Research Inspiration
An International Multidisciplinary e-Journal
(Peer Reviewed, Open Access & Indexed)
Web: www.researchinspiration.com; Email: publish1257@gmail.com
ISSN: 2455-443X
Vol. 3, Issue-III
June 2018
e-ISJN: A4372-3069
Impact Factor : 4.012 (IIJIF)

# BRIEF CRITICAL ANALYSIS ON TRIPLE TALAQ IN ISLAMIC LAW

**Ms. Shalini Saxena**[1]

**Abstract**

The issue of the Triple divorce is regarded as highly sensitive among the Muslims in India. The Holy Quran is very cautious in matter of divorce, may be triple divorce has a effect of irrevocable but have to be spaced over a period of three months to give husband and wife time for reconciliation their relationship through the intervention of family members and friends. Triple Talaq pronounced by Husband only when the wife is in state of *Tuhur*. Yet despite clear Quranic injunctions to the contrary, immediate triple divorce is permitted, destroying matrimonial life in a one breathe. Triple Talaq is an inhuman practice that violates rights and dignity of women. The Constitution of India under Article 25 confers Right to Freedom of religion. The protection under Articles 25 and 26 extend guarantee to rituals, observances, ceremonies, mode of worship etc. which are integral to religion. But for such practices to be considered as a part of the religion.

**Key words:** Triple Pronouncement, Halala, Constitutionality of Triple Talaq by Judicial pronouncement.

## INTRODUCTION

***"Talaq Talaq Talaq …These three words are most hated, undesirable, and also against the Islam".***

India is a democratic country consisting of several laws and statutes to regulate the country as a whole. Also, it has the world's largest written constitution but still lacks an essential or much needed law, i.e. Uniform Civil Code. India is a land of religions and every religious community has its own set of laws dealing with the personal issues of marriage, divorce, inheritance, maintenance and adoption. Muslims, Christians, Zoroastrians and Jews enjoy their separate personal laws while Hindus, Buddhists, Jains and Sikhs are governed under a single law i.e. Hindu Law.

Unlike Hinduism and other religions where marriage is viewed as a sacrament, under Muslim Law, marriage (*nikah)* is considered as a civil contract which is based upon the consent which is spelt out in the utterance of the word *qabul*. The Muslim Law provides with different ways for the dissolution of this contract i.e. *Talaq-ul-sunnat* and*Talaq-e-biddat*. *Talaq* is an extremely sensitive affair which has the

[1] Assistant Professor, School of Law IMS Unison University, Dehradun

power to smash years of marital relation between husband and wife. The Holy Quran also, is very cautious when it comes to the matter of *talaq* and says:

***"And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever knowing and Acquainted [with all things."***[2]

*Talaq-ul-sunnat* was considered to be the best option as it had the option of revocability whereas *Talaq-e-biddat* does not experience revocability. *Talaq-ul-sunnat* is recognized in both the Muslim sects i.e. Shia as well as Sunni. Also, this kind of *talaq* may either be pronounced in any form, either *hasan* or *ahasan.*

*Talaq-e-biddat* is a disapproved form of *talaq.*It is a practice which was once acknowledged to be bad in theology by the members of clergy but is being upheld as valid by the same people. A distinctive characteristic of this kind of *Talaq* is that it becomes effective as soon as the words are pronounced and it does not have the option of revocability hence, leaving no possibility of reconciliation between the parties. Also, this form of *talaq* allows men to pronounce *talaq* during a single *tuhr* either in one sentence, e.g. "I divorce thee thrice - or in separate sentences, e.g. "I divorce thee, I divorce thee, I divorce thee"[3]or a single pronouncement made during a *tuhr* clearly indicating an intention irrevocably to dissolve the marriage,[4]e.g., "I divorce thee irrevocably." Even if a man himself wants to revoke his decision, the divorce still remains irrevocable. The only way out in such a condition is through *nikah halala*. This requires the wife to remarry followed by consummating the second marriage and then getting divorced and observe *iddat* period and finally then come back to the prior husband. The *Sunna* or Prophet has never consented neither been in favour of a form of *talaq* which did not provide an opportunity for the parties to reconcile. This form of *talaq*is not recognized under the *Shias*.

