

**IN THE SUPREME COURT OF INDIA**

CIVIL ORIGINAL JURISDICTION WRIT

PETITION (CIVIL) NO                      222 OF 2018

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

**IN THE MATTER OF:**

SAMEENA BEGUM

...PETITIONER

VERSES

UNION OF INDIA & ANOTHER

...RESPONDENTS

PAPER BOOK

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**(ADVOCATE FOR PETITIONER: ARCHANA PATHAK DAVE)**

## SYNOPSIS

The petitioner in the present Writ Petition is constrained to file this petition under Article 32 of the Constitution of India, in the nature of a Public Interest Litigation, being the victim of polygamy herself and also moved by the plight of thousands of Muslim women across the country suffering due to the draconian practices of 'Polygamy' and 'Nikah- Halala' that are rampant in the Muslim society.

Petitioner got married in the year 1999 to one Mr. Javed Anwar and two sons were born out of the said wedlock. All the time when she was at her matrimonial home, she was tortured, bullied, beaten, and was asked to bring money from her parents house. After the repeated tortures, she filed a complaint U/s 498 A of the IPC. Getting infuriated with this, petitioner's husband sent a letter giving her 'Triple Talaq'.

Petitioner kept on living on the mercy of her parents till she was married for second time in 2012 to Mr. Riyazuddin from Bulandshahr, who was already married and had a wife called Arifa. The petitioner got pregnant third time and soon after birth of her third son, she was given 'Triple Talaq' over phone. Since then, she is living alone with three children. Moved by her own situation and of many other similarly situated Muslim women throughout India, the petitioner is before this Court praying to declare practices of 'Polygamy' & 'Nikah Halala' as against the basic rights enshrined under Part III of the Constitution.

This Hon'ble Court in Shayara Bano Vs. Union of India & Ors. (2017) 9 SCC 1 (also known as the Triple Talaq judgment) in para 10 as delivered by the then Hon'ble Chief Justice of India Mr. Justice J.S. Khehar, as his lordships then was, held:

*“Keeping in view the factual aspect in the present case, as also, the complicated questions that arise for consideration in this case (and, in the other connected cases), at the very outset, it was decided to limit the instant consideration, to ‘talaq-e-biddat’ – triple talaq. Other questions raised in the connected writ petitions, such as, polygamy and ‘halala’ (- and other allied matters), would be dealt with separately. The determination of the present controversy, may however, coincidentally render an answer even to the connected issues.”*

On 16.10.2015, while deciding the Civil Appeal - 7217/2013 [Prakash & others v. Phulavati & others], this Hon’ble Court ordered registration of a PIL [Suo Motu Writ (Civil) 2 of 2015] to consider gender discrimination suffered by Muslim women owing to *“arbitrary divorce and second marriage of their husbands during the currency of their first marriage”*. This comes 30 years after this Hon’ble Court urged the Centre government to frame a uniform civil code to *“help in the cause of national integration”* in the Shah Bano case.

India recognizes a plural legal system, wherein different religious communities are permitted to be governed by different ‘personal laws’. It is submitted, that there could be no dispute, that different religious communities can have different laws, but personal laws must meet the test of constitutional validity and constitutional morality, in as much as, they cannot be violative of Articles 14, 15,21 of the Constitution.

Matters of faith and belief are protected by the Article 25 but law relating to marriage divorce succession and inheritance are liable to be tested on grounds of public order, morality and health, as well as, on the touchstone of the other provisions of Part III of the Constitution.

The concept of polygamy came into the picture in Seventh Century to consider the issue of taking care of large number of widows and orphans who were left without husbands and father after the battle of Uhud near Medina between early Muslims and the inhabitants of Mecca in which Muslims suffered defeat and many Muslim men were killed.

The verse is addressed to the guardians of such female orphans and not to the Muslims in general. It enjoins on such guardian to treat the orphans justly and not cast dirty eyes on them or have greed of orphan's property and if required by marrying (outside their guardianship) amongst other women who are virtuous. This context is crucial to any discussion of polygamy in Islam. The concept of polygamy was allowed in this verse because of utmost concern for the welfare of women and orphans who were left behind in the battle. It is pertinent to mention that by no means it is a general licence to Muslims in present times to marry with more than one woman.

