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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 28th September, 2018

+ W.P.(C) 10341/2018 & C.M.No.40331/2018 (stay)

SHAHID AZAD

..... Petitioner

Through: Petitioner in person.

Versus

UNION OF INDIA

..... Respondent

Through: Ms.Monika Arora, CGSC with
Mr.Harsh Ahuja, Mr.Kushal Kumar, Mr.Vibhu
Tripathi, Mr.Abhishek Kaushik, Advs.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

Rajendra Menon, Chief Justice (Oral)

1. Challenge in this petition under Article 226 of the Constitution of India is made to the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 and a mandamus is sought to declare the entire ordinance as *ultra vires* the Constitution. The petitioner claiming to be a practicing advocate has approached this Court to challenge the ordinance in question on the ground that it adversely affects his fundamental rights besides affecting the rights of citizens of this country, the ordinance runs contrary to the shared belief, practice and tradition of Islam, is discriminatory in nature and, therefore, should be declared as *ultra vires*.

2. It is the case of the petitioner that the Supreme Court in the case of ***Shayara Bano vs. Union of India & Ors., (2017) 9 SCC 1*** declared the practice of instant triple *talaq* to be unconstitutional. Thereafter on 28th December, 2017 Lok Sabha passed the Muslim Women (Protection of Rights on Marriage) Bill, 2017. On 9th August, 2018 amendments to the Bill was circulated in the Rajya Sabha and on 10th August, 2018, the Chairman, Rajya Sabha declared that the Bill could not be presented due to lack of consensus and thereafter on 19th September, 2018, it is said that the ordinance in question was promulgated.

3. It is argued that the manner in which the ordinance has been promulgated is arbitrary and unsustainable, by promulgating the ordinance, Union of India has acted in an arbitrary and illegal manner. It is submitted that there are three forms of *talaq* in Islam, namely, *Talaq-e-ahsan*, *Talaq-e-hasan* and *Talaq-e-biddat*. By declaring *Talaq-e-biddat* to be an offence, it is argued that the same amounts to excessive and unnecessary legislation when the Hon'ble Supreme Court itself in ***Shayara Bano vs. Union of India (supra)*** by a majority judgment of 3:2 has already declared the said form of *talaq* as invalid and unconstitutional. It is said that once the law laid down by the Supreme Court declares such a practice to be unconstitutional, there is no necessity for promulgating an ordinance, when under Article 141 of the Constitution the law declared by the Supreme Court is binding. It was further argued that the power of promulgating an ordinance has been misused and it is an abuse of the process of law. It further pointed out that by making triple *talaq* as an offence, the provisions of Articles 14, 15, 21 and 25 of the Constitution are violated. It is submitted that the husband by

pronouncing *Talaq-e-Biddat* does not consider the spouse as his wife and leaves her, that is, he only deserts her and does not divorce. Now, as it is an invalid form of divorce and as desertion of a wife is not punishable under the Indian Law, it is argued that the ordinance which makes the *talaq* in question as an offence is unsustainable in law.

4. It is further argued that a system which is already declared as illegal and invalid by operation of law laid down by the Supreme Court need not be incorporated in the form of an ordinance to make it punishable. That apart, prescribing the punishment of three years is said to be an arbitrary decision on account of the fact that it is discriminatory as certain other serious offences like offences punishable under Section 147, 304A, 171E of the IPC prescribed lesser punishment of 1 to 2 years. *Inter alia* contending that on these grounds, the entire ordinance be struck down as *ultra vires* the Constitution, this writ petition has been filed.

5. Ms.Monika Arora, the learned CGSC appears for the Central Government, refutes the aforesaid contentions and points out that the ordinance has been brought into force by virtue of the provisions of Article 123(1) of the Constitution at a period when the Parliament is not in session and, therefore, at this stage interference into the matter may not be made. That apart, she points out that once in the case of ***Shayara Bano vs. Union of India*** (*supra*) by majority it has been held that the procedure for divorce by adopting the system of triple *talaq* is declared to be unconstitutional and violative of Article 14 of the Constitution, if the Government in its wisdom thought it appropriate to make it an offence, no unconstitutionality is committed in the matter. That apart, she argues that at this stage the

ordinance has only been brought into force, it is yet to be passed by the Parliament and, therefore, interference is not called for.