This matter of *talaq-e-biddat* was full of debate and several controversies on gender equality, human rights and secularism until the landmark judgment in the case of **Shayara Bano & Others v Union of India[5].**

## 1. HISTORICAL BACKGROUND

*Talaq-e-biddat* can be traced back in the second century of the Islamic-Era. This form of *talaq* was also practiced during the life of *Sunna* or Prophet. There is a well-known incident of Abdullah Ibn Umar, where he had divorced his wife but during the period of menstruation. When the Holy Prophet got to know about this case, he told that the act was wrongful in nature and moreover, advised to

[2]Surat An Nisa [4:35]- Al Qur'an al-Kareem
[3]In re Abdul Ali (1883) 7 Bom.180; Amir-ud-Din v KhatunBibi (1971) 39 all. 371: 39 I.C. 513
[4]Sarabhai v Rabiabai (1905) 30 Bom. 537: SC 8 Bom. LR.35; Sheikh Fazlur v musamnat Aisha (1929) 8 Pat. 690: 115 I.c. 546: AIR 1929 Pat 81
[5] LNIND 2017 SC 415

cancel the divorce and further to proceed in a proper manner if he was still firm on his decision of getting separated from his wife. The fact is that, *Sunna* strongly criticized *talaq-e-biddat* and did not approve it even tacitly in either form at any point of time.

*But* in accordance with the views of Ameer Ali, a renowned Islamic Jurist, this form of *talaq* was introduced by the Omayad Kings as the checks in the *Sunna*'s formula for *talaq* were inconvenient to them. Since then it came to be considered as a valid as well as one of the legal modes of *talaq.*

## 2. EFFECT OF TRIPLE PRONOUNCEMENT

Triple pronouncement of *talaq* at one and the same time has always been a hot topic for controversies due to its characteristic of smashing the pious relationship of husband and wife in just one go. Various Islamic scholars hold their different opinions in this context which is due to their difference in interpretation and application of law. On one hand, some eminent Islamic scholars are of the view that no leniency should be shown towards the application of law in order to avoid people from taking undue advantage on that account whereas, on the other hand the other set of Jurists are of the opinion that *talaq* is a very sensitive matter and *Allah* wants his people to be dealt with leniency and every possible effort should be made to reduce the chances of separation. So they are of the opinion to consider three pronouncements as one *talaq*. IbnRushid, an eminent Islamic Jurist is also of the view that *talaq* should not be allowed to be revoked by husband on indefinite occasions as through this he could harass his wife by every time revoking *talaq* before the expiry of her *iddat* period. Similarly, irrevocable divorce would also provide hardship to the husbands as they would get no opportunity to revoke his act. Hence, Ibn Rushid concludes to hold three pronouncements at one and same time which would amount to three divorces. The other set of Jurists held the opinion that if the second and third pronouncements were made in order to emphasis the first pronouncement, then only a revocable divorce shall be affected. They then applied the same rule to the other situation that when the second or third pronouncement had been made under momentary excitement without the intention to pronounce revocable divorce, a final divorce must be affected as soon as the last pronouncement i.e. third pronouncement is made irrespective of the intention of the husband.

## 3. PRESENCE OF WIFE ON DECLARATION

Whether the presence of wife is mandatory at the time of declaration or pronouncement of triple *talaq*? This question has been answered in the case of **AnishaBibi v Qazi Ibrahim**[6] where the court held that where the words of divorce i.e. "I divorce thee thrice", or " I divorce thee, I divorce thee, I divorce thee" or " I divorce thee irrevocably" were addressed to wife by name and render her *Haram* for himself, showing the clear intention to dissolve the marriage which is further followed by execution of a deed for divorce stating that three divorces were given in the abominable form i.e. *Talaq-e-biddat*, the presence of wife is unnecessary.

[6] (1910) 3, Madras 22

In the case of **Fulchand v Namal Ali**[7]**,** it was held that the presence of wife or her absence at the time of pronouncement of Triple divorce does not make a difference so far as its effectiveness is the concern. Justice SubbaRao opined that "We, therefore, hold that it is not necessary for the wife to be present when the *talaq* is pronounced. Triple divorce to be effective.

## 4. IS TRIPLE *TALAQ* IN CONFIRMITY WITH ISLAMIC LAW?

The entire Muslim Law is based upon the four pillars of knowledge, i.e.,

- The *Quran(kitab)*
- The *Sunnah (Hadiths)*[8]
- The *Ijma*[9]
- *Qiyas*[10]

For a principle to be accepted as law, it must find a place in the aforementioned sources. If for a matter, the solution is found in the Holy *Quran,* then it shall be the final ruling of *Shariah.* In case, the solution cannot be found in the Holy *Quran,* then the traditions of Prophet, which are documented by his companions in the form of *Hadiths,* are looked upon.