Besides it puts onus on them to treat the additional spouses justly, which is admittedly a difficult task. The Holy Quran at Surah Al Nissa 4:129 it is said that *“And it will not be within your power to treat your wives with equal fairness, however much you may desire it.....”*

It is further submitted that Muslim Marriage Dissolution Act 1939 provides nine grounds for dissolution of marriage, including impotency, incapacity to fulfill martial obligations and cruelty but there is no eligibility pre-condition for marriage. There is also no requirement for Muslim husband that the permission of the first wife is to be taken before contracting second marriage. As a result Muslim male is out of purview of offence of Polygamy.

It is illegal for a married Muslim female to marry a second time during subsistence of first marriage and such second marriage is void. As marriage is a contract in Islam, the girl can include a condition in marriage Contract i.e Nikahnama that boy shall not marry during the subsistence of that marriage. But, this will make the second marriage as a breach of Contract but still not a ground for making Polygamy void.

The constitution envisages a secular society. Article 44 of the Constitution prescribes that the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. To be treated equally before law and get equal protection of law is a cherished right of every person under the Indian Constitution. This is included in the Part III on Fundamental Rights- Right to equality.

According to Article 13 of the Constitution, all laws in force or to be made must be consistent with the Provisions of Part III on fundamental Rights and law includes any custom or usage which has the force of law in India. Thus, marriage laws also must not be inconsistent with the fundamental rights, particularly the Articles 14, 15 and 21.

It is submitted that this Hon'ble Court had held that what is protected under Article 25 of the Constitution is the positive mandate of the Religion, which is obligatory on every person professing that religion and not the permissions of the religion or a practice, which a religion overlooks. Further, there is no hindrance for state to make any law, which provides for social welfare and reform.

In *Khursheed Ahmad Khan versus State of U.P.*, (CA No- 1662/2015) it has been held that though the personal law of Muslims permitted having as many as four wives but it could not be said that having more

than one wife is a part of religion. Neither is it made obligatory by religion nor is it a matter of freedom of conscience. Any law in favour of monogamy does not interfere with right to profess, practice/propagate religion and does not involve violation of Article 25 of the constitution.

In *R.A Pathan versus Director of Technical Education (1981) 22 Guj LR 289*], it was held that a religious practice ordinarily connotes a mandate which a faithful must carry out. What is permissive under the scripture cannot be equated with a mandate, which may amount to a religious practice. Therefore, there is nothing in the extract of the Quran that contracting plural marriages is matter of religious practice.

It is submitted that Polygamy cannot get the protection of Article 25 of the Constitution neither as a matter of freedom of conscience nor as a religious practice. It is further stated that interpretation of Article 21 of the Constitution, right to protection of life and personal liberty, as right to live a wholesome life and right to live dignity, the polygamy will also not stand its stringent test.

Petitioner is a victim of Polygamy. Polygamy means entering into more than one marriage while the first marriage is still subsisting. Polygamy is an offence under IPC but if the Personal Law or Practice permits polygamy and does not make the second marriage void then it is not a penal offence. Section 494 of IPC states that marrying again during lifetime of husband or wife- whoever, having husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

Verdict dated 16.11.2015 in *Prakash Vs. Phulwati*, (2016) 2 SCC 36, refers to dozens of its own judgments since 1990 in order to record the Apex Court's growing realization that gender discrimination is a violation of the constitutional rights of women. Writing the judgment, this Hon'ble Court held "*the decision to consider the rights of Muslim women came up during discussions with lawyers on gender discrimination at the hearing of a batch of civil appeals on the issue of a daughter's right to equal shares in ancestral property under the Hindu succession law.*" The judgment said: "*An important issue of gender discrimination which, though not directly involved in this appeal, has been raised by some of the learned counsel for the parties which concerns rights to Muslim women. Discussions on gender discrimination led to this issue also. It was pointed out that in spite of guarantee of the Constitution; Muslim women are subjected to discrimination. There is no safeguard against arbitrary divorce and second marriage by her husband during the currency of the first marriage, resulting in denial of dignity and security to her. It is pointed out that the matter needs consideration by this court as the issue relates not merely to policy matter but to fundamental rights of women under Articles 14, 15 and 21 and international conventions/covenants.*"

Triple Talaq, Polygamy and Nikah-Halala is arbitrary and violative of the Articles 14, 15 and 21 of the Constitution and injurious to public order, morality and health also. Thus, can be superseded by the State just it prohibited human sacrifice or practice of *sati*. Triple Talaq, Polygamy and Nikah Halala as offence under Sections 498A, 375 and 494 of IPC, respectively. However, Executive is inactive in this regard. Hence, this writ petition in larger public interest.

