CASE COMMENT: SHAYARA BANO V. UNION OF INDIA

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FORUM: Supreme Court of India

CITATION: AIR 2017 9 SCC 1 (SC)

DATE OF JUDGMENT: 22nd August 2017

JUDGES BENCH (5): Justice Jagdish Singh Khehar
Justice S. Abdul Nazeer
Justice Rohinton Fali Niraman
Justice Uday Umesh Lalit
Justice K.M. Joseph

LAWS APPLIED: Muslim Personal Law (Shariat) Act 1937

PARTIES OF THE CASE:

Petitioner: Shayara Bano

Petitioner's lawyer: Amit Chandha, Salman Khurshid

Respondent: Union of India, Ministry of Law and Justice, Ministry of Women and child development, Ministry of minority affairs National Commission for women, AIMPLB, Ahmad (Bano's Husband)

Respondent's lawyer: Mukul Rohatgi, Kapil Sibal, and Manoj Goel.

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INTRODUCTION

This case is confined to the topic called "***Triple Talaq***"

What is Triple Talaq?

Triple Talaq means a practice where, by uttering the word called 'Talaq' thrice times the Muslim man can get divorce. With the advancement of technology, this concept was misused, where husband send talaq through even voice notes, Whatsapp messages and all.

DESCRIPTION OF THE CASE

Instantaneous Triple Talaq is held unconstitutionality by the constitutional bench.

BACKGROUND OF THE CASE

A short note to the facts

A woman survivor of the grounds like domestic violence and dowry Harassment was divorced by her husband through Instantaneous triple talaq. She then filed the petition before apex court stating that this Instantaneous Triple Talaq, Polygamy and Nikah Halala in personal law of Muslim, are violating Art 14, Art 15, Art 21 and Art 25 of the constitution. It was supported and criticised by many organisations. After that Instantaneous Triple Talaq gone without legal validity and held as unconstitutional. This was already illegal, because since 1980's a number of judgements in High Court held that, for the talaq to be legally valid, it must hold the following principles.

- Pronouncing for a reasonable cause
- Must be come last by as many attempts for reconciliation held by facilitators representing both parties.

These principles are not followed in most of the cases by the husband. So, it is already illegal. This case goes a long way to the case called ***State of Bombay vs. Narasu Appa***[1] Bench in Bombay HC, where it was said that personal law is a source of religion and not state because personal law is not covering the phrase '*laws in force*'. The SC for this showed a positive reaction in ***Sri Krishna Singh vs. Mathura Ahir (1980)***[2], Subsequently it was reversed in the 1996 judgement of the case ***Masilamani Mudaliar and others v The Idol of swaminathaswami Thirukoil***[3] and the 1997 judgement of Ahmedabad women's action group Union of India, it was again upheld. Shayara Bano case was vital not only for her immediate claims out also gave an opportunity to classify the personal law's constitutional status.

FACTS OF THE CASE

The Supreme Court through a 5 judge bench held that this practice was unconstitutional on August 22nd 2017 in a 3:2 majority.

Majority: Rohinton Nariman J and U.U. Lalit J

Heretic / Dissenting: J.S. Khehar and Abdul Nazeer

Concurring: Kurian Joseph

Shayara Bano gets married with Rizwan Ahmed for 15 years. She was divorced by him through instantaneous triple talaq (talaq –e – biddat) in 2016. She then filed a writ petition on SC, on the ground that because they are violating Articles 14,15,21,25 of the constitution, the following three practices should be held as unconstitutional.

- Talaq –e – biddat
- Polygamy(multiple wives)
- Nikah – halala

[1] AIR 1952 Bom 84
[2] AIR1982 SC 686
[3] 1996 AIR 1697

Nikah Halala also termed as tahleel marriage, in which a woman, through triple talaq she was divorced, married with another man, consummating the marriage, in order to remarry her former husband, she is getting divorced again.