In *Qur'an,* it is nowhere mentioned that three divorces on a single occasion shall amount to divorce, that too irrevocable in nature. Also, the Prophet as narrated by Abdullah Ibn Umar said "Divorce is most detestable in the sight of God, abstain from it".[11]Morever, the Prophet described marriage as his *Sunnat. Quran* recognizes only two kinds of divorce, i.e., *Talaq-Hasan* and*Talaq- Ahasan* which are in conformity with the Prophet. *Talaq-e-biddat,* the third mode of *talaq,* is considered to be most sinful of all which was disallowed by Prophet himself.

In accordance with the holy *Quran,* husband is not supposed to divorce his wife during her menstruation cycle. When he divorces his wife, the wife has to experience a period of *iddat,* which is of about three months and in case of pregnant women, the *Iddat* period is till she delivers the child. This *iddat* period is to be followed and during his period husband could take his wife with an intention to reconcile[12].

Divorce which has been given two times is revocable in nature unless made for the third time.[13] Once a muslim husband has divorced his wife, she cannot remarry him unless she marries another man and consummates and then gets divorced by his free will, only after this she can remarry her former husband.

---

[7] (1911) 36 Calcutta 184

[8] Meaning: the percepts, actions and sayings of the Prophet Mohammad, not written down during his lifetime, but preserved by tradition and handed down by generations

[9] Meaning: the occurrence of opinion of the companions of Mohammad and his disciples

[10] Being analogical deductions derived from comparisons of the first three sources

[11] Abu Dawud 9:2173

[12] Surah al-Baqarah 2:228

[13] Surah al-Baqarah 2:230

In the case of **Shamim Ara v State of U.P. and Anr**.[14], the Supreme Court upheld its view stating *Quran* that there has to be some valid reason for divorce and also an attempt or an effort to reconcile. This opinion was furthermore upheld by several High Courts including the High Court of Kerela in the case of **Kuni Mohammed v Ayisha kutty**.[15]

## 5. DOES '*TALAQ*-E-BIDDAT' VIOLATE THE PARAMETERS EXPRESSED IN ARTICLE 25 OF THE CONSTITUTION OF INDIA?

*Talaq-e-biddat*is a matter of 'personal law', which is applicable to a particular sect of Muslims i.e., *Sunni* Muslim belonging to *Hanafi* School. As it violates the parameters of Article 25, can it be declared as not enforceable in law?

In regard to the aforementioned question, a judgment rendered by the Bombay High Court in the case of **Narasu Appa Mali**[16]authored by M.C. Chagla, CJ in paragraph13and Gajendra Gadkar, J. (as he was then) in paragraph 23, opined as follows:

"That this distinction is recognized by the Legislature is clear if one looks to the language of S. 112, Government of India Act, 1935. That section deals with the law to be administered by the High Courts and it provides that the High Court's shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject. Therefore, a clear distinction is drawn between personal law and custom having the force of law. This is a provision in the Constitution,and having this model before them the Constituent Assembly in defining "law" in Art. 13 have expressly and advisedly used only the expression "custom or usage" and have omitted personal law. This, in our opinion, is a very clear pointer to the intention of the Constitution-making body to exclude personal law from the purview of Art. 13. There are other pointers as well. Article 17 abolishes untouchability and forbids its practice in any form. Article 25(2)(b) enables the State to make laws for the purpose of throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Now, if Hindu personal law became void by reason of Art. 13 and by reason of any of its provisions contravening any fundamental right, then it was unnecessary specifically to provide in Art. 17 and Art. 25(2)(b) for certain aspects of Hindu personal law which contravened Arts. 14 and 15. This clearly shows that only in certain respects has the Constitution dealt with personal law. The very presence of Art. 44 in the Constitution recognizes the existence of separate personal laws, and Entry No. 5 in the Concurrent List gives power to the Legislatures to pass laws affecting personal law. The scheme of the Constitution, therefore, seems to be to leave personal law unaffected except where specific provision is

[14] (2002) 7 SCC 513
[15] 2010 (2) KHC 63
[16] AIR 1952 Bom. 84

made with regard to it and leave it to the Legislatures in future to modify and improve it and ultimately to put on the statute book a common and uniform Code. Our attention has been drawn to S. 292, Government of India Act, 1935, which provides that all the law in force in British India shall continue in force until altered or repealed or amended by a competent Legislature or other competent authority, and S. 293 deals with adaptation of existing penal laws. There is a similar provision in our Constitution in Art. 372(1) and Art. 372(2). It is contended that the laws which are to continue in force under Art. 372(1) include personal laws, and as these laws are to continue in force subject to the other provisions of the Constitution, it is urged that by reason of Art. 13(1) any provision in any personal law which is inconsistent with fundamental rights would be void. But it is clear from the language of Arts. 372(1) and (2) that the expression "laws in force" used in this article does not include personal law because Art. 373(2) entitles the President to make adaptations and modifications to the law in force by way of repeal or amendment, and surely it cannot be contended that it was intended by this provision to authorise the President to make alterations or adaptations in the personal law of any community. Although the point urged before us is not by any means free from difficulty, on the whole after a careful consideration of the various provisions of the Constitution, we have come to the conclusion that personal law is not included in the expression "laws in force" used in Art. 13(1)."[17]

