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Case Commentary on Shayara Bano and Others v. Union of India and Others

UTKARSH DIXIT¹

ABSTRACT

There are certain cases which shapes the future of mankind in a particular society. The reason being that some of these cases are applicable on particular sections of the society. It has a tremendous effect on that particular section of society.

One such case is Shayara Bano v. Union of India. This case is related with the issue of instant triple talaq (also known as talaq-e-biddat). It is one of the forms of talaq in Muslim law. Though it is not supported by all but it continues to prevail in the society. This case raises mainly three issues namely: Whether this form of talaq is Islamic in nature, whether is it protected by the Article 25 of the Constitution and whether it violates Article 14 or 15 of the Constitution of the India.

This particular case deals with all those issues and the Hon'ble Court has decided to set aside this practice with the majority of 3:2.

Parties Involved:

Petitioner: Shayara Bano

Respondent: Union of India; Ministry of Law and Justice; Ministry of Women and Child Development; Ministry of Minority Affairs; National Commission for Women; All India Muslim Personal Law Board; Rizwan Ahmad

Intervenor: Jamait-Ul-E-Hind; Centre for Study of Society and Secularism; Jamait Ulama-i-Hind; Zakia Soman; Bharatiya Muslim Mahila Andolan; Forum for Awareness of National Security;

Judges

Majority: Rohinton Nariman, U. U. Lalit, Kurian Joseph

Dissenting: Jadhish Singh Khehar, Abdul Nazeer

Lawyers

Petitioner: Amith Chadha; Salman Khurshid (Amicus Curiae)

Respondent: Mukul Rohatgi; Kapil Sibal; Manoj Goel;

Date of the Ruling: Aug 22 2017

Forum: Supreme Court of India

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I. INTRODUCTION

The Constitutional validity of *Triple Talaq* has always been challenged in the Courts of law. However, never before, has the constitutional validity of *Triple Talaq* been challenged before a Constitution Bench comprising of 5 judges of the Supreme Court. The most important thing is the dissent in reasoning adopted by the majority in spite of the final conclusion being the same and the in-depth analysis by the minority judges. One may say that even though the bench has a clear majority in concluding *Triple Talaq* to be unconstitutional, but the Bench is clearly divided over its reasoning in coming to this conclusion. Another novel aspect of this case was that the minority judgment enjoined the enjoyment of Art. 25 of the Constitution in the interest of justice and also applied Art.142 for its enactment. This suggests that although the Bench was divided on the point of law, it was quite determined to end the abominable practice which even Islam looks down upon.

II. FACTS OF THE CASE

Shayara Bano was married to Rizwan Ahmed for 15 years. In 2016, he divorced her through instantaneous triple *talaq (talaq -e biddat)*. She filed a Writ Petition in the Supreme Court asking it to hold three practices – *talaq-e-biddat*, polygamy, *nikah-halala* – unconstitutional as they violate Articles 14, 15, 21, 25 of the Constitution.

Talaq-e- bidat is a practise which gives a man the right to divorce to his wife by uttering ‘talaq’ three times in one sitting without his wife’s consent. It permits men to arbitrarily and unilaterally effect instant and irrevocable divorce by pronouncing the word ‘talaq’ (Arabic for divorce) three times at once in oral, written or, more recently, electronic form. *Nikah Halala* is a practise where a divorced woman who wants to remarry her husband would have to marry, and obtain divorce, from a second husband before she can go back to her first husband. And polygamy is a practice which allows Muslim men to have more than one wife.

Specifically, she claimed that they violated several fundamental rights under the Constitution of India (Constitution) namely, Articles 14 (equality before the law), 15(1) (prohibition of discrimination including on the ground of gender), 21 (right to life) and 25 (freedom of religion). Her petition underscored how protection against these practices has profound consequences for ensuring a life of dignity. Further, it asserted that failure to eliminate de jure (formal) and de facto (substantive) discrimination against women including by non-State actors, either directly or indirectly, violates not only the most basic human rights of women but also violates their civil, economic, social and cultural rights as envisaged in international treaties and covenants.

On 16th February 2017, the Court asked Shayara Bano, the Union of India, various women's rights bodies, and the All India Muslim Personal Law Board (AIMPLB) to give written submissions on the issue of *talaq-e-bidat*, *nikah-halala* and polygamy. The Union of India and the women rights organizations like Bebaak Collective and Bhartiya Muslim Mahila Andolan (BMMA) supported the Ms Bano's plea that these practices are unconstitutional. The AIMPLB has argued that uncodified Muslim personal law is not subject to constitutional judicial review and that these are essential practices of the Islamic religion and protected under Article 25 of the Constitution.

After accepting the Shayara Bano's petition, the Apex Court formed a 5 judge constitutional bench on 30th March 2017. The first hearing was on 11th May 2017. On 22nd August 2017, the 5 Judge Bench pronounced its decision in the Triple Talaq Case, declaring that the practice was unconstitutional by a 3:2 majority.