**LIST OF DATES**

- 29.03.2000: India ratified the International Covenant on Civil and Political Right, which talk about equality of rights between Men and Women.
- 13.05.2005: India ratified UNESCO provision, which talk about the equal right of men and women to enjoyment of economic, social and cultural rights.
- 16.10.2015: The Division Bench of this Hon'ble Court, while deciding the Civil Appeal No-7217/2013, Prakash & Others v. Phulwati & Others, taken suo-motu cognizance of gender discrimination. The matter was registered as SMW(C) 2 of 2015.
- 07.10.2016: Law Commission sought public opinion on the exercise of revising and reforming family laws in context of Article 44 of the Constitution.
- 14.07.2017: India ratified UN Convention, which also talk about violence against women.
- 22.08.2017: This Hon'ble declared *Section 2 of the Muslim Personal Law Application Act, 1937*, arbitrary insofar as it seeks to recognize *Talaq-Ul-Biddat*.
- 09.03.2018: *Polygamy and Nikah-Halala* is violative of the Articles 14, 15 and 21 and injurious the public order, morality and Health. However, Government has not declared them an offence under the IPC nor introduced the Uniform Civil Code in spirit of the Article 44. Hence, this petition in public interest and interest of justice.



**IN THE SUPREME COURT OF INDIA**  
**CIVIL ORIGINAL JURISDICTION**  
**WRIT PETITION (CIVIL) NO 222 OF 2018**  
**(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)**

**IN THE MATTER OF:**

Sameena Begum



...Petitioner

Verses

1. Union of India Through  
the Secretary,  
Ministry of Law and Justice,  
Shashtri Bhawan, New Delhi-110001,
2. Union of India Through  
the Secretary,  
Ministry of Women & Child Development,  
Shashtri Bhawan, New Delhi-110001
3. Law Commission of India  
Through the Chairman,  
4<sup>th</sup> Floor, B-Wing, Loknayak Bhawan,  
Khan Market, New Delhi-110003

.....Respondents

**WRIT PETITION UNDER ARTICLE 32 TO DECLARE SECTION 2 OF THE MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937, ARBITRARY AND VIOLATIVE OF ARTICLES 14, 15 AND 21 OF THE CONSTITUTION INSOFAR AS IT SEEKS TO RECOGNIZE AND VALIDATE THE PRACTICE OF POLYGAMY AND NIKAH-HALALA;**

To,

**THE HON'BLE CHIEF JUSTICE  
 & LORDSHIP'S COMPANION JUSTICES  
 OF HON'BLE THE SUPREME COURT OF INDIA  
 HUMBLE PETITION OF ABOVE-NAMED PETITIONER  
 MOST RESPECTFULLY SHOWETH AS UNDER:**

1. Petitioner is filing this petition under Article 32 to declare Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, arbitrary and violative of Articles 14, 15 and 21 of the Constitution, insofar as it seeks to recognize and validate the practice of *Polygamy and Nikah-Halala*.
2. Petitioner has not filed any other petition either in this Hon'ble Court or in any other High Court seeking same and similar directions as prayed in this writ petition.

3. Petitioner's full name is Sameena Begum [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Petitioner is a Muslim women who has suffered the plight of Polygamy herself and is also a social activist, working continuously for the destitute women who are victims of the draconian practices of 'Polygamy' and 'Nikah Halala'.
4. The facts constituting cause of action accrued on 22.08.2017 and every subsequent date, when this Hon'ble Court declared Triple-Talaq void and unconstitutional. But, till date, neither practices of Triple-Talaq, Polygamy and Nikah-Halala have not been declared as an offence under the Indian Penal Code nor Uniform Civil Code has been implemented.
5. The injury caused to the women as practice of Triple-Talaq, Polygamy and Nikah-Halala is violative of Articles 14, 15, 21 and 25 of the Constitution and also injurious to public order, morality and health. However, police does not lodge FIR under Sections 498A, 494 and 375 of the IPC respectively for these offences.
6. Petitioner has no personal interests, individual gain, private motive or oblique reasons in filing this petition. It is not guided for gain of any other individual person, institution or body.
7. There is no civil, criminal or revenue litigation, involving petitioner, which has or could have legal nexus, with issue involved in this petition.
8. Petitioner has not approached any other court for the reliefs claimed in this Petition. No representation has been filed with any authority since the constitutional validity of a statute is under challenge and the reliefs claimed can only be granted by this Hon'ble Court.