The Court asked to give written submissions for the above said grounds like Talaq – e-biddat, Polygamy and Nikah Halala from Shayara Bano, Union of India, various bodies supporting women's rights and AIMPLB (All India Muslim Personal Law Board) on 16th Feb 2017. Union of India and Organisations specifically for Women's rights like Bebaak collective and Bhartiya Muslim Mahila, Andalon (BMMA) gave support on the ground that these practices are unconstitutional to Ms. Bano's Plea. But AIMPLB made an argue statement 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).

On 30th March 2017, the Supreme Court formed a 5 judge constitutional bench and accepted Shayara Bano's Petition. Then on 22nd August 2017, by a 3:2 majority, the 5 judge constitutional bench held that the instantaneous practice of triple talaq is unconstitutional.

ISSUES IN SHYARA BANO CASE

- Whether the practice of talaq-e-biddat specifically mentioning Instantaneous Triple Talaq an essential practice of Islam?

- Whether the practice of Instantaneous triple talaq violating any fundamental rights of the constitution?

- Whether Triple Talaq protected under Act 25 of the constitution?

- Does Shariat Act give triple talaq Applicability?

CONTENTIONS

<u>Argument supporting Shayara Bano (petitioner)</u>

Mr. Amit Chandha made an advent into argument by arguing that Muslim personal law doesn't recognise a form of divorce called 'Triple Talaq'. And also made a statement like

unilateral form of divorce and triple talaq had brought no quranic sanction. Divorce under Muslim law is in need of two concepts called reasonable cause and preceded attempt of reconciliation. He also argued like, because it is violating Article 14 and Article 15 of the constitution, it should be struck down. He gave a solution to the alternative form of divorce where irrespective of gender; the entire Muslim community will get divorce which is known as "Dissolution of Muslim Marriage Act, 1939".

Arguments supporting Shayara Bano by Mr. Salman Khurshid

He made an advent into argument by saying that under Quran, after reconciliation attempts failed and with reasonable cause, if a man utters talaq 3 times, he can get divorce. And also, under Quran it is mentioned that the pronouncement of each talaq should accompany a waiting period of 3 months (Iddat) for reconciliation. And during the reconciliation period if they are not reconciling, husband by pronouncing talaq at the third time can get divorce which is effective and unalterable. Also made an argument by saying that most of the Muslim communities which are prevailing are Sunni (90%) and they don't made triple talaq as a valid one, so it must be declared void.

Arguments supporting respondents by Mr. Kapil Sibal (supporting AIMPLB)

He made an advent by saying that since Muslim marriage is a private contract, the concept of judicial review is not acceptable. And also mention that Art 13 is something which does not include personal laws. Court can access validity only after parliament made any changes on secular activities (freedom of religious practice) under art 25(2). And also, triple talaq is not discriminating Muslim woman and for bad marriages also, she can claim remedies under.

- Special marriage act,1954
- By delegating right to talaq to herself
- Insisting high mehar amount

Arguments for respondent by Mr. Mukul Rohatgi (supporting Union of India)

He made an advent into argument by declaring the constitutional validity of three grounds called triple talaq, polygamy, and Nikah halala. The AG argued on the basis of Narasu Appa Mali case, stated that "Immunity to uncodified personal law from fundamental rights challenges" is at the point of revisiting. Through Masilamani case, **J. Kurian Joseph**

suggested that personal law was also subjected to fundamental rights. He then stated to argue about the scope of art 25. Also he made a stressed statement like triple talaq is protected under art 14, 15, 21. He concluded by saying that the court must invalidate triple talaq as it is infringing Art 13,14,15,21,51 by striking down sec 2 of Shariat act 1937.

Arguments by Manoj Goel in favour of Shayara's husband

He made a major argument in the point that divorce is actually between two individuals and no state action is involved for that **J .Nariman** made a counter argument like Shariat act 1937 includes state; therefore the state's involvement is mandatory.

FINDINGS

The court by analysing the following points came to the final judgement.

Amit Chandha, a petitioner's side advocate made a very important point like triple talaq is not recognised by Muslim personal law (Shariat act) and it is totally against quranic principle, therefore received no legal sanctity.