"The Constitution of India itself recognizes the existence of these personal laws in terms when it deals with the topics falling under personal law in item 5 in the Concurrent List—List III. This item deals with the topics of marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law. Thus it is competent either to the State or the Union Legislature to legislate on topics falling within the purview of the personal law and yet the expression "personal law" is not used in Art. 13 because, in my opinion, the framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution. They must have been aware that these personal laws needed to be reformed in many material particulars and in fact they wanted to abolish these different personal laws and to evolve one common code. Yet they did not wish that the provisions of the personal laws should be challenged by reason of the fundamental rights guaranteed in Part III of the Constitution and so they did not intend to include these personal laws within the definition of the expression "laws in force." Therefore, I agree with the learned Chief Justice in holding that the personal laws do not fall within Art. 13(1) at all."

The position expressed by the Bombay High Court as has been extracted above, deserves to be considered as the presently declared position of law as it was conceded on behalf of the learned Attorney general of India that the judgment rendered by the Bombay High Court in the above mentioned case i.e. **Narasu Appa Mali** case. Furthermore, it was upheld in **Shri Krishna Singh** case as well as **Mahaarshi**

[17] Paragraph 13 of Narasu Appa Mali: AIR 1952 Bom 84

**Avadhesh** cases, wherein the 'personal laws' had been tested on the touchstone of fundamental rights in the cases of **Mohd. Ahmed Khan v Shah Bano Begum**[18]**, Daniel Latifi v Union of India**[19]and in **John Vallamattom** case[20].

So far as the challenge to the practice of *talaq-e-biddat* in accordance with the constitutional mandate enshrined under Article 25 of the Indian Constitution is concerned, it would be pertinent to note that the 'personal laws' cannot be interfered with, as long as the same do not infringe 'public order, morality and health' or 'with the provisions of Part III of the Constitution of India.'.

*Talaq-e-biddat* would have being violation of Article 14, 15 and 21 of the Constitution of India as Article 14 requires the state to ensure equality before the law and equal protection of the laws within the territory of India[21]. Likewise Article 15 requires the state to treat everyone equally[22]. Even Article 21 is a protection from the State action, as it prohibits the State from depriving anyone of the rights ensuring to them as a matter of life and liberty[23].

But as 'Personal Law' is a matter of religious faith, and not being State action, there is no question of its being violative of the provisions of the Constitution of India, more specifically Articles 14,15 and 21 of the Constitution.

## 6. THE TIGHTROPE WALK

On October 16, 2015 a special bench was constituted in order to examine discriminatory practices of Muslim law such as triple divorce and polygamy made by a two- judge bench which comprised of Justice Anil Dave and Justice Arun Kumar Goel in the case of Prakash v Phulawati[24] while deciding an appeal in regard to the rights of a Hindu woman to ancestral property. The judges referred to Chief Justice for the constitution of a special bench to examine the practices violating the fundamental rights of Muslim women which came to be titled as 'Re: Muslim Women's Quest For Equality.'[25]

The Constitutional Bench comprised of Justice Kurien Joseph, F.Nariman, U.U. Lalit, Abdul Nazeer headed by Chief Justice J.S. Khehar heard the arguments on the days of May 11-18, 2017. Prof. Tahir Mahmood, an expert on Islamic law appreciated the strategy of placing four minority community judges out of five judge bench, and commented that such a move was much needed as the unruly media debates had given the issue an image of majority- minority scuffle.[26] The bench

[18] (1985) 2 SCC 556
[19] (2001) 7 SCC 740
[20] (2003) 6 SCC 611
[21] Constitution of India
[22] Constitution of India
[23] Constitution of India
[24] (2016) 2 SCC 36
[25]ShamimAra v State of Uttar Pradesh, (2002) 7 SCC 518
[26]ShamimAra v State of Uttar Pradesh, (2002) 7 SCC 518

furthermore declined to examine polygamy and restricted the arguments strictly to the question that whether instant triple *talaq* constitutes a core belief among Sunni Hanafi followers of Islam in India.