Article which were the issues in this case:

- a) Article 14
- b) Article 15
- c) Article 13(1)
- d) Article 25

Cases which were referred in this case:

- a) *Rukia Khatun case* [(1981) 1 Gau LR 375]
- b) *Shamim Ara v. State of U.P.* (2002) 7 SCC 518
- c) *State of Andhra Pradesh v. Mc Dowell* (1996) 3 SCC 709

III. ISSUES

- 1) Is *Talaq-e-biddat* Islamic in nature?
- 2) Whether the Muslim Personal Law (Shariat) Act, 1937 confers statutory status to the subjects regulated by it or is it still covered under "Personal Law" which is not "law" under Article 13 of the Constitution as per previous the Supreme Court judgments?
- 3) Is it protected by Article 25 of the Constitution?

IV. ANALYSIS

Issue 1 – Is *Triple Talaq* Islamic?

Talaq-e-biddat is an irreversible form of pronouncement of *Talaq* or divorce either by

pronouncing it thrice in one go or by a definitive pronouncement viz “I *Talaq* you irrevocably”. A distinctive feature of this form of *Talaq* is that it is effective immediately and is irrevocable. Moreover, *Triple Talaq* can only be pronounced by a husband against his wife and not vice versa.

Islamic law has four sources, namely, The *Quran*, *Hadith*, *Ijma* and *Qiyas*. According to the learned author A.A. Fyzee, the *Quran*, being the word of God is the fundamental source of law; supplementary to the same is *Hadith* which are the traditions of the prophet; the remaining two are not relevant. The major point of controversy arises since there is no mention of *Triple Talaq* in the *Quran*. The *Quran* frowns on the practice of *Talaq* but it frowns more on irrevocable and capricious form of divorce. The respondents have argued that the *Quran* does not mention any form of *Talaq* and therefore, if the logic behind petitioner’s argument is to be followed then all forms of divorce will have to be declared unislamic which will render the married couples remediless in case of marital disputes.

Analysis

To find out that is *Triple Talaq* Islamic we need to see that whether *Talaq-e-biddat* is mentioned anywhere in *Quran*. It was found that there is no such provision in *Quran* and it is sought to be justified by *Hadiths* only. And since the *Quran* is considered as a authentic source of Muslim Law, we can come to a conclusion that *Talaq-e-biddat* is not Islamic in nature.

Also, Maulana Usmani, in tracing the origins of *Triple Talaq* in his book focuses on verse 2:229-30 of the *Quran* which mentions the term, “*Al-talaqu marratan*”, i.e., divorce may be pronounced twice. He reasons that since a person cannot visit someone’s house twice unless there has been some time gap between two visits; in the same way the word “twice” cannot be interpreted to mean in quick succession.

Issue 2 – Whether the 1937 Act confers a statutory status on its subjects?

Coming to the other majority Judgment where Nariman J. writes *Triple Talaq* to be unconstitutional on the basis of arbitrability, the following deductions we can make from his judgment:

By focusing on arbitrability of law and not gender equality under Art. 15, as a basis for declaring *Triple Talaq* to be unconstitutional, he tactfully swings the discussion away from the concern that *Talaq*, as an instrument, is available only for males and not for females and steers clear from the difficulty of also questioning the other two forms of *Talaq*.

Analysis

Laws that existed before constitution are called pre-constitutional laws. These laws existed even at the time when the constitution came into force in India and continued thereafter. Art. 13 (1) of the constitution itself provides that:

All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

The law that existed at the time when constitution came into force were not checked by any other law. But after the constitution came into being they had to pass the test of constitutionality in the Art 13 (1) of Indian Constitution. So if they were found inconsistent with the fundamental rights of the people that are contained in part III OF the constitution, they were declared unconstitutional by the judiciary by judicial review power in art 32 and 226.

BUT, declaring them unconstitutional does not mean that they are effaced of or they are deleted form the statute book or the Indian legal system. It only means that from the date of commencement of constitution impugned law is void and no future action can be taken in that law. But if any matter comes before the court which arose before the commencement of constitution, that matter will be governed only by the law that has become void now. This is called **doctrine of ECLIPSE**. So, if there is any conflict between 1937 Act and Constitution, then provision of Constitution will prevail.

Issue 3- Whether *Triple Talaq* is protected by Article 25?

The answer to this question will be determined by the essentiality test. The essentiality test decides whether a particular practice is an integral part of a religion or not. Both the minority and the majority judgments dwell on this issue and rely on different judgments to reach their conclusions. Relying upon *Sardar Syedna Taher Saifuddin Saheb case 1962 AIR 853*, CJI Khehar, quotes that whether a practice is essential or not must be decided from the view of the members of that community. Nariman J., in quoting, *Commissioner of Police v. Acharya Jagdishwarananda Avadhuta 2004 (12) SCC 770*, states that an essential practice is the practice 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. It is a permanent and essential part of the religion and cannot be subtracted or added later.