Salman Khurshid, also a petitioner's side lawyer made an argument where in which he stated that triple talaq is not followed by a majority of people(called Sunni's) therefore, it is not an essential religious practice. These are the findings which the court analysed to give the final judgement which was given by majority judges (**J. Nariman and J. Uday Umesh Lalit**) and also concurring judge called (**J. Joseph**)

The findings from which the dissenting judges (**J. Khehar** and **J. Abdul Nazeer**) gave their judgement are:

Kapil Sibal, a respondent side's lawyer gave a statement stating that Muslim marriage being a private contract, is not subjected to judicial review. **Mukul Rohatgi**, another respondent's lawyer, stating that it is an intrinsic part of personal law and not subjected to declare its constitutionality. **Manoj Goel**, also a respondent's lawyer stated that divorce is between two individuals therefore the involvement of state in it is not necessary.

REASONING

The solutions which are provided for the questions which are raised in the issues...

a) **Whether the practice of talaq –e- biddat specifically mentioning Instantaneous triple talaq an essential practice of Islam?**

Essential practice is something which relies basically on their custom. If such practice / custom is not followed or restricted to follow means, that is not the essential religious practice of that religion; the essential practices are something which is fundamental to the proliferation of that religion. It is commonly known as "vivacious practice of that religion". If the encroachment of such religious practice causing any intervention of state, then that right is violated under Art 25(1) . And the instantaneous triple talaq is not followed in mode of the Muslim countries and they declared that this is not the essential practice of Muslim. This question was actually been raised from the minority judge **J.S Khehar** and he was arguing, as this was followed by an optimum number of people and it was sanctioned by religious denomination, therefore it is the most important and essential religious practise and made it as constitutionally valid

b) Validity of Triple Talaq

Art 25 of the constitution says that if it is an essential religious practice, you cannot strike it out, but if not and it is found arbitrary you can strike it out, that is covered under Art 25(1).

As per majority decision, it was not a thing which is protected under Art 25, because although is followed by one school called Hannifin, still is considered as s sinful matter according to theology of Islam. And it is completely against the basic motto of Quran and if it is found arbitrary against Quranic principle, then of course it is against Shariat Act too. And just by the fact that it is followed by a majority of people cannot be validated by the constitution.

And also, Act 25 guarantees the person under the following exceptions alone to proliferate any religion of choice

- Public Order
- Health
- Morality
- Other provisions of part III

The following issue is in no way related the first three exceptions but related to the 4th exception (i.e.). It is violative of Art 14.As held by **J. Nariman and J. Lalit** that, the major institutional tie that marital tie is broken without the consent of wife (gender inequality) and

without reconciliation, and everything is in the hand of husband, clearly indicates that it is violative Art 14 and this is not the principle which is followed in the divorce of other religion. The same gave the answer to Issue No: 3 that are whether triple talaq protected under Art 25. (i.e.) No protection will be given by constitution why because:

"*What held to be evil in Quran cannot be a virtuous thing in Shariat and what is evil in theology cannot be a virtuous thing in law as well*"

c) <u>Does Shariat Act give Triple Talaq applicability?</u>

According to Muslim law "the Muslim man under the circumstance like the woman is in docile or with a bad character alone, can divorce his wife otherwise he can't"

The answer to the question:

- It will come under Art 13(1) (Pre constitutional law) because it came before the commencement of the constitution (i.e.) at 1937.

- According to pre constitutional law , if anything that infringes fundamental rights, then that should be declared as void according to their inconsistency level by using doctrine of eclipse and severability.

- Triple talaq is violative of Art 14 because it gave privileges to male alone and not female and according to Art 13(1) Shariat Act, as far as giving applicability to triple talaq should be struck down. This is the applicability of triple talaq in Shariat Act.

DISPOSITION

The case is disposed of accordingly.