9. The petitioner in the present Writ Petition is constrained to file this petition under Article 32 of the Constitution of India, in the nature of a Public Interest Litigation, being the victim of polygamy herself and also moved by the plight of thousands of Muslim women across the country suffering due to the draconian practices of 'Polygamy' and 'Nikah- Halala' that are rampant in the Muslim society.
10. Petitioner got married in the year 1999 to one Mr. Javed Anwar and two sons were born out of the said wedlock. All the time when she was at her matrimonial home, she was tortured, bullied, beaten, and was asked to bring money from her parents house. After the repeated tortures, she filed a complaint U/s 498 A of the IPC. Getting infuriated with this, petitioner's husband sent a letter giving her 'Triple Talaq'.
11. Petitioner kept on living on the mercy of her parents till she was married for second time in 2012 to Mr. Riyazuddin from Bulandshahr, who was already married and had a wife called Arifa. The petitioner got pregnant third time and soon after birth of her third son, she was given 'Triple Talaq' over phone. Since then, she is living alone with three children. Moved by her own situation and of many other similarly situated Muslim women throughout India, the petitioner is before this Court praying to declare practices of 'Polygamy' & 'Nikah Halala' as against the basic rights enshrined under Part III of the Constitution and also against public order, morality and health.
12. This Hon'ble Court in Shayara Bano Vs. Union of India & Ors. (2017) 9 SCC 1 (also known as the Triple Talaq judgment) in para 10 as delivered by the then Hon'ble Chief Justice of India Mr. Justice J.S. Khehar, as his lordships then was, held:

*“Keeping in view the factual aspect in the present case, as also, the complicated questions that arise for consideration in this case (and, in the other connected cases), at the very outset, it was decided to limit the instant consideration, to ‘talaq-e-biddat’ – triple talaq. Other questions raised in the connected writ petitions, such as, polygamy and ‘halala’ (- and other allied matters), would be dealt with separately. The determination of the present controversy, may however, coincidentally render an answer even to the connected issues.”*

**13.** On 16.10.2015, while deciding the Civil Appeal - 7217/2013 [Prakash & others v. Phulavati & others], this Hon’ble Court ordered registration of a PIL [Suo Motu Writ (Civil) 2 of 2015] to consider gender discrimination suffered by Muslim women owing to *“arbitrary divorce and second marriage of their husbands during the currency of their first marriage”*. This comes 30 years after this Hon’ble Court urged the Centre government to frame a uniform civil code to *“help in the cause of national integration”* in the Shah Bano case.

**14.** India recognizes a plural legal system, wherein different religious communities are permitted to be governed by different ‘personal laws’. It is submitted, that there could be no dispute, that different religious communities can have different laws, but personal laws must meet the test of constitutional validity and constitutional morality, in as much as, they cannot be violative of Articles 14, 15, 21 of the Constitution.

**15.** Matters of faith and belief are protected by the Article 25 but law relating to marriage divorce succession and inheritance are liable to be tested on grounds of public order, morality and health, as well as, on the touchstone of the other provisions of Part III of the Constitution.

**16.**The concept of polygamy came into the picture in Seventh Century to consider the issue of taking care of large number of widows and orphans who were left without husbands and father after the battle of Uhud near Medina between early Muslims and the inhabitants of Mecca in which Muslims suffered defeat and many Muslim men were killed.

**17.**The verse is addressed to the guardians of such female orphans and not to the Muslims in general. It enjoins on such guardian to treat the orphans justly and not cast dirty eyes on them or have greed of orphan's property and if required by marrying (outside their guardianship) amongst other women who are virtuous. This context is crucial to any discussion of polygamy in Islam. The concept of polygamy was allowed in this verse because of utmost concern for the welfare of women and orphans who were left behind in the battle. It is pertinent to mention that by no means it is a general licence to Muslims in present times to marry with more than one woman.

