

Court No. - 58

Case :- WRIT - C No. - 51421 of 2016

Petitioner :- Smt. Hina And Another

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Sunil Kumar Dwivedi

Counsel for Respondent :- C.S.C.

Hon'ble Suneet Kumar,J.

Petitioners claim to have married as per muslim custom under personal law. First petitioner, i.e. the lady is aged about 23 years, whereas, second petitioner is aged about 53 years; both are illiterate. The document in support of their age is the Aadhar card. Both the petitioners are present in the Court, and have been identified by their counsel. In para-11 of the petition, it is averred that the second petitioner has contracted the present marriage after effecting instant talak (Triple Talaq) to his wife. The second petitioner admits before the Court that from his first marriage, he has two minor children, one residing with the wife and other with him. On a specific query as to when and why the instant divorce was effected, the second petitioner would state that to contract second marriage he has divorced his wife, no other reason is pleaded or stated before the Court.

The petitioners seek a direction to restrain the respondent police authorities and the third respondent, who is the mother of the lady from harassing them, further, to ensure security and safety of the petitioners and in particular to the first petitioner. It is alleged that the respondents are harassing the petitioners living as man and woman.

Learned counsel for the petitioner would submit that the petitioners are adult and are at liberty to choose their own partner on attaining age of majority within social framework of the society

and the country, therefore, the petitioners cannot be deprived of their life and personal liberty except in accordance with the procedure established by law under Article 21 of the Constitution.

There can be no dispute to the proposition that is being advanced by learned counsel, nor difference in age is an issue, what is disturbing is that the instrument of instant divorce (Triple Talaq), in the facts of the present case, has been used for ulterior purpose for divorcing the wife. It is not being disputed that the first petitioner used to visit Mohalla, Tehsil Rokan Sarai, District Bulandshahar, where she met the second petitioner and fell in love, thereafter, decided to marry. First petitioner left her family and joined the company of second petitioner, consequently, the second petitioner decided to get rid of his first wife by divorcing her by pronouncing instant talaq.

The question which disturbs the Court is should muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Whether the personal law can be amended suitably to alleviate their sufferings? The judicial conscience is disturbed at this monstrosity. The first wife has to live life for no fault of her but for the reason that her husband got attracted to a lady half of her age which is the reason for being divorced. The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. It is a popular fallacy that a Muslim male enjoys, under the Quaranic Law, unbridled authority to liquidate the marriage. The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him. The Islamic law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the

absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously. In other Islamic State, where the husband must satisfy the court about the reasons for divorce.

However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quoran laid down and the same misconception vitiates the law dealing with the wife's right to divorce. The divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting a reconciliation have failed, the parties may proceed to a dissolution of the marriage by 'Talaq' or by 'Khola'. The statement that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" cannot be approved as the correct law. The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters—one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected. (Ref: *Pathayi v. Moideen* 1968 KLT 763; *A. Yousuf Rawther Vs. Sowramma*, AIR 1971 Kerala 261; referred to with approval by the Supreme Court in *Shamim Ara vs State Of U.P. & another* : 2002 (7) SCC 518). The decision in **Shamim Ara** was rendered in 2002, wherein, the observation of the Division Bench judgment of the Kerala High Court was noticed and approved, which was rendered 20-30 years before.

Country has in recent times marched steps ahead in all walks of life including progressive interpretation of laws which cannot be lost sight of except by compromising with regressive trends.... "Law

is dynamic and its meaning cannot be pedantic but purposeful." (Refer— *Bai Tahira Vs. Ali Hussain* AIR 1979 SC 362).

The purpose of Law in a modern secular State based upon the Constitution is to bring about social change. The muslim community comprise a large percentage of Indian population, therefore, a large section of citizen, in particularly women, cannot be left to themselves to be governed by archaic customs and social practise under the garb of personal law purportedly having divine sanction. The women of the community continue to suffer bias, deprived of the protection, they should otherwise get through provisions in the Constitution that provide for equality and non discrimination.

India is a nation in the making, geographical boundaries alone do not define a nation. It is to be adjudged, amongst others, on the parameter of overall human development and how the society in particular treat their women; leaving such a large population to the whims & fancy of personal law which perpetuate gender inequality and is regressive, is not in the interest of society and the country. It impedes and drags India from becoming a nation. The instant divorce (Triple Talaq) though has been deprecated and not followed by all sects of muslim community in the country, however, is a cruel and the most demeaning form of divorce practised by the muslim community at large. Women cannot remain at the mercy of the patriarchal setup held under the clutches of sundry clerics having their own interpretation of the holy Quoran. Personal laws, of any community, cannot claim supremacy over the rights granted to the individuals by the Constitution.

I would not like to say anything further for the reason that the Supreme Court is seized with the matter.

In **Shamim Ara**, a statement merely made in the pleadings “written statement” though unsubstantiated that the wife was divorced upon delivering copy of the written statement, was not accepted by the Supreme Court and the subsequent marriage contracted by the husband was held void.

In the facts and circumstances of the present case, the petition stands **dismissed**. The legality of the marriage/divorce and rights of parties is kept open.

No cost.

Order Date :- 5.11.2016
Mukesh Kr.