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CONSTITUTIONALITY OF TRIPLE TALAQ

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Introduction

Muslim marriage is purely a form of contract. Like a contract it also deals with certain essentials that are necessary for a valid contract- offer, acceptance, parties competent to perform the contract, consideration, etc. The Arabic word for marriage among Muslims is Nikah, which means the union of sexes, which is marriage in the eyes of law². Muslim marriage is polygamous in nature which mean that they can have more than one wives, but it is unlawful in Muslims to have more than four wives, if a man marries with a fifth woman than it will be a irregular marriage but its irregularity can be removed by divorcing one of the wives³.

In *Abdul Kadir v. Salima* it has been held that Marriage according to Muslim Law is not a sacrament but a contract and the rights and obligations rise immediately and are not dependent on any conditions such as payment of dower money by husband to a wife⁴.

Marriage is not permanent and eternal union. Divorce may be taken whenever desired. Under Muslim Law, divorce can be taken by the parties but the liberty to give divorce under Muslims is mostly given to the husband. The Arabic word *Talaq* is used among Muslims which in its original sense means repudiation of the marriage and to release the other party from the marriage tie⁵. Only one form of talaq is there which is vested with the wife that is *Talaq-e-tafweez*. Other types under talaq are- *Talaq-ul-Sunnat* and *Talaq-ul-Biddat*. *Talaq-ul-Biddat*, under it two forms are there- Written divorce and Triple Divorce.

This work discusses Triple Talaq as a form under Muslim Law. This paper will give its readers a look into nature of *Talaq-ul-Biddat* (Triple Talaq), a detailed study of Triple Talaq, landmark

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² Aqil Ahmad, Mohammedan Law(Central Law Agency),26th edition

³Ibidat p.no.123

⁴ (1886) 8 A11. 149 : (1886) A11 .W.N. 53., Mulla, Principles of Mohammedan Law, p.no.338, 22nd edition

⁵Supra note 2 Aqil Ahmad, Mohammedan Law, Central Law Agency, 26th edition

judgments, rights of Muslim women under the constitution, recent stand of Government on Triple Talaq, its constitutional validity, and other important points will be discussed in this work.

Historical background

Triple divorce is a recognized but disapproved mode of talaq. It is recognized as sinful form of divorce. This type of talaq, was first introduced by the *Omayyad* to escape the strictness of law⁶. This type of talaq is not sanctioned in Holy Quran and Holy Prophet and is considered by Islamic jurists as an innovation within the fold of Shariat. It was also not in practice during first Caliph Abu Bakar as well as during second Caliph Umar's reign. Later, Hazrat Umar permitted it. When Arabs conquered Syria, Egypt, Persia, they found women much better than the women in Arab states, so they wanted to marry them. But the women in Egypt and Syria insisted that they can marry them only when they would divorce their existing wives by pronouncing three divorce in one sitting. The Arabs knew that Islam permits divorce only twice in separate period of tuhr and its repetition at one sitting is not permitted in Islam and hence void, due to this they could not marry these women. This was then reported to the Caliph Hazrat Umar, who then decreed that even repetition of the word talaq three times would dissolve the marriage irrevocably. So, the decision taken by Umar was based on an emergency situation and Hanafi Jurists later accepted this decision as an administrative order of the second Caliph and declared it as a valid form of divorce⁷.

View of Quran and Hadith

The Holy Quran, the paramount source of Islamic Jurisprudence has not permitted three divorces pronounced in one single breath. There is no mention in the Holy Quran that three divorces pronounced at one single time would be treated as irregular but it states that three divorces are to be pronounced one after another on different occasions⁸. So the Quran does not permit triple divorce, in fact it is the sinful. The words of Prophet Mohammed are described here:

*“Of all the lawful things, divorce is the most hated by Allah”*⁹

During the time of Prophet Mohammed and after his time for a period, triple form of divorce was considered as a single divorce and the couples were reunited.¹⁰