6. Having considered the contentions as were advanced before us, we find that merely because the Bill was presented in the Rajya Sabha and after the Rajya Sabha was adjourned *sine die*, in the absence of the Parliament not being in session the ordinance has been promulgated by the Union of India in exercise of its power of legislation under Article 123(1) of the Constitution, we see no reason to make an indulgence into the matter. Except for contending that the decision is arbitrary and without any justification an ordinance has been brought into force, nothing on facts except pointing out the number of instances when such a form of divorce has been resorted to, is brought to our notice on the basis of which the decision to promulgate the ordinance can be termed as arbitrary or illegal. The petitioner in ground (p) of the writ petition tries to indicate the number of cases for various periods where the system of triple *talaq* has been invoked and it is his case that there was no emergency or exonerating circumstance to warrant use of the powers of promulgating an ordinance under Article 123(1). Apart from the fact that the statistics given in the pleading is not supported by any cogent material or evidence if the Union of India in its wisdom thought it appropriate to promulgate an ordinance based on the law laid down by the Supreme Court, we see no reason to make any indulgence into the matter on the ground that it amounts to arbitrary exercise of power without there being any cogent material or evidence in support of the aforesaid contention, merely on the basis of vague or unspecified allegations, this ground is unsustainable.

7. As far as the contention of the petitioner that once this system of divorce is already held illegal and unconstitutional by the Supreme Court, there is no reason for putting in place any law on the subject is concerned, we find that the law in question has been brought into force to protect the rights of married muslim women and to make the system and form of *talaq* having the effect of instantaneous and irrevocable divorce an offence and impose criminal liability in case this illegal form of divorce is put into practice by any person.

8. The Supreme Court in the case of *Shayara Bano vs. Union of India* (*supra*) considered the provisions of the Muslim Personal Law, the practice of *Talaq-e-Biddat* or triple *talaq* and held that the practice of triple *talaq*, that is, instant, irrevocable, unilateral divorce by a husband as a formula for pronouncing divorce three times as unconstitutional and cannot be permitted. In the majority judgment, in para-104, the Hon'ble Supreme Court has crystallized the law after detailed deliberations in the following manner:-

“104. Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. Also, as understood by the Privy Council in *Rashid Ahmad* [*Rashid Ahmad v. Anisa Khatun*, 1931 SCC OnLine PC 78 : (1931-32) 59 IA 21 : AIR 1932 PC 25], such Triple Talaq is valid even if it is not for any reasonable cause, which view of the law no longer holds good after *Shamim Ara* [*Shamim Ara v. State of U.P.*, (2002) 7 SCC 518 : 2002 SCC (Cri) 1814]. This being the case, it is clear that this form of *talaq* is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at

reconciliation so as to save it. This form of talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognise and enforce Triple Talaq, is within the meaning of the expression “laws in force” in Article 13(1) and must be struck down as being void to the extent that it recognises and enforces Triple Talaq. Since we have declared Section 2 of the 1937 Act to be void to the extent indicated above on the narrower ground of it being manifestly arbitrary, we do not find the need to go into the ground of discrimination in these cases, as was argued by the learned Attorney General and those supporting him.” *(emphasis supplied)*

9. The aforesaid enunciation of law by the Supreme Court is after analysing the Muslim Personal Law, the practice and the entire law with regard to *talaq*. The judgments of various Courts dealing with the issue in question have been scrutinized, which includes the judgment of the Madras High Court in the case of ***A.S.Parveen Akhtar vs. Union of India, (2002) SCC Online Mad. 836*** wherein while considering the constitutional validity of Section 2 of the Muslim Personal Law, Shariat Application Act, 1937 insofar as it recognizes triple *talaq* as a valid form of divorce. The Court referred to various provisions of the Holy Quran, opinion of various eminent scholars of Islamic Law, previous judicial pronouncements including the law laid down by the Supreme Court in the case of ***Shamim Ara vs. State of U.P., (2002) 7 SCC 518*** to hold that *talaq* in whatever form practiced must be for reasonable cause and has to be preceded by an attempt for reconciliation and if undertaken otherwise, is an arbitrary unreasonable act.

10. The High Court of Jammu & Kashmir also in the case of ***Manzoor Ahmad Khan vs. Saja, (2010) 4 JKJ 380*** has referred to the judgments of

the Supreme Court and various High Courts and opined that these judgments are nothing but an eye opener for those who think that a muslim man can divorce his wife merely at his own whim or on caprice. It has been held by the Jammu & Kashmir High Court in the aforesaid case that by this system the marriage between the parties cannot be dissolved.

