorce becomes irrevocable. Further, each pronouncement is followed by the iddat. He also pointed out that if triple talaq is declared to be illegitimate then Nikah-halala de facto gets eliminated. Further he relied upon the arguments made by BMMA; he too urged the court to avoid inquiring into the constitutionality of triple talaq as it is not recognized by the Shariat Act, 1937.

Ram Jethmalani, representing the Forum for Awareness of National Security (intervenor), began with the submission that triple talaq violates Article 14 and 15 of the Indian Constitution as it are unilateral rights of males.

Ms. Nithya Ramakrishnan, representing another set of intervenor, made a theological argument. She stated that what is morally beautiful is Sharia and what is ugly is not. Hence, triple talaq which is sinful and not morally beautiful is not part of Sharia.

Ms. Farah Faiz, representing the Ministry of Law and Justice, urged the Court to assess the validity of triple talaq under the primary sources of Muslim law i.e. Quran, sunnat, ijma and qiyas and not the interpretations of the various schools.

Mr. Mukul Rohatgi, the then Attorney General of India representing the Union of India, began by urging the court to assess the constitutional validity of all the three practices i.e. triple talaq, nikah-halala and polygamy. However on this point Justice Nariman and CJI made it clear that the Bench was concerned only with the constitutional validity of the triple talaq.

He next pointed out the different countries which prohibit triple talaq such as Pakistan, Bangladesh, Afghanistan, Morocco, Tunisia and Indonesia. He further stated that in the context of 'personal law', it was submitted, that in *Shabnam Hashmi v. UOI*, the Court had refused to examine the constitutional validity of 'personal law'. Therefore the counsel contended that through interpretation of the court should declare talaq-i-biddat as unconstitutional, illegal and ineffective. And the reference was made to the Delhi High Court, Guwahati High Court and the Madras High Court. He further stated that the Shariat Act, 1937 are subject to fundamental rights under Article 13 and hence the *State of Bombay v. Narasu Appa Mali* needs to be revisited. Here on hearing this Justice Kurian Joseph suggested that even personal law was subject to fundamental rights as set out in *C. Masilamani Mudaliar case.*

The AG then further argued about the scope of freedom of conscience and religion under Article 25. He furthered stressed that even if triple talaq is protection under Article 25 it is subject to other fundamental rights of equality, life and dignity guaranteed under Articles 14, 15 and 21 respectively. On these grounds, he urged that this Hon'ble SC should invalidate triple talaq by striking down Section 2 of the Shariat Act. He further argued that all the unilateral forms of divorce i.e. talaq ahasan, talaq hasan and talaq-i-biddat should be struck down.

He further submitted that the Government of India ratified the Vienna Declaration and the Convention on the Elimination of all forms of Discrimination against Women on 1993. The preamble of CEDAW reiterates, that discrimination against violated the principles of equality of rights and respect for human dignity.

Mr. Kapil Sibal representing the All India Muslim Personal Law Board argued that unless the uniform civil code under Article 44 of the Constitution was realized both custom and personal laws of all communities, would be protected under the Constitution. He gave example to support this argument by stating that the matriarchal societies in Kerala and particular customs in Himachal Pradesh continue to be protected despite the enactment of the Hindu Marriage Act, 1955. Mr. Kapil Sibal continues his arguments and argued that the Shariat Act, 1937 does not codify substantive Muslim personal law but restates that the Sharia shall apply as the rule of decision to Muslims which is overriding any custom or usage. He asserted that object of the Act was to overcome customs that discriminated against women in matters of inheritance. He also referred to the debates of the Constituent Assembly to justify his statement that the definition of law under

Article 13 does not include personal laws. He also suggested that the explicit mention of personal laws in the concurrent List and its absence in Article 13 demonstrates the Constitution makers' intention to exclude personal laws.

He relied on *Krishna Singh v. Mathura Ahir* and *Youth Welfare Federation v. UOI* to affirm that non-statutory personal law is excluded from Article 13 of the Indian Constitution. He also referred upon the case *State of Bombay v. Narasu Appa Mali*; the Bombay High Court affirmed that the personal laws cannot be challenged under Part III of the Indian Constitution. He then stated the more recent *Ahmedabad Women Action Group v. UOI (1997),* where also the court confirmed the decisions of the Narasu Appa Mali case and the Krishna Singh case. He further argued that there are certain customs deviating from personal laws are protected even after the codification of personal laws. For example, Section 29(2) of the HMA, 1955 protects customs contrary to the Act. He argued that if customs of Hindus are protected, then those of Muslims also ought to be protected.