Several subsequent writ petitioners' application tagged along with original reference by individual Muslim women's organisations inclusive of RSS affiliated Rashtrawadi Muslim Mahila Sangh, the All India Muslim Personal Law Board and several other associate organisations such as the Jamiat Ulama-i-Hind, the All India Muslim Women's Personal Law Board, etc. The hearing in this matter attracted the public interest even during the summer vacation along with extensive report on the case every single day. The Bhartiya Muslim Mahila Andolan published a report on the study of around 4710 women and came to the conclusion that Triple *talaq* and polygamy are the main concerns among Muslim women and these are not just the concerns of the women who have been a part of the survey but Muslim women community as a whole. The issue of Triple *Talaq* received a huge amount of publicity next to demonetization affecting the country as a whole. In accordance with a recent survey conducted by Centre for Research and Debates in Development Policy (CRDDP) 331 divorces and about a quarter occurred due to the intervention of the religious institutions e.g. Q*azi* and *darlqaza* and only about 0.3 percent of the total study reported 'instant triple *talaq*'.

Relying upon the Census data of 2011, the number of deserted Hindu women living in deplorable conditions (2.3 millions) exceeds the number of Muslim women who have been divorced and deserted (2.8 lakhs)[27]. These figures were presented before the Prime Minister during the election campaign in Uttar Pradesh and yet no heed has been paid to them. This is not a unique problem only for the Muslim Community but a social problem which is deep- rooted within patriarchy. The mere fact that this organization has been campaigning for the concept of triple *talaq* since years shows the tightrope walk for Muslim women who have been demanding a strong change in their flawed personal laws. Furthermore, the decision by the Supreme Court in the case of Shayara Bano v Union of India upholding the instant triple *talaq* to be invalid was not an easy task and was actually like walking on a razor's edge.

## 7. MAKING OF SHAYARA BANO AND THE LEGAL PRECEDENT IN SHAMIM ARA

Shayara Bano, who is being hailed as the champion of the Muslim women community was the first one to file petition in regard to triple *talaq*. After reference was made to the Chief Minister, a petition pleading to enact Uniform Civil Code was filed by a BJP activist Ashwini Upadhyay. The then presiding Chief Justice T.S. Thakur dismissed the petition on the ground that this prayer is enshrined under the domain of the legislature and furthermore questioned the petitioner's motive for filing the petition. However, the bench affirmed that if any victim of triple *talaq* approaches the court it would analyze whether instant and arbitrary triple *talaq*is violative of the fundamental rights of the wife.

[27] The Wire, Abandoned Women Vastly Outnumber Victims of Triple Talaq and It's Time Modi Spoke Up for Them, December 12, 2016, available at https://thewire.in/86335/abandoned-women-triple-talaq/

Initially, Bano's brother contacted a local lawyer in order to file a transfer petition in Supreme Court to transfer the case in the family court at Allahabad to her native place in Kashipur who in turn referred them to Srinivasan to file transfer petition in Supreme Court. Since Bano did not want to reconcile with her husband and wanted to confront the case, in order to bring an end to the debatable litigation, and the husband's lawyer drew up a *talaqnama*and sent it to Bano by post.

This act of his husband was brought to the notice of Srinivasan who advised them to file PIL on the ground that the aforementioned *talaqnama* violated her dignity and also Shayara consistently maintained that she did not want to reconcile with her abusive husband. ShayaraBano's core concerns were: protection from domestic violence, access to her children, regular monthly maintenance and also a fair and reasonable settlement for future. After the filing of this case, several other aggrieved women along with several muslim women's organisations approached Supreme Court of India.

In 2002, in a landmark judgment in the case of **Shamim Ara v State of Uttar Pradesh[28],** Supreme Court invalidated arbitrary triple talaq and plea of talaq in reply to the petition filed for maintenance by wife cannot be treated as pronouncement of talaq. Also, in the case of **Dagdu Chotu Pathan v Rahimbi[29]**the Bombay High Court held that a Muslim Husband cannot repudiate the marriage at will. For this decision, the court relied upon the Holy *Qur'an :*'To divorce the wife without reason, only to harm her or to avenge her for resisting the husband's unlawful demands and to divorce her in violation of the procedure prescribed by the Shariat is haram'.

The aforementioned judgements were relied upon two earlier judgements i.e., Sri Jiauddin v Anwara Begum and RukiaKhatun v Abdul KhaliqueLaskar which had declared:

"The correct law of talaq as ordained by Holy Quran is:

i. Talaq must be for a reasonable cause and
ii. It must be preceded by an attempt at reconciliation between the husband and wife by two arbiters; one chosen by the wife from her family and the other by the husband from his. If their attempts fail, Talaq may be affected."[30]

Following Shamim Ara, there were a plethora of judgments which declared the instant triple talaq to be invalid, furthermore, safeguarding the rights of the Muslim women approaching the courts for maintenance.[31] The general view of the society is that once a husband pronounces *talaq,* the wife is stripped of all her rights. It is due to the selective amnesia in regard to the struggles of Muslim women which made the petition filed by Srinivasan as the first instance where a woman challenged the concept of triple talaq.