11. The Kerala High Court in the case of ***Kayyumparamb Ummer Farooque vs. Peredath Naseema, (2005) SCC Online Ker. 471*** has also considered the same provisions, the decisions of various High Courts and the Supreme Court and has approved the proposition to the effect that the instant dissolution of marriage by the husband without any effort for reconciliation is not sufficient to effect a divorce under the Mahomedan Law. Even a Bench of this Court in the case of ***Masroor Ahmed vs. State (NCT of Delhi), (2008) 103 DRJ 137*** after following the law laid down in the case of ***Shamim Ara (supra)*** has approved the aforesaid principle of law. In the case of ***Shayara Bano (supra)*** before declaring the practice of triple *talaq* to be unconstitutional, as detailed hereinabove, the provisions of Article 25(2) of the Constitution has been considered by His Lordship Justice Kurian Joseph in his opinion and His Lordship goes on to hold that there cannot be any constitutional protection to such a practice and he declares it to be *ultra vires* the Constitution and the fundamental rights available to a citizen. His Lordship Justice Rohinton Fali Nariman before finally declaring the law (by majority) as detailed hereinabove in para-104 has analysed various judgments not only of the Constitutional Bench of the Supreme Court and other Division Benches but judgments of various High Courts, the importance of gender discrimination, safeguards against arbitrary

divorce, various forms of *talaq* prescribed in the Muslim Personal Law, the constitutional protection available under Section 25 and the conclusion arrived at para-104 is a result of all those discussions and analysis. Before doing so, Justice Nariman also refers to concept of arbitrariness as envisaged under Article 14 of the Constitution, the law laid down in the case of ***Shamim Ara*** (*supra*) and the judicial precedents with regard to declaring a law to be constitutionally *ultra vires* invalid and comes to the conclusion that the system of triple *talaq* is unconstitutional, arbitrary and violative of Article 14 of the Constitution.

12. It is a well settled and cardinal principle of law that a legislation passed by the Parliament can be set aside only on constitutionally recognized grounds, namely, grounds of legislative competence and whether the legislation is *ultra vires* the provisions of the Constitution or the same violates fundamental rights or any other provisions of the Constitution. It may also be challenged on grounds of unreasonableness if it violates the principle of equality enshrined in our Constitution or unreasonably restricts the fundamental right under Article 19 of the Constitution. However, a legislation cannot be challenged only on the ground that it is unreasonable or that it is not to the liking of a particular person or a group of persons. If we analyse the present piece of legislation in the backdrop of the aforesaid law, we find that the ordinance in question has been brought into force by following the principles enumerated under Article 123(1) of the Constitution. It prescribes a particular act which is already declared as *ultra vires* and unconstitutional by the Constitution Bench in the case of ***Shayara Bano*** (*supra*) to be punishable as the act violates the fundamental right and

the rights of equality under the Constitution to a woman.

13. That being so, none of the ingredients necessary for impugning the legislation on account of legislative competency or unreasonableness as it restricts the fundamental rights under Article 19 is available in this case, for the simple reason that the form of *talaq* as described in Section 2(b) of the impugned ordinance is already declared to be unconstitutional and arbitrary by the Constitutional Bench of the Supreme Court in the case of ***Shyara Bano*** (*supra*). If an act is found to be manifestly arbitrary and unconstitutional by the Hon'ble Supreme Court and if such an act is declared to be an offence punishable under law, this Court cannot interfere into the legislative act of making punishable such a manifestly arbitrary act which is already declared under law to be violative of Article 14.

14. In fact, the main contention of the petitioner before us was that once the law declared by the Supreme Court in the case of ***Shayara Bano*** (*supra*) prohibits practicing such a form of dissolution of marriage, there is no necessity for further bringing into place a law for again doing something which is nothing but a law laid down by the Supreme Court by virtue of Article 141 of the Constitution. In our considered view, this argument cannot be accepted and is misconceived. What the Supreme Court does in the case of ***Shayara Bano*** (*supra*) is a declaration to the effect that the practice of triple *talaq* is unconstitutional, arbitrary and cannot be given effect to or practiced. If in spite of such a declaration of law by the Supreme Court to prevent use of this system of *talaq* being still practiced, the legislator/Union of India, as a measure of deterrent in its own wisdom, legislates a law to declare it to be an offence and makes it punishable, we