**18.**Besides it puts onus on them to treat the additional spouses justly, which is admittedly a difficult task. The Holy Quran at Surah Al Nissa 4:129 it is said that *“And it will not be within your power to treat your wives with equal fairness, however much you may desire it....”*

**19.**It is further submitted that Muslim Marriage Dissolution Act 1939 provides nine grounds for dissolution of marriage, including impotency, incapacity to fulfill martial obligations and cruelty but there is no eligibility pre-condition for marriage. There is also no requirement for Muslim husband that the permission of the first wife is to be taken before contracting second marriage. As a result Muslim male is out of purview of offence of Polygamy.

**20.**It is illegal for a married Muslim female to marry a second time during subsistence of first marriage and such second marriage is void. As marriage is a contract in Islam, the girl can include a condition in marriage Contract i.e Nikahnama that boy shall not marry during the subsistence of that marriage. But, this will make the second marriage as a breach of Contract but still not a ground for making Polygamy void.

**21.**The constitution envisages a secular society. Article 44 of the Constitution prescribes that the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. To be treated equally before law and get equal protection of law is a cherished right of every person under the Indian Constitution. This is included in the Part III on Fundamental Rights- Right to equality.

**22.**According to Article 13 of the Constitution, all laws in force or to be made must be consistent with the Provisions of Part III on fundamental Rights and law includes any custom or usage which has the force of law in India. Thus, marriage laws also must not be inconsistent with the fundamental rights, particularly the Articles 14, 15 and 21.

**23.**It is submitted that this Hon'ble Court had held that what is protected under Article 25 of the Constitution is the positive mandate of the Religion, which is obligatory on every person professing that religion and not the permissions of the religion or a practice, which a religion overlooks. Further, there is no hindrance for state to make any law, which provides for social welfare and reform.

**24.**In *Khursheed Ahmad Khan versus State of U.P, (CA No- 1662/2015)* it has been held that though the personal law of Muslims permitted having as many as four wives but it could not be said that having more

than one wife is a part of religion. Neither is it made obligatory by religion nor is it a matter of freedom of conscience. Any law in favour of monogamy does not interfere with right to profess, practice/propagate religion and does not involve violation of Article 25 of the constitution.

**25.**In *R.A Pathan versus Director of Technical Education (1981) 22 Guj LR 289*], it was held that a religious practice ordinarily connotes a mandate which a faithful must carry out. What is permissive under the scripture cannot be equated with a mandate, which may amount to a religious practice. Therefore, there is nothing in the extract of the Quran that contracting plural marriages is matter of religious practice.

**26.**It is submitted that Polygamy cannot get the protection of Article 25 of the Constitution neither as a matter of freedom of conscience nor as a religious practice. It is further stated that interpretation of Article 21 of the Constitution, right to protection of life and personal liberty, as right to live a wholesome life and right to live dignity, the polygamy will also not stand its stringent test.

**27.**Petitioner is a victim of Polygamy. Polygamy means entering into more than one marriage while the first marriage is still subsisting. Polygamy is an offence under IPC but if the Personal Law or Practice permits polygamy and does not make the second marriage void then it is not a penal offence. Section 494 of IPC states that marrying again during lifetime of husband or wife- whoever, having husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

28. Verdict dated 16.11.2015 in *Prakash Vs. Phulwati*, (2016) 2 SCC 36, refers to dozens of its own judgments since 1990 in order to record the Apex Court's growing realization that gender discrimination is a violation of the constitutional rights of women. Writing the judgment, this Hon'ble Court held "*the decision to consider the rights of Muslim women came up during discussions with lawyers on gender discrimination at the hearing of a batch of civil appeals on the issue of a daughter's right to equal shares in ancestral property under the Hindu succession law.*" The judgment said: "*An important issue of gender discrimination which, though not directly involved in this appeal, has been raised by some of the learned counsel for the parties which concerns rights to Muslim women. Discussions on gender discrimination led to this issue also. It was pointed out that in spite of guarantee of the Constitution; Muslim women are subjected to discrimination. There is no safeguard against arbitrary divorce and second marriage by her husband during the currency of the first marriage, resulting in denial of dignity and security to her. It is pointed out that the matter needs consideration by this court as the issue relates not merely to policy matter but to fundamental rights of women under Articles 14, 15 and 21 and international conventions/covenants.*"

29. Triple Talaq, Polygamy and Nikah-Halala is arbitrary and violative of the Articles 14, 15 and 21 of the Constitution and injurious to public order, morality and health also. Thus, can be superseded by the State just it prohibited human sacrifice or practice of *sati*. Triple Talaq, Polygamy and Nikah Halala as offence under Sections 498A, 375 and 494 of IPC, respectively. However, Executive is inactive in this regard. Hence, this writ petition in larger public interest.