[28] AIR 2002 SC 3551
[29] 2003 (1) Bom Cr 740
[30] Sri Jiauddin v Anwara Begum, (1981) 1 GLR 358; Rukia Khatun v Abdul Khalique Laskar, (1981) 1 GLR 375
[31]Parveen Akhtar v Union Of India, 2003-1-LW (CrL) 115

## 8. JUDICIAL PRONOUNCEMENTS , ON THE SUBJECT OF '*TALAQ*-E-BIDDAT'

- **Rashid Ahmad v AnisaKhatun**[32]

AnisaKhatun the respondent in this case challenged the validity of the divorce, firstly for the reason that she was not present at the time of pronouncement of divorce. And secondly, that even after the aforesaid pronouncement, cohabitation had continued and subsisted for a further period of fifteen years, i.e., till the death of Ghiyas-ud-din and AnisaKhatun. According to AnisaKhatun, Ghiyas-ud-din continued to treat Anisa-Khatun as his wife and the children born to her as his legitimate children. It was also the case of AnisaKhatoon that the payment of Rs. 1000 was a payment of prompt dower and as such not payment in continuation of the *talaq-e-biddat,* pronouncement by Ghiyas-ud-din.

The Privy Council while considering the validity of *talaq-e-biddat* and legitimacy of child born to AnisaKhatoon held as under:

"Their Lordships are of opinion that the pronouncement of the triple talak by Ghiyas-ud-din constituted an immediately effective divorce, and, while they are satisfied that the High Court were not justified in such a conclusion on the evidence in the present case, they are of opinion that the validity and effectiveness of the divorce would not be affected by Ghiyas-ud-din's mental intention that it should not be a genuine divorce, as such a view is contrary to all authority. A talak actually pronounced under compulsion or in jest is valid and effective (Baillie's Digest, 2nd edn., p. 208; Ameer Ali's Mohammedan Law, 3rd edn., vol. 2, p. 518; Hamilton's Hedaya, vol. 1, p. 211).[33]

The respondents sought to found on the admitted fact that for about fifteen years after the divorce Ghiyas-ud-din treated Anis Fatima as his wife and his children as legitimate, and on certain admissions of their status said to have been made by appellant No. 1 and respondent pro forma No. 10, who are brothers of Ghiyas-ud-din, but once the divorce is held proved such facts could not undo its effect or confer such a status on the respondents.[34]

While admitting that, upon divorce by the triple talak, Ghiyas-ud-din could not lawfully remarry Anis Fatima until she had married another and the latter had divorced her or died, the respondents maintained that the acknowledgment of their legitimacy by Ghiyas-ud-din, subsequent to the divorce, raised the presumption that Anis Fatima had in the interval married another, who had died or divorced her, and that Ghiyas-ud-din had married her again, and that it was for the appellants to displace that presumption. It must not be impossible upon the face of it: i.e., it must not be made when the ages are such that it is impossible in nature for the acknowledge to be the father of the acknowledgee, or when the mother spoken to in an acknowledgment, being the wife of another, or within prohibited degrees of the acknowledger, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledge. But if none of these objections occur, then the acknowledgment has more than a mere evidential value. It raises a presumption of marriage a

[32] AIR 1932 PC 25
[33] Paragrapgh 15 of Rashid Ahmed v AnisaKhatun AIR 1932 PC 25
[34] Paragrapgh 16 of Rashid Ahmed v AnisaKhatun AIR 1932 PC 25

presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact, and not jurist de jure, it is like every other presumption of fact capable of being set aside by contrary proof.[35]

The legal bar to re-marriage created by the divorce in the present case would equally prevent the raising of the presumption. If the respondents had proved the removal of that bar by proving the marriage of Anis Fatima to another after the divorce and the death of the latter or his divorce of her prior to the birth of the children and their acknowledgment as legitimate, the respondents might then have had the benefit of the presumption, but not otherwise.[36]

Their Lordships are, therefore, of opinion that the appeal should be allowed, that the decree of the High Court should be reversed, and that the decree of the Subordinate Judge should be restored, the appellants to have the costs of this appeal and their costs in the High Court. Their Lordships will humbly advise His Majesty accordingly.[37]"

The Privy Council upheld as valid, '*talaq-e-biddat'*, pronounced by husband in the absence and without the knowledge of the wife, even though the husband amd wife continued to cohabit for fifteen long years thereafter wherefrom five offspring's were born to them.