see no reason to hold that this is an arbitrary or an unreasonable act or a colourable exercise of power. In fact, in furtherance to the law declared by the Supreme Court in the case of *Shayra Bano (supra)*, the ordinance in question is for protecting the right available to a muslim woman and to enforce the law declared by the Supreme Court in its right earnest in letter and spirit. If we go through the aims and objects which compelled the legislation to be brought into force, we find that the legislature/Union of India was of the opinion that in spite of the practice of triple *talaq* being declared as unconstitutional, the said practice continues unabated and, therefore, to curb the same, the impugned ordinance in question has been brought into force. That being the factual position, the contention of the petitioner that it was not necessary to bring any such legislation or ordinance, in our considered view is a misconceived submission which cannot be accepted.

15. If we analyse the impugned ordinance in question, we find that it only deals with certain procedure to curb the practice of this form of unconstitutional *talaq* being followed and is an effort to protect the right of a married woman and for doing so even custody of a child, that is, minor child is being protected and given to the married woman who is a victim of such unconstitutional act on the part of her husband. In our considered view, there is nothing which has been specifically brought to our notice or argued on the basis of which we can hold that the ordinance in question is unconstitutional or *ultra vires* any provisions of the Constitution.

16. Once this form of *talaq* is declared as unconstitutional and impermissible by the Supreme Court, if the Government/legislature in its

wisdom thought it appropriate to make such unconstitutional or illegal act an offence, we, in exercise of our extraordinary jurisdiction under Article 226 of the Constitution, cannot declare the law making such an act punishable as *ultra vires* the Constitution. The legislature or the Union of India thought it appropriate to protect the rights of women belonging to a particular section of the society, declares an unconstitutional act to be an offence also under the impugned ordinance, we see no reason to interfere into the matter merely because the law laid down by the Supreme Court takes care of the issue in question. The law laid down by the Supreme Court only mandates that such a form of *talaq* is unconstitutional and cannot be permitted and if based on the aforesaid, the Government declares this act as an offence, we see no unconstitutionality in the same. The law laid down by the Supreme Court does not declare the act to be punishable or an offence under the criminal law, but now the Union of India or the legislature in their wisdom can always declare such an unconstitutional act to be a criminal offence also and if the same is done, we see no reason to declare it *ultra vires* the Constitution.

17. The petitioner, during the course of hearing, tried to indicate that under the Muslim Personal Law, there are different forms of *talaq*, namely, three as detailed hereinabove and they only relate to dissolving the marriage between the party and certain conditions are stipulated for giving effect to the different forms of *talaq* or divorce. It is argued that by making each and every form of *talaq* an offence, the rights available to the citizens of a particular section of the society is being taken away. It was tried to be emphasized that the mode of pronouncing *talaq* causing no effect on the

marital ties between the husband and wife cannot qualify to be an offence. If we analyse the definition of *talaq* as is contained in Section 2(b) of the ordinance, we find that “*talaq*” means *talaq-e-biddat* or any other similar form of *talaq* having the effect of instantaneous and irrevocable divorce pronounced by a muslim man. It is, therefore, clear that it is not that all forms of *talaq* which have been classified as an offence. It is only such *talaq* which takes effect instantaneously and is irrevocable after its pronouncement which has been made an offence and this, if analysed in the backdrop of the principles laid down by the Supreme Court in the case of ***Shayara Bano vs. Union of India*** (*supra*), particularly in para-104 as detailed hereinabove, it is clear that the ordinance only declares *talaq* which is instant and irrevocable to be an offence and this is done in view of the fact that the Supreme Court goes on to hold that this form of *talaq* is manifestly arbitrary as the marital ties can be broken capriciously and whimsically by a muslim man without any attempt for reconciliation and, therefore, is violative of the fundamental rights contained in Article 14 of the Constitution of India. That being so, it is not all forms of *talaq* which is made punishable under the ordinance. It is only the form of *talaq* which becomes effective instantaneously on its pronouncement and which is irrevocable which is declared to be an offence.

18. Taking note of all these factors, we are of the considered view that the ordinance in question has been brought into force in accordance with the requirements of law only to make more effective implementation of the law laid down by the Supreme Court in the case of ***Shayara Bano vs. Union of India*** (*supra*) in the form of an ordinance and we see no reason to make an

indulgence into the matter.

19. The petition is, therefore, dismissed in *limine*.

CHIEF JUSTICE

V. KAMESWAR RAO, J

SEPTEMBER 28, 2018
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