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"The Journey from Discrimination to Recognition- A Case Analysis on SHAYARA BANU v. UNION OF INDIA & Ors."

-- (2017) 9 SCC 1

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Abstract: -

The Indian society from the time of its inception has witnessed the insecurity and the fear of the Muslim women persisting throughout their marriage wherein at any moment of displeasure, the marital relationship could be ended with the utterance of just three simple words. The Islamic Jurisprudence from the time of Caliph Umar has recognised this form of dissolution of marriage and such allowance has made the way for patriarchy to set into the society.

It is also of greater misfortune to mention the reality that such practice has continued in the Indian territory and recently in the year 2017, the highest court of the country delivered a landmark dictum stating that such practice stands unconstitutional, arbitrary and violative of the fundamental rights of the citizens especially Article 14, 15, 21 and 25 of the Constitution.

This manuscript focuses on the analysis of the landmark judgement **(Shayara Banu v. Union of India)**[1] of the Hon'ble Supreme Court which includes various facets and disputes about the question of law.

Introduction: - The Stage of Discrimination.

The multi-talented Bell Hooks who is known for her works in the field of writing and social activism once said and emphasised that "Patriarchy can be termed as a form of social-political system that insists and paves the way for the males of the society to be inherently dominant and superior to everyone and over everything and especially over the female counterparts with the enjoyment to rule bestowed by the society." Such words by the eminent personality hold up the exact scenario of discrimination and oppression faced by the women in India. The Islamic tradition of uttering "talaq" three times in a row has made the lives of the Muslim women miserable and has given an invisible weapon of establishing patriarchy at its core by the Muslim men of the country.

[1] Shayara Banu v. Union of India & Ors, (2017) 9 SCC 1.

Shayara Banu v. Union of India & Ors. is considered as one of the most celebrated landmark judgement of the Supreme Court of India, as this Court upheld the dignity of the Muslim Women by removing the inequality present under the personal law of Islam. This judgement of the Hon'ble Apex Court of India ensured the way for a new era of pride and equality for the women and will stand as a powerful weapon of women empowerment.

The Petitioner (Shayara Banu) has approached the Hon'ble Supreme Court of India by filing a Writ Petition under Article 32 of the Constitution of India against the Respondent (Union of India & Ors.) seeking for a writ or order like Mandamus declaring the practices of Talaq-Ul- Biddat, Nikah –Halala under the Islamic Personal Law as illegal, inconsistent and unconstitutional as they violate Article 14, 15, 21 and 25 of the Constitution of India. **Talaq –Ul- Biddat – The practice under test:**

Talaq-Ul-Biddat also is known as the triple talaq is considered as the disapproved mode of talaq. It is the irregular mode of talaq introduced by the Omeyyads to escape the strictness of the law.[2] This type of divorce is recognised under the Hanafi sub-school of Islam which comes under the Sunni School, although they recognise it still they consider it as a sinful form of divorce.[3] However, Shias or the other sub-schools of Sunni law does not recognise this form of divorce at all.

The factual outline: -

The Petitioner in the above-mentioned case is a female citizen of India and is a Muslim by religion. She is a resident of Kashipur (Uttarakhand) and is unemployed. She is the daughter of a government employee who has a limited and meagre income. The Petitioner was married to one of the Respondents (Rizwan Ahmed) on 11.04.2002 at Allahabad, Uttar Pradesh as per Muslim Shariyat law rites and customs. The Petitioner and the Respondent also have two children from the wedlock. The family of the Respondent forced the Petitioner's family for dowry during the marriage and the bride was also subjected to mental cruelty by the husband's family. The Petitioner had to face various sort of torture including physical abuse, imposing of drugs to fade away the memory**.** The Husband eventually decided to abandon her and forced her to stay with her family. Due to the consequence of drug imposition, the Petitioner always felt sick and thus required every minute of medical attention. The husband finally divorced her by triple talaq on 10.10.2005.

Issues Raised: -

I. Whether the practice of Talaq-Ul- Biddat is an essential practice of Islam?
II. Whether the practice of Talaq-Ul-Biddat violates any Fundamental Right of the citizen?