By a 3:2 majority, the constitutional bench of the Apex court held that triple talaq is an unconstitutional practice on 22nd August; 2017. The judgement was reserved for this case after an argument which went for about 6 days. Parliament was directed by the court to bring legislative measures against the practice of triple talaq. Muslim personal law regulated talaq-e-biddat which is the holding position of **J. Rohinton Nariman, Uday Umesh Lalit**. Because of the arbitrariness, they held triple talaq as unconstitutional in its nature. Concurring opinion was given by **J. Kurian Joseph** in which he held that due to arbitrariness

of triple talaq against the holy quranic principle it lacked the legal sanctity. The dissenting/heretic opinion was given by **CJI Khehar** and **Abdul Nazeer** in which they elevated the personal law into fundamental rights in the debate of constituent assembly on Art 25 and Art 44. They made a statement where they held that triple talaq is protected under Art 25 why because even though it is not regulated by Shariat act, still it is an intrinsic part of personal law. And they made a statement stating that we cannot challenge its constitutionality just because of the fact to provide a solution to gender discriminatory practice of it and it is totally up to legislative action. And the judgement is still applicable and not overruled.

CRITICAL ANALYSIS

Analysing personal and constitutional law in Triple Talaq

In most of the cases, we will think that the correct one to take is the court's decision and the same also can be used as precedent in many case but this case made a different approach because the principles which was given by the majority judges give rise to a new debate called in a secularized country like India how to look at personal law. The major arguments which was raised to **J. Khehar** was that scope of the sovereign law does not include an uncodified law of personal law to be enacted and authorised by state and also the general principle is only state enacted laws are subjected to fundamental rights and here it is not similar to the general principle. For this he gave a varied opinion to the constitution and same was held valid too. **J. Nariman's** decision made a different view that he included triple talaq under Art 13 "*law in force*".[4]

Analysing the violation of Article 14

J. Nariman made test of arbitrariness as void but the general principle is art 14's violation can be found through test of reasonable classification as well as test of arbitrariness. He finally reached the conclusion where he focuses the arbitrariness of religious practice of triple talaq rather on the inequality of two genders.

Analysing right to gender equality under Art 14 and Art 15

The major point which was missing in the argument was gender inequality. They formed more towards unislamic practice rather than on the ill effects of triple talaq. It will follow the same result of Shah Bano case if AIMPLB view it as a problem of Muslim identity. Nothing

[4] https://www.shoneekapoor.com/shayara-bano-case-triple-talaaq-illegal/

happened like in the judgement of shah bano case and they gave a judgement which is similar to equality, where marriage had been given a higher priority as an institution.

Analysing right to freedom of religion

J. Nariman made an argument by saying that it was not protected under art 25. **J. Joseph** also came with similar opinion but move the case in a quite different manner by saying that it is the judge's duty to decide on the case and clearly explain where private law is unclear about something. His only focus was to determine legal sanctity of triple talaq in Muslim personal law rather to choose constitutional aspect. He tactfully invalidates instantaneous triple talaq by mainly focussing commentaries by Muslim judges on Muslim law and thus made a judgement which is politically viable. Finally we arrive at a judgement which was given by majority judges that they struck down the repressive triple talaq.

RELEVANT CASES

Ishrat Jahan v Union of India[5]

Court: High Court of Judicature at Patna

Case no: 9643 of 2017

Mohd Ahmed Khan v Shah Bano Begum[6]

Court: Supreme Court of India

Aafreen Rehman v Union of India[7]

Writ petition no: 288 of 2016

CONCLUSION

Even though triple talaq was held unconstitutional by a 3:2 majority in apex court, still there is an ambiguity which is prevailing on the part of reasoning which is given and the same is proven by judges. Triple talaq was considered as unislamic and unconstitutional by **justice Nariman, Lalit, Joseph**. Presently the law of the land is clear and it was abolished by the constitution of India and also to curb the menace the legislation was enacted by the government of India.

[5] CIVIL WRITJURISDICTION CASE
[6] 1985AIR 945
[7] (2017) 9 SCC 1