⁶ Supra note 2

⁷ Supra note 2

⁸ Supra note 2

⁹<http://www.feminisminindia.com>

Talaq-i-biddat

Talaq-i-biddat is the most disapproved form of divorce under the Mohammedan Law. It is the most sinful. Mere three pronouncements “*Talaq-Talaq-Talaq*” to a Muslim woman dissolve the marriage. This form of divorce has disastrous consequences in the life of a Muslim woman as mere three pronouncements of Talaq separates her from the marriage tie and her whole life is at stake. The Allahabad High Court in the case of *Rahamtullah v. State of U. P*¹¹ has given a new meaning to the law of talaq. Justice Tilhari observed: “*talaq-ul-biddat or talaq-i-bidai, that is giving an irrevocable form of divorce at once or at one sitting in a tuhr once in irrevocable form, without allowing the will of Allah to bring about re-union, by removing differences or cause of differences and helping the two in solving their differences, runs counter to the, mandate of the Holy Quran and has been regarded as by all under Islam-sunnat, to be sinful*”¹². The Triple Talaq does not mean saying or messaging talaq three times and thereby dissolving the marriage. Rather it means that the person has to wait for the period of three months. Within the time if the party changes the mind, then the concentrated problem is resolved mutually, and they can continue the marriage¹³.

Landmark Judgments

Shamim Ara v. State of Uttar Pradesh¹⁴

In this case the couple married in 1968 according to Muslim Shariat Law. They had four sons. In 197, the wife filed an application under section 125 of Code of Criminal Procedure complaining about desertion and cruelty by the husband with her. The judge of the Family Court at Allahabad refused to grant maintenance as she was already divorced by the husband. After that maintenance of Rs.150/- per month was granted to her minor son.

Later the husband in the written statement to the application denied about the same and contended that he had already divorced his wife in 1987 and since then the parties had ceased to

¹⁰ Ibid

¹¹ Decided on 29th January 1994

¹² Mulla, Principles of Mohammedan Law, Lexis Nexis, 22nd edition

¹³ <http://www.lawtimesjournal.com>

¹⁴ AIR 2002 SC 619

be spouses. And also contended that he had purchased the house and delivered the same to the wife in lieu of the *mahr* (dower). The High Court held that the divorce which was given to her was not given in her presence and there it was not communicated to her. The High Court further held that the wife was entitled to claim maintenance from 1988 to 1990. The appellant wife filed the suit to the Supreme Court. The Apex Court observed that talaq to be effective has to be pronounced. The Court held that in the instant case neither the marriage between the parties stands dissolved nor does the liability of the husband to pay maintenance comes to an end. The husband was not able to establish the factum of the divorce and therefore he was entitled to pay maintenance to his wife.

Mohammed Ahmad Khan v. Shah Bano¹⁵

One of the milestones of Muslim women fight for rights in India was the Shah Bano case.

Facts: Shah Bano and Ahmad Khan who was a renowned lawyer in Indore, married in 1932 and were having five children. Shah Bano's husband asked her to move to a separate residence, after a prolonged period of living with Mr. Khan and his second wife. Shah Bano, then went to the court for claiming maintenance for herself and her five children under section 125 of CrPC, the section puts the obligation on husband to provide maintenance to the wife. However, Ahmad Khan contested that Muslim Personal Law in India requires the husband to provide maintenance to the wife during her iddat period after divorce. Ahmad Khan's stand was supported by All India Muslim Personal Law Board which contended that the courts cannot take the liberty of interfering in the matters which are to be dealt by Muslim Personal Law and added further that it would violate the provisions of The Muslim Personal Law (Shariat) Application Act, 1937. After the arguments the Hon'ble Supreme Court gave the judgment in 1985.

Judgment: Justice Y.V Chandrachud, the then CJI stated that, a divorced woman who was unable to maintain herself, is entitled to claim maintenance for her lifetime and until she remarries. And if she is able to maintain herself then the husband's liability to provide maintenance is only limited till the expiration of the iddat period. But if she is not able to maintain herself then the husband has to provide maintenance to the wife under section 125 of CrPC, as long as she did not get remarried¹⁶.

¹⁵ AIR 1985 SC 945

¹⁶<http://www.lawyersnotes.com>,<http://www.indianexpress.com>

From the above stated landmark judgments it is clear that, under Muslim Law, a husband has the duty to maintain her wife after talaq (divorce).

Where the Magistrate is satisfied that the divorced woman is unable to maintain herself after the iddat period, he may make an order directing to her relatives to pay her reasonable and fair maintenance, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable to her by such relatives in the proportions in which they would inherit her property. Provided that if she had children than such divorced woman is entitled to maintenance by her children. Provided further that if the children are unable to pay such maintenance, then parents of such divorced woman have to pay maintenance to her¹⁷.

If the husband fails to pay her maintenance within the iddat period, and the amount equal to the sum of dower has not been paid to her, then the court has the power to make an order within one month of the date of filing such application, direct the husband to pay such maintenance to the divorced woman and for payment of such *mahr* or dower. Muslim law further states that if the person against whom such an order has been made fails without the sufficient cause to comply with the order, the magistrate may issue a warrant for levying fines under the Code of Criminal Procedure and sentence such a person for the whole or part of any amount remaining unpaid after the execution of the warrant, further such a person may be given imprisonment for a term of one year or until payment if sooner made¹⁸.