[2] DR. RAKESH KUMAR SINGH, TEXT BOOK ON MUSLIM LAW (3 ed. Universal Law Publishing House, 2017)
[3] SIR DINSHAW FARDUNJI MULLA, PRINCIPLES OF MAHOMEDAN LAW, (22 ed. Lexis Nexis, 2017)

Oral Submissions – Petitioner's perspective: -

The Advocate appearing on behalf of the Petitioner drew the attention of the Court to the fact that the Muslim husband's right to instantly talaq three times without any justification is completely arbitrary, unilateral and has no rationality. This practice was never an essential practice under Islamic law. The Petitioner also contended before the Hon'ble Court that according to the Hon'ble Quran, every Muslim man and woman are equal. Therefore, if the Quran and the Constitution of county guarantee equal rights to its citizens, then how can this practice still be valid in India. Such sinful practice should be declared unconstitutional immediately by this Hon'ble Court in the name of public justice.

Respondent's Perspective: -

The Advocates appearing on behalf of the Respondents stated the fact that Talaq-Ul-Biddat is a recognised form of divorce under the Hanafi School of Islamic law which is considered as a religious denomination and bought up the relevant case of **S.P. Mittal v Union of India & Ors**[4]. wherein the Hon'ble Supreme Court stated that every religious denomination has a right to practice religion under Article 26 of the Indian Constitution.[5] The case of **Daniel Latifi & Anr. v. Union of India** [6] was also taken up by the Respondent wherein the Supreme Court has acknowledged that personal laws are a legitimate basis of the distinction between persons and such a distinction can never violate Article 14 of the Constitution.[7]

Analysis: -

Issue –I.

It is most humbly submitted that whether any particular practice under a personal law needs to be determined through the Essentiality Test. This test prominently determines whether a particular practice forms an essential part of a religion or personal law or not. In the relevant case of **Sardar Syedna Taher Saifuddin v. The State of Bombay**[8] , the Supreme Court clearly stated the fact that whether a practice performed under a personal law is essential or not, it must be deduced from the conduct of the members of the community.

It is of quite important to also mention out the case of **Commissioner of Police v. Acharya Jagdishwarananda Avadhuta**[9], wherein the Hon'ble Court delivered the meaning of the term "essential" and stated that an essential practice should be based on the core belief on which the existence of the religion is founded, the practice should be of such nature without which the fundamental character of the religion would change or the superstructure of the religion will

[4] S.P. Mittal v, Union of India & Ors, 1983 SCR (1) 729
[5] INDIAN CONST. Art 26.
[6] Daniel Latifi & Anr. v Union of India, (2001) 7 SCC 740.
[7] INDIAN CONST. art 14.
[8] Sardar Syedna Taher Saifuddin v. The State of Bombay, 1962 AIR 853.
[9] Commissioner of Police v. Acharya Jagdishwarananda Avadhuta, 2004 (12) SCC 770

demolish. The essential practice should be based on the basic ideology and the philosophy which also stands as the base and foundation of the religion.

Therefore, looking into the present practice which is in dispute, it is quite evident to mention the fact that as per the various Supreme Court judicial pronouncement such practice doesn't fall under the essential practice of Islamic personal law**.** The religion of Islam, which consists of various communities**,** out of which many sects do not recognize Talaq-Ul-Biddat as an approved form of Talaq. The Hanafi School of Islamic Jurisprudence although recognises this form of divorce but considers this form as sinful. One of the Respondent in this present case that is the All India Personal Law Board in its various submission before the Hon'ble Supreme Court stated that it is a recognized practice among the Hanafi Community but however it is a sinful form of divorce. Therefore, it will be quite strange to hold the fact that what is considered to be sinful among the various sects of the religion, how that particular practice can be considered as essential.

ISSUE-II

The practice of Talaq-Ul-Biddat which is existing in India is very much inconsistent with the provisions of our Constitution[10]. Such Islamic tradition with the basic framework of the spontaneous utterance of "talaq" without any valid reason and justification. Such practice has therefore blatantly violated the fundamental rights of the Muslim women which have gone unchecked for so many years. The Judiciary of our country prominently in the case of **Rukia Khatun v. Abdul Khalique Lashkar**,[11] determined with greater precision than the correct law about the dissolution of marriage under the Islamic jurisprudence as desired by the Holy Quran should suffice to the fact that such talaq should primarily be based on "reasonable cause" and such end to the matrimonial alliance should be once attempted with the process of reconciliation through such arbitrators appointed by both the families. If the dissolution suffices to such conditions, then it can be termed as a valid divorce otherwise such dissolution holds no validity before the eyes of the law. Such practice therefore never stood as a valid form of dissolution and always acted against the conscience of human sentiments. The Supreme Court also in one of its earlier dictums **Shamim Ara v. State of U.P**[12] profoundly mentioned that this specific tradition does not go by the theology and the personal law of the land as just because it has been enforced by the people and practiced by a maximum of the population. It does not come under the essential working of the personal law of the country and is unconstitutional. This practice eliminates the concept of equality among men and women. This practice puts a very strict question on the legislators and the judiciaries of our country as to what will be a legal remedy to the Muslim women who have to spend their life without dignity and self-respect. The women under this practice had to face a lot of suffering from their marital relations. Article 14 which about the Fundamental Right of Equality and Article 21 which talks about the Right of Life and liberty enshrined under our Constitution has been blatantly