- **Jiauddin Ahmed v Anwara Begum[38]**

The respondent Anwara Begum had petitioned for maintenance under Section 125 of the Code of Criminal Procedure. Her contention was that she had lived with her husband for about nine months, after her marriage. During, that period, her husband began to torture her and even used to beat her. It was therefore, that she was compelled to leave his company and start living with her father who was a day labourer. Maintenance was duly granted by the First Class Magistrate, Tinsukia. Her husband, the petitioner Jiauddin Ahmed, contested the respondent's claim for maintenance, before the Gauhati High Court, on the ground that he had divorced her, by pronouncing divorce by adopting the procedure of *talaq-e-biddat.*

It is in above circumstances that the validity of *talaq-e-biddat* and the wife's entitlement to maintenance came up to be considered by the Gauhati High Court, which examined the validity of the concept of *talaq-e-biddat.*

The High Court laid down reliance on verses 128 to 130, contained in section 19 of sura 'IV' and verses 229 to 232, contained in sections 29 and 30 of Sura 'II' and thereupon referred to the commentary on the above verses by Scholars and the views of the jurists with pointed reference to *talaq*. Furthermore, the High Court also placed its reliance on verse 35 contained in section 6 of Sura 'IV' and again referred to the commentary on the above verse by Abdullah Yusuf Ali, an Islamic scholar.

[35] Paragrapgh 17 of Rashid Ahmed v AnisaKhatun AIR 1932 PC 25
[36] Paragrapgh 18 of Rashid Ahmed v AnisaKhatun AIR 1932 PC 25
[37] Paragrapgh 19 of Rashid Ahmed v AnisaKhatun AIR 1932 PC 25
[38] (1981) 1 Gau LR 358

The conclusion as recorded by the High Court leaves no room for any doubt that *talaq-e-biddat* pronounced by the husband without reasonable cause and without being preceded by attempts of reconciliation and without the involvement of arbitrators with due representation on behalf of husband and wife would not lead to a valid divorce. Moreover, the High Court also concluded that Jiauddin Ahmed had mainly alleged that he had pronounced *talaq* but had not established the factum of divorce by adducing any cogent evidence. Having concluded, that the marriage between parties was subsisting, the High Court upheld the order awarding maintenance to the wife, Anawara Begum.

- **Must. RukiaKhatun v Abdul KhaliqueLaskar**[39]

RukiaKhatun was marrried to Abdul Khalique Laskar. The couple lived together for about three months, after their marriage. During that period, the marriage was consummated. RukiaKhatun alleged that after the abovementioned period her husband abandoned and neglected her. She was allegedly not provided with any maintenance and as such had been living in penury for a period of about three months, before she moved an application for grant of maintenance. The petitioner's application for maintenance filed under Section 125 of Code of Criminal Procedure, was rejected by Judicial Magistrate, Hailkandi. She challenged the order rejecting her claim of maintenance before Gauhati High Court. The respondent, husband contested the claim for maintenance by asserting that even though he had married the petitioner but he had divorced her on 12-04-1972 by way of *talaq-e-biddat* and had thereafter even executed a *talaqnama*. The husband also asserted that he had also paid dower to the petitioner. The claim of wife was declined on the ground that she had been divorced by the husband.

It is in the above circumstances that validity of the divorce pronounced by the husband by way of *talaq-e-biddat* and wife's entitlement to maintenance came up for consideration.

The first point was to be decided whether the opposite party divorced the Petitioner. The equivalent of the word 'divorce' is *talaq* in Muslim law. What was considered to be as valid talaq was considered by Bahrul Islam J.as that the word *talaq* carries the literal significance of 'freeing' or the 'undoing of knot'. *Talaq* means divorce of a woman by her husband. Moreover the case of Ahmed KasimMolla v KhatunBibi was also relied on in order to come to the conclusion.

The High Court listed several essential ingredients of a valid *talaq* under Muslim law. 'Firstly' *talaq* has to be based on some good cause and must not be at the mere desire, sweet will, whim and caprice of the husband. Secondly it must not be a secret. Thirdly, between the pronouncement and finality there must be a time gap so that the passions of the parties may calm down and reconciliation may be possible. Fourthly, there has to be a process of arbitration wherein the arbitrators are representatives of both the husband and the wife. If the above ingredients do not exist *talaq* would be considered as invalid. For the reason *talaq-e-biddat* pronounced by the husband did not satisfy all the

[39] (1981) 1 Gau LR 375

ingredients as a valid divorce, the High Court concluded that the marriage was subsisting and accordingly held the wife to be entitled to maintenance.