If the essentiality test as per Nariman J. is to be followed, we find no difficulty in declaring *Triple Talaq* to be outside the ambit of Article 25. However, following the test laid down by CJI Khehar, we come to question whether *Triple Talaq* is regarded as an essential part

by the Islamic community or not. This question can be answered in the negative, since Islam consists of many communities, a lot of which do not follow *Triple Talaq* as a practice.

Analysis

Though the Art.25 provide us freedom of conscience and right to freely profess, practice and propagate religion but if any of those practices violate our fundamental rights then those practices should be abolished either by practice or by making law.

Some of the other issues were:

- a) Is *Talaq-e-biddat* violation of Art. 14 of Indian Constitution?
- b) Is *Talaq-e-biddat* violation of Art.15 of Indian Constitution?

Before taking any decision, regarding the practice of Triple talaq references from other countries such as Pakistan, Afghanistan, Saudi Arabia, Philippines etc. were taken in view.

V. JUDGEMENT

In this case, the Court focused solely on the practice of triple talaq. In August 2017, the Court, by a majority of 3:2, set aside the practice of triple talaq. Of the justices who voted against the practice, two held it to be unconstitutional while the third relied on case precedents to reiterate that such practice was impermissible under Islamic law.

The majority judgment held triple talaq to be unconstitutional under Article 14 read with Article 13(1). In this regard, the Court held that the practice had been sanctioned as a matter of personal law by the Muslim Personal Law (Shariat) Application Act, 1937. The Court clarified that "...an action that is arbitrary, must necessarily involve negation of equality" and determined, as triple talaq provides that "...the marital tie can be broken capriciously without any attempt at reconciliation so as to save it", this arbitrariness violates Article 14. The Court concluded that the 1937 Act is void to the extent that it recognizes and enforces triple talaq, on the basis that as per Article 13(1) all laws in force immediately before the commencement of the present Constitution (which includes the 1937 Act) shall be void in so far as they are inconsistent with the fundamental rights set out in the Constitution. The Court also considered whether triple talaq is protected under Article 25 but, following a review of relevant precedents and Islamic scholarship, concluded that it is not essential to the practice of Islam.

Enforcement of the Decision and Outcomes

This decision meant that triple talaq will no longer be legal throughout India. Following the judgment, and on its own initiative, the government introduced a bill criminalizing triple talaq.

The Lok Sabha (Lower house of India's bicameral Parliament) passed this bill in December 2017 and in accordance with India's legislative process, it is currently before the Rajya Sabha (Upper house) where a united opposition has demanded that it be sent for review to a parliamentary committee.

VI. SIGNIFICANCE OF THE CASE

Women's rights groups and other human rights and social justice organizations in India have widely celebrated this historic judgment, which advances the essential constitutional values of equality, dignity and secularism. While Muslim women have challenged triple talaq in courts previously, this was the first instance where a Muslim woman had challenged a triple talaq divorce on the basis that her fundamental rights under the Constitution had been violated. While the Court did not address gender discrimination explicitly, it is instructive to note that even the dissenting judgment noted "...that all concerned are unequivocal, that besides being arbitrary the practice of 'talaq-e-biddat' is gender discriminatory."

The Bharatiya Muslim Mahila Andolan (BMMA), a rights-based mass organization led by Muslim women, and a party in the current case, conducted a study in 2015 which found that approximately 1 in 11 Muslim women were survivors of triple talaq, the majority receiving no alimony or compensation. This practice has left thousands of women destitute, at times rendered homeless overnight along with their children. In India different religions (for example, the Hindu, Muslim, and Christian communities) are governed by their own personal laws in family matters, pertaining for instance, to inheritance, property rights, marriage, divorce and so on. It is possible, to an extent, to opt out of these personal law systems. However, these systems remain widely prevalent and often incorporate systemic discrimination against women. This reality undermines the ability of women to realize their other human rights, including in relation to housing, land and resources in general. The decision is particularly relevant because it addressed a practice within the ambit of personal law through the lens of structural equality and within the framework of fundamental rights. Now, in a limited way, it will be feasible to test and challenge other discriminatory personal laws against fundamental rights.

While this case is a significant recognition of women's experiences and confirmation of their rights, subsequent events are a reminder that a sustained advocacy strategy is needed to ensure that other groups do not frame decisions to support their own interests. For example, the government bill has been criticized by certain commentators as being less about gender justice and more about political persecution of a minority community.

Though the case itself does not primarily focus on gender justice but has strong positive

implications on advancing women's rights and gender equality in India.