[10] ASAF A.A. FYZEE," THE OUTLINES OF MUHAMMADAN LAW" (Oxford, 5th Edn)
[11] Rukia Khatun v. Abdul Khalique Lashkar, (1981) 1 Gau. L.R. 375.
[12] Shamim Ara v. State of U.P, AIR 2002 S.C. 3551

compromised under this specific form of divorce. This practice puts a very strict question on the legislators and the judiciaries of our country as to what will be a legal remedy to the Muslim women who have to spend their life without dignity and self-respect Islamic countries like Pakistan and Bangladesh has eliminated this evil practice due to the very reason that this practice directly violates the human rights of an individual. The lives of Muslim women have been going under tremendous mental fear that years of matrimonial alliance and cohabitation can end instantly just by the utterance of three quick words. The report clearly states the fact that India's ninety million if women face the threat of instant, oral, and out of court divorce. This whimsical, arbitrary power vested on the hands of the Muslim man was blatantly exploited with no regards to the rights and dignity of the women.

The judgement of the Supreme Court: -

The Five Judge Constitutional Bench, headed by Chief Justice Khehar of the Supreme Court of India delivered the judgement (majority 3:2), by keeping aside the practice of Talaq-Ul-Biddat (an irrevocable and instant form of divorce) as it violated the basics of the Constitution of India.[13] This practice violated Article 14, 15, 21, and 25 of the Supreme source of law of the land. The majority judgement mentioned out the fact that such practice prominently violates Article 14 of our Constitution read with Article 13(1) of the Constitution. The judgement also pointed out that such practice is inherently arbitrary, merciless, and negates out the concept of equality. The Court also stated that the legislation Muslim Personal Law (Shariat) Application Act, 1937 will be void to the extent it enforces triple talaq.[14] The Court emphasized the point that the State does not have the authority to take away the essential religious practices under Article 25 of the Constitution. However, if such practice stands as arbitrary and inconsistent with Part III then subsequently such act comes under the exception laid down under Art.25. Therefore, Triple Talaq being arbitrary and whimsical does not come under the domain of "Essential Practices" about the Islamic personal law.

Conclusion (Legal Effect): -

The judgement delivered by the Hon'ble Supreme Court, in this case, bought up a wave of celebrations and applause across the country. Muslim women all over the country welcomed this decision with utter happiness as their hope of dignity was restored by our great judiciary. Various Women's rights group, human rights organisation and other Non-Governmental Organisation defined this judgement as "historic" which will be remembered by generations and generations.

However, after the historic triple talaq judgement, more than a hundred cases were registered all over India. On 28th December 2017, the Lower House of the Parliament passed **The Muslim**

[13] Pushkraj Deshpande, Triple Talaq, Judgment of Hon'ble Supreme Court and The Most Anticipated Triple Talaq Bill, (August, 11, 2020, 19:51 AM) https://www.mondaq.com/india/divorce/668468/triple-talaq-judgment-of-hon39ble-supreme-court-and-the-most-anticipated-triple-talaq-bill#:~:text=On%20August%2022%2C%202017%2C%20this,Nazeer%20dissented%20with%20the%20majority.

[14] ET Online, "*What after Triple Talaq judgement? All that you need to know*", (August 22nd, 2017.)

Women (Protection of Rights on Marriage) Bill, 2017. The proposed legislation was intended to make triple talaq in any form whether oral, writing or by any electrical medium such as SMS, Email or WhatsApp or any other social media will be illegal and void and such punishment will go up to a maximum of three years of jail for the Husband.

The Muslim Women (Protection of Rights of Marriage) Act, 2019 which was passed on 31st July 2019 is legislation enacted by the Parliament of India with the legislative objective of criminalizing (cognizable offense) the practice of triple talaq. The legislation provides that any pronouncement of Talaq upon the female by way of oral, written, or through electronic means will be punished with imprisonment which may extend to 3 years and shall also be liable to pay fine. A married Muslim woman upon whom talaq has been pronounced shall have the right to receive from her husband such amount of allowance and maintenance for her, as well as for her children, as may be determined by the Magistrate. A married Muslim woman upon whom talaq has been pronounced will have a right of custody of her minor children as may be determined by the Magistrate.