Criminalizing Triple Talaq

Triple Talaq which is the most sinful form of talaq and which was introduced by the Caliphs has now been taken into consideration by many Muslim countries. This form of talaq has nothing but a major effect on the lives of the Muslim women. Many Islamic countries like the- Pakistan, Bangladesh, Afghanistan, Turkey, Cyprus, Tunisia, Algeria, Malaysia, Jordan, Egypt, Iran, Iraq, Brunei, UAE, Indonesia, Libya, Sudan, Lebanon, Saudi Arabia, Morocco, Kuwait have banned the instant triple-talaq. Sri Lanka has also banned triple-talaq.¹⁹

While the other countries had banned this sinful form of talaq, In India the major, the biggest landmark judgment of the Hon'ble Supreme Court created a new history by criminalizing the

¹⁷ The Muslim Women (Protection of Rights on Divorce) Act, 1986 (Act 25 of 1986),§4

¹⁸ Ibid§3

¹⁹<http://www.economictimes.com>

instant triple-talaq and provided relief to the Muslim women who had faced such sinful form of divorce.

ShayaraBano v. Union of India²⁰

The petitioner- Shayara Bano approached the court assailing the divorce pronounced by her husband-Rizwan Ahmad on 10th October 2015, in presence of witnesses.

In the presence of witnesses- Mohammed Yaseen and Ayaz Ahmad, the husband said *“I gave talak talak talak, hence like this I divorce from you from my wife, from this date there is no relation of husband and wife. From today I am ‘haraam’ and I have become ‘naamharaam’, in future you are free for using your life”*. Petitioner sought declaration from the court that the *talaq-e-biddat* is void ab initio and such a divorce should be declared unconstitutional. The petitioner also stated that it is the violation of the fundamental rights guaranteed to the citizens.

The respondent-husband on the other side contended that the marriage was solemnized on 11th April 2001 and the petitioner performed her matrimonial duties intermittently, coming and leaving the matrimonial home from time to time. They had one son and one daughter. On 9th April 2015 the petitioner left the matrimonial home with her children. Whenever the respondent tried to meet her, she refused. Respondent made attempts to meet him but was not successful.

Seeing, the wife was not ready for reconciliation, he divorced the wife by serving her talaq-nama (deed of divorce).

After hearing both the side, the Hon’ble Supreme Court gave its judgment:

“Triple Talaq is instant and irrevocable, it is obvious that any attempt for reconciliation cannot ever take place. The court stated that the triple talaq is violative of the fundamental rights contained under Article 14 of The Constitution of India. And, in the light of the opinions of all the judges, by a majority of 3:2, the practice of Triple-Talaq was set aside.”²¹

Analyzing the Judgment

²⁰ (2017) 9 SCC 1

²¹<http://www.sci.gov.in>

Though the judgment was in favor of the Shayara Bano, the five-judge bench gave three separate orders, which set aside the practice of instant triple talaq by 3:2 majority judgment. The majority judgment was constituted by separate orders, one authored by Justice Rohinton Nariman and Justice U.U Lalit and the other was written by Justice Kurian Joseph. Justice U.U Lalit and Justice Nariman faced the question whether The Muslim Personal Law (Shariat) Application Act, 1937 recognize and enforce triple talaq as a rule of law to be followed by the courts in India and if not whether the precedent that personal laws are outside the ambit of Article 13 (1) of the Indian Constitution is correct in law. In the first question Justice U.U Lalit and Justice Nariman followed a straight approach and rejected the Muslim Personal Law Board contention that Act of 1937 was only aimed at doing away all the customs that were contrary to Muslim Personal Law. In their view, such reading of the act of 1937 was impermissible in law. Therefore, the 1937 act was not only dealt with doing away all the customs contrary to Muslim personal law but also to enforce Muslim personal law. Such reading led them to the conclusion that triple talaq was enforced by the 1937 act. As regards to the second question that whether personal laws are outside the ambit of Article 13(1) of the Indian Constitution is enforceable in law, they refrained from providing a decision on it. However, treating the Muslim Personal Law (Shariat) Application Act of 1937 as a pre-constitutional legislative enactment, they concluded that the act was within the purview of Article 13 (1) of the Indian Constitution and therefore to be declared void to the extent to which it is inconsistent with the Part III of the Constitution. They concluded that triple talaq is violative of Article 14 of the Indian Constitution and therefore void to that extent.²²