30. That on 29.03.2000, General Comment No. 28: Equality of rights between men and women (Article 3): 29/03/2000. ICCPR/C/21/ Rev.1/Add.10, General Comment No. 28, where India is a ratifier to International Covenant on Civil and Political Right, where the concerned document talk about equality of rights between Men and Women and the copy of the same is annexed as **Annexure P/1. (Page )**
31. That on 13.05.2005, General Comment N. 16 (2005) Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights, where India is a ratifier to UNESCO (United Nation Economic and Social Council) which talk about the equal right of men and women to the enjoyment of all economic, social and cultural rights and copy of the same is annexed as **Annexure P/2. (Page )**
32. That on 14.07.2017, Committee on Elimination of Discrimination against Women (CEDAW) General recommendation No. 35 on gender- based violence against women, updating general recommendation No. 19. India is a signatory and ratifier in this committee which also talk about violence against women and the copy of the same is annexed herewith as **Annexure P/3. (Page )**
33. The Laws dealing with marriage and succession are not a part of religion, and, has to change with time, and, international covenants and treaties could be referred to examine their validity and reasonableness. This Hon'ble Court directed that issue of gender discrimination against Muslim women under personal laws, specifically, the lack of safeguards against arbitrary divorce and second marriage during the currency of first marriage notwithstanding the guarantees of the Constitution, was registered as PIL and five Judges Bench pronounced the judgment.

- 34.** Polygamy and Nikah-Halala is injurious to basic fundamental rights guaranteed under Articles 14, 15 and 21 of the Constitution and against public order, morality and health. Hence, can be superseded by State just it prohibited human sacrifice or the practice of *Sati*.
- 35.** This Hon'ble Court in Triple Talaq Case [SMW(C) 2/2015] has held that practices permitted or not prohibited by religion do not become a religious practice or a positive tenet of the religion and a sinful practice does not acquire the sanction of religion merely because it is practiced since long time.
- 36.** It is submitted that ban on *Polygamy and Nikah-Halala* has been the need of the hour to secure basic rights and in the interest of public order, morality and health. This Hon'ble Court has already expressed the view that *Oral Talaq* is not an integral part of religion and Article 25 merely protects religious faith, but not the practices, which may run counter to public order, morality and health and fundamental rights.
- 37.** Presently, once a Muslim woman has been divorced, her husband is not permitted to take her back even if he pronounced *Talaq* under influence of intoxicant, unless his wife undergoes *Nikah-Halala*, which involves her marriage with another man, who subsequently divorces her so that her previous husband can re-marry her. This unfortunate practice was highlighted by media in the case of *Nagma Bibi* of Orissa, whose husband divorced her in the spur of the moment in a drunken state and wanted her back next morning, when he realized his mistake. But, she was prevented by religious leaders, and forcibly sent her with three children to her father's house suggesting that she will have to undergo *Nikah-Halala* before she can re-unite with her husband.

- 38.** Polygamy is practice that has been recognized as an evil plague similar to *sati* which has been banned under Section 494 of the IPC. Unfortunately, even in 21st century, it continues to vex Muslim women notwithstanding that such practice poses extremely serious health, social, economic, moral and emotional injury. It is submitted that religious leaders and priests like *imams, maulvis*, etc. who propagate, support and authorize practices like *Talaq-E-Bidat, Nikah-Halala* and *Polygamy* are grossly misusing their position, influence and power to subject Muslim women to such gross practices which treats them as chattel, thereby violating their basic rights enshrined in Constitution.
- 39.** It is submitted that the failure to secure the same equal rights and life of dignity for Muslim women violates their most basic human and fundamental right to life of dignity unmarred by gender discrimination, which in turn have a critical impact on their social and economic rights.
- 40.** It is submitted that Muslim Personal Law (Shariat) Application Act, 1937, by providing for the application of Muslim personal law in matters relating to marriage where the parties are Muslims, conveys a wrong impression that the law sanctions the sinful form of *talaq* and the practice of *Halala* and *Polygamy*, which is grossly injurious to the basic rights of married Muslim women and offends Articles 14, 15 and 21.
- 41.** The Constitution neither grants absolute protection to personal law of any community that is arbitrary or unjust, nor exempts personal laws from jurisdiction of the Legislature or Judiciary. To the contrary, Entry 5 of List III in the Seventh Schedule confers power on Legislature to amend and repeal existing laws or pass new laws in all such matters, which were on August 15, 1947, governed by the personal laws.