- **Masroor Ahmed v State (NCT of Delhi)**[40]

In this case the position expressed by High Court in paragraph 12 of the judgment crystallizes the challenge

"Several questions impinging upon Muslim law concepts arise for consideration. They are:—

(1) What is the legality and effect of a triple talaq?

(2) Does a talaq given in anger result in dissolution of marriage?

(3) What is the effect of non-communication of the talaq to the wife?

While considering the legality and effect of *talaq-e*-biddat, the High Court recorded the following:

"There is no difficulty with talaq *ahasan* and *talaq hasan*. Both have legal recognition under all schools, *sunni* or *shia.* The difficulty lies with triple divorce which is followed by only Sunni.*"*

The High Court arrived on following decision:

"It is accepted by all schools of law that talaq-e-bidaat is sinful. Yet some schools regard it as valid. Courts in India have also held it to be valid. The expression bad in theology but valid in law is often used in this context. The fact remains that it is considered to be sinful. It was deprecated by Prophet Muhammad. It is definitely not recommended or even approved by any school.

- **Shayara Bano v Union of India**[41]

**The facts**: ShayaraBano, the petitioner was married to Rizwan Ahmed for about fifteen years. Rizwan Ahmed, the husband in 2006 divorced her through *talaq-e-bidat* due to which ShayaraBano, the petitioner, filed a Writ Petition in the Supreme Court which challenged the constitutional validity of three practices namely *talaq-e-bidat*, polygamy, *nikah-halala* which violated Articles 14, 15, 21, 25 of the Constitution of India.

On 16 February, the court in itsorder demanded written submissions from ShayaraBano, the aggrieved petitioner, the Union of India, women' rights bodies and the All India Muslim Personal Law Board (AIMPLB) on the issue of *talaq-e- bidat, nikah-halala* and polygamy. The petitioner's plea was supported by The Union of India and Bebaak Collective and Bhartiya Muslim Mahila Andolan (BMMA) whereas the AIMPLB argued that Muslim personal law is uncodified and hence not subject to constitutional judicial review. Furthermore, AIMPLB contended that these practices are essential parts of the Islamic religion and also protected under Article 25 of the Constitution.

[40] 2008 (103) DRJ 137
[41] LNIND 2017 SC 415

After Shayara Bano's petition was accepted, a Constitutional bench of five judges was formed by the Apex Court.

**The challenge**: The challenges before the Court was to decide whether or not the practice of *talaq-e-biddat* one of the essential practices of the Islamic religion and also that whether or not such practices are in violation of the fundamental rights guaranteed under the Indian Constitution?

**The consideration**: In order to come to the conclusion the Holy *Quran* and the Hadiths were referred to. Also laws of Arab states, Southeast Asian States, Sub-continental States were relied upon. Furthermore several judicial pronouncements such as Rashid Ahmad v Anisa Khatun, Jiauddin Ahmed v Anwara Begum, Must.RukiaKhatun v Abdul KhaliqueLaskar, Masroor Ahmed v State (NCT of Delhi) etc. were considered.

**The conclusion**: The Lordships had arrived to the conclusion that the legal challenge raised at the behest of the petitioners must fail on the judicial front. But as it may, the question still remains that whether this is a fit case to exercise the jurisdiction under Article 142. It was held that *talaq-e-biddat* is gender discriminatory and Muslim husbands had been injuncted from pronouncing *talaq-e-biddat* as a means for severing their matrimonial relationship. The instant injunction shall in the first instance be operative for a period of six months. If the legislative process commences before the expiry of six months and a positive decision emerges towards redefining *talaq-e-biddat* as one or alternatively, if it is decided that the practice of triple *talaq* be done away with altogether, the injunction would continue, till the legislation is finally enacted, failing which the operation shall cease to operate.

## 9. CONCLUSION

The journey of the striking down of Triple *Talaq* was a tightrope walk for the Muslim women who were previously bound to follow the unconstitutional practices enshrined Muslim Personal Laws. In spite of knowing what situations they would have to face after getting divorced, they quietly accepted it either with or without their consent which has never been a matter of concern under the Islamic laws. It was believed that Muslim wives would have to suffer this tyranny for all times and their personal law would remain so cruel towards them until a brave lady named Shayara Bano, who was also a victim of triple divorce, decided to fight for the rights of every Muslim woman and challenge the Islamic laws. Her journey would definitely not have been easy but the result is actually a great victory providing justice to the Muslim women community as a whole.

The decision was a victory for the Muslim women and has been celebrated throughout the country. It was considered as the beginning of a long overdue amendment of discriminatory personal laws.

The battle for gender equality still has a long way to go, and this victory has paved a path for many more victories on their way.

**********