He further stated that any legislation on personal laws must satisfy the right to religion under Article 25 of the Constitution. He cited the SC in *Riju Prasad v. State of Assam* to affirm that religious rights under Articles 25 and 26 can be curtailed only by law.

Mr. Amith Chadha, representing the petitioner pointed out that even though triple talaq is sinful, patriarchal and bad in theology and yet AIMPLB is arguing that the practice of triple talaq is essential part of their religion. He countered Mr. Sibal's claims that the Shariat Act, 1937 was enacted only to override customs contrary to Sharia and argued that it codifies and declares the Sharia as "rule of law". He further placed a reliance on *Charu Khurana v. UOI*, to contend that talaq-i-biddat should be considered as arbitrary and discriminatory, under Article 14 and 15.

The learned senior counsel then placed reliance on the UDHR adopted by the United Nations Assembly on 10th December 1948, to contend that the preamble recognized the inherent dignity of the entire human family, as equal and inalienable. It was also submitted that *Article 1* of the UDHR also provides for equal rights to men and women. So it is submitted that there could be no distinction on the basis inter alia of sex and or religion. It was further submitted, that it was this Court's responsibility to widen and not to narrow, the right to equality contained in the aforesaid Declaration. Their attention was also drawn to the International Convention on Economic, Social and Cultural Rights, which provided for elimination of all forms of discrimination against women.

Mr. Anand Grover representing BMMA prayed for the court to read down Section 2 of the Shariat Act. He said that in *Tilkayat Govindlalji v. State of Rajasthan*, the court held that if there is conflicting evidence on religious practice, the court must assess if the practice is part of religion and then scrutinize if it is an essential practice of a religion.

HOLDING AND REASONING:

On 22nd August 2017, the 5 judge bench of the SC pronounced the decision and declared that talaq-i-biddat is unconstitutional with 3:2 majority.

Justice Rohinton endorsed by Justice U.U. Lalit held that talaq-i-biddat is regulated by the Shariat Act, 1937 and it does not fall within the confines of Article 25. They said triple talaq is instant and irrevocable and it is obvious that any attempt at reconciliation between the husband and wife cannot ever take place. They also pointed out that this form of talaq is manifestly arbitrary in the sense that the marital tie can be broken by a Muslim man without any attempt at reconciliation so as to save it. This form of talaq must, therefore be violative of Article 14 of the Constitution of India. They also stated that triple talaq is within the meaning of the expression "laws in force" in Article 13(1) and must be struck down as being void.

CONCURRENCE:

Justice Kurian Joseph was in the concurring opinion. He held that triple talaq is against the basic tenant of Quran. He also held that the freedom of religion under the Constitution of India is absolute and on this point he was fully agreeing with the learned Chief Justice. And lastly, he held that triple talaq is manifestly arbitrary and the Shariat Act, 1937 insofar as it recognizes the same is unconstitutional and consequently should be struck down.

DISSENTING:

Chief Justice JS Khehar endorsed by Justice Abdul Nazeer was in the dissenting view. They were of the view that the triple talaq is an integral part of Islam. They also said that the contentions

raised by the petitioners, that the questions covered by the Muslim Personal Law (Shariat) Application Act, 1937, ceased to be 'personal law', and got transformed into 'statutory law', and therefore this cannot be accepted, and hence, these contentions of the petitioners are rejected. They also said that the practice of talaq-i-biddat being a constituent of personal law has a stature equal to other fundamental rights conferred in Part III of the Constitution. The practice therefore, could not be set aside on the ground of being violative of the concept of the constitutional morality. They also directed the Union of India to consider appropriate legislation, particularly with reference to talaq-i-biddat. They further stated that till such time as legislation in the matter is considered, we are satisfied in injuncting Muslim husbands, from pronouncing talaq-i-biddat as a means for severing their matrimonial relationship.

CONCLUSION:

The court held that the triple talaq is unconstitutional and is violative of Article 14, 15, 21 and 25.