**42.**The freedom of conscience and free profession, practice and propagation of religion guaranteed by Article 25 of the Constitution is not absolute and, in terms of Article 25(1), “*subject to public order, morality and health and to the other provisions of this Part*”. It is submitted that a harmonious reading of Part III of the Constitution clarifies that the freedom of conscience and free profession, practice and propagation of religion guaranteed by Article 25 is subject to the fundamental rights guaranteed by Articles 14, 15 and 21. In fact, Article 25 clearly recognizes this interpretation by making the right guaranteed by it subject not only to other provisions of Part III of the Constitution but also *public order, morality and health*.

**43.**The Legislature has failed to ensure the dignity and equality of women in general and Muslim women in particular especially when it concerns matters of marriage, divorce and succession. Despite the observations of this Hon’ble Court for the past few decades, Uniform Civil Code remains an elusive Constitutional goal that the Courts have fairly refrained from enforcing through directions and the Legislature has dispassionately ignored except by way of paying some lip service.

**44.**Petitioner respectfully submits that the laws dealing with marriage and succession are not part of religion and the law has to change with time, and it finds support from the views expressed by this Hon’ble Court in *John Vallamattom (supra)* and *Prakash v. Phulavati*.

**45.**This Hon’ble Court has held that discrimination against women under personal laws, specifically the lack of safeguards against arbitrary divorce and second marriage during currency of first marriage notwithstanding guarantees of the Constitution, needs to be examined.

46. Article 3 of the Universal Declaration of Human Rights provides that everyone has the right to life, liberty and security of person while Article 7 provides that everyone is equal before the law and is entitled without any discrimination to equal protection of the law. Since the adoption of the Universal Declaration of Human Rights, universality and indivisibility of human rights have been emphasized and it has been specifically recognized that women's human rights are part of universal human rights. In the year 2000, on the grounds that it violates the dignity of women, the United Nations Human Rights Committee considered polygamy a destruction of binding International Covenant on Civil and Political Rights (to which India acceded on 10.04.1979) and recommended that it be made illegal in all States. It is accordingly submitted that it is well recognized in international law that polygamy critically undermines the dignity and worth of women.

47. The United Nations Economic and Social Council's Committee on Economic, Social and Cultural Rights explained in its General Comment No. 16 of 2005 that parties to the International Covenant on Economic, Social and Cultural Rights are obliged to eliminate not only direct discrimination, but also indirect discrimination, by refraining from engaging in discriminatory practices, ensuring that third parties do not discriminate in a forbidden manner directly or indirectly, and taking positive action to guarantee women's equality. It is submitted that failure to eliminate *de jure* (formal) and *de facto* (substantive) discrimination constitutes a violation of rights of women envisaged in such international treaties and covenants. Therefore, not only the *Talaq-e-Bidat* but also polygamy, and *nikah halala* should be declared illegal.

- 48.**The freedom of conscience and free profession, practice and propagation of religion guaranteed by Article 25 of the Constitution is in terms of Article 25, “*subject to public order, morality and health and to the other provisions of this Part*”. It is submitted that the Constitution does not preclude the State from introducing social reforms and enacting laws on subjects traditionally associated with religion, especially when such laws aim to secure public order, morality, health and the rights guaranteed by Part III of the Constitution.
- 49.**The Constitution only protects religious faith and belief while the religious practices under challenge run counter to public order, morality, and health and must therefore yield to the basic human and fundamental right of women to live with dignity, under equal protection of laws, without any discrimination on the basis of gender or religion.
- 50.**The Legislature has failed to ensure the basic dignity and equality of women in general and Muslim in particular when it concerns matters of marriage and divorce and succession. A complete ban on *Polygamy* and *Nikah-Halala* has long been need of the hour as it renders Muslim wives extremely insecure, vulnerable and infringes their fundamental rights. Equality should be the basis of all personal law since the Constitution envisages equality, justice and dignity for women.
- 51.**Fundamental rights are supreme and have primacy over Personal Laws. Hence, this Hon’ble Court may declare that “*Nikah-Halala is Rape under Section 375 and Polygamy is an offence under Section 494 of IPC*”.
- 52.**The actions of religious groups, bodies and leaders that permit and propagate practice of Triple Talaq, Polygamy and Nikah-Halala must be declared unconstitutional and an offence under the IPC.