On the other hand, the minority judgment authored by Chief Justice Khehar and Justice Nazeer came to a different conclusion that, though triple talaq is regarded as sinful but it is prevalent in the Sunni Islam of Hanafi sect. moreover since it had been the practice of since 1400 years, it had acquired an essential part of the faith and thereby the essential constituent of their personal law. And therefore, they are protected under Article 25 of the Indian Constitution. They further observed that the practice did not violate the principles of public order and morality, health and other fundamental rights set forth by the Indian Constitution and under Article 25 of the Constitution which states that people have the right to profess, practice any religion, they are

²² Invalidating Instant Triple Talaq : Is the top-down approach of reforming personal laws prudent ? by Niraj Kumar and Akhilendra Pratap Singh, NUJS Law Review (11 NUJS L. REV.2 (2018)) , published in Articles of <http://www.manupatra.com>

protected within the ambit of the same. They further concluded that since the practice of triple talaq was protected under personal laws, the practice has protection equal to that of the fundamental rights under the Indian Constitution.²³

The balance which was there between the majority and the minority was tilted towards the majority when Justice Kurian Joseph gave his verdict. For him the question was only that whether the practice of triple talaq has a legal sanctity. Referring and relying on the verses of Quran and the decision of the two judge bench in Shamim Ara v Union of India, Justice Kurian Joseph concluded that the practice of triple talaq lacks legal sanctity²⁴. And therefore the majority judgment of 3:2 declared the practice of instant triple talaq invalid and unconstitutional.

Triple Talaq Bill

The Triple Talaq bill was introduced in Lok Sabha in December 2017. The Narendra Modi led government introduced it in December 2017. The bill followed the judgment of the Supreme Court in August of that year, where the supreme court declared the practice of triple talaq unconstitutional and held that such a talaq is illegal and void.

Though the previous bill was lapsed because of the dissolution of the Lok Sabha upon the completion of the tenure, but when the NDA (National Democratic Alliance) once again formed the government, the first draft legislation of the bill was then again presented before the Lok Sabha. On July 25 2019 the bill was passed in Lok Sabha and on 30th July 2019, Rajya Sabha passed it.

The bill states that:

“Any pronouncement of Talaq by a Muslim husband to his wife by words either spoken or written or in electronic form, shall be void and illegal”.

The Bill further states that:

“Any Muslim husband pronounces talaq under above stated conditions shall be punished with imprisonment for a term, which may extend to three years and shall also be liable to a fine.”²⁵

Constitutional Validity of Triple Talaq

The Constitution of India is the one supreme authority that has the solution of all such problems. The Constitution of India under Article 13(1) states that *“all laws that are in practice before the*

²³ Ibid

²⁴ Supra note 21

²⁵ <http://www.prsindia.org>

*commencement of this Constitution, in so far as they are inconsistent with the provisions of this part, shall be void*²⁶. Since the practice of triple talaq is followed since more than 1400 years, it is thereby inconsistent with the provisions of the fundamental rights provided in The Indian Constitution, it is hereby void.

Further under Article 14 of the Constitution, all the citizens have equality before law²⁷ and thereby all the citizens are entitled, including the Muslim women who face triple talaq are entitled to be protected from such sinful practices because any failure on the part of the state to protect the citizens from such sinful practices would result in injustice with them, which is against the principles of Natural and Social Justice.

Conclusion

It is hereby concluded by the author, that Triple Talaq is the biggest injustice with the Muslim Women in a democratic country like India. Those people who follow such practices have wrongly interpreted the Holy Quran. Though, the Holy Quran gives the right to the husband to dissolve the marriage by talaq but it did not even say that you have to dissolve the marriage by pronouncing three times divorce at one sitting and ruin the life of a woman. The basic principle of each religion is to have purity in mind and soul, and to treat all its followers fairly, and not doing injustice with anyone. The decision of the Hon'ble Supreme Court of India and the Government's action proved beneficial for the Muslim women and granted them some relief, but each coin has two sides, and there will be some of its effects in the Muslim Personal Law. All India Muslim Personal Law Board was not happy with the decision of the Supreme Court. So, though there are some advantages of the criminalizing of triple talaq, but many of the sects in Muslim personal law are not happy with the decision and considering this invalidating triple talaq as an interference in the Muslim Personal Law.

²⁶ The Constitution of India, Art.13(1), Universal Law Publishing

²⁷ Supra note 26; Art.14