**53.** If the Preamble is key to understand the Constitution, the Directive Principles are its basic ideals. The Constitution makers poured their mind by setting forth humanitarian socialist principles, which epitomized hopes and aspirations of people and declared the Directives as the fundamental in the governance of the country. They are affirmative instruction from the ultimate sovereign to the State authorities, to secure to all citizens; Justice – social, economic, and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity and to promote among them all fraternity, assuring dignity of the individual and unity and integrity of the nation. Therefore, it is duty of the State to direct their activities in such a manner so as to secure the high ideals set forth in the Preamble and Part IV of the Constitution. The Directives are an amalgam of diverse subjects embracing the life of the nation and include principles, which are statements of socio economic rights, social policy, administrative policy and international policy.

**54.** The object of the Article 44 is to introduce a uniform civil code for all the Indian citizens to promote fraternity, unity and national integration. It proceeds on the assumption that there is no necessary connection between religion and personal law in a civilized society. While the Constitution guarantees freedom of conscience and of religion, it seeks to divest religion from personal law and social relations and from laws governing inheritance, succession and marriage, just as it has been done even in Muslim Countries like Turkey and Egypt. The object of Article 44 is not to encroach upon religious liberties. The Article 25 already reserves such right of the State.

**55.**Dr. B.R. Ambedkar, during debate on the Article 44, said in the Constituent Assembly that *“In fact, bulk of these different items of civil laws have already been codified during the British Rule and the major items still remaining for a Uniform Civil Code are marriage, divorce, inheritance and succession(adoption, guardianship).”*

**56.**It is to be noted that the several enactments, which have been made by Parliament since Independence in the name of the Hindu Code relating to marriage, succession, adoption and guardianship, relate only to Hindus (including Budhists, Jains and Sikhs) and excludes the Muslims, who are the major slice of the minority communities and who are more vociferously objecting to uniform civil code for all citizens. -

**57.**The Constitution makers wanted to establish a ‘Secular State’ and with that purpose they codified the Article 25(1) which guaranteed freedom of religion, freedom of conscience and freedom to profess, practice and propagate religion, to all persons. But at the same time they sought to distinguish between the essence of a religion and other secular activities, which might be associated with religious practice but yet did not form a part of the core of the religion, and with this end in view they inserted Clause 2(a) as thus: *“Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law regulating or restricting any economic, financial, political or other secular activities, which may be associated with religious practices.”*

**58.**This Hon’ble Court has observed: *“A belief seems to have gained ground that it is for the Muslims community to take a lead in the matter of reforms of their personnel law.....But it is the State which is charged the duty of securing a uniform civil code for the citizens of the country. This*



*duty has been imposed on the State with the object of achieving national integration by removing disparate loyalties to laws which have conflicting ideologies.”* The question arises – why then has the Union Government failed to discharge this Constitutional mandate for more than six decades? The Answer has been pithily answered by the Court - lack of political courage – which many other responsible persons have amplified as the fear of losing Muslim votes at the next election.

**59.** The State has not only failed to implement the Article 44 but also violated the norm of the much-vaunted secularism. It is also curious that the Government has not yet protested against the decision of the Indian Muslim Personal Law Board to setup parallel Courts in many localities to decide the cases under Shariat, even though the setting up of such a parallel Court will not only sound a death knell to the Article 44 but also to the provisions in the Constitution providing for one system of judiciary for the entire nation and all its people. It is a retrograde step cutting at the roots of the Constitution.

**60.** It is also urged that the Shariat is immutable being founded on the Koran which is ordained by the God. Apart from the historical fact that this issue has been concluded by the partition of India and adoption of the Constitution of India, it has been belied by the multifarious changes by way of reform in all the Muslim State e.g. Egypt, Jordan, Morocco, Pakistan, Syria, Tunisia, Turkey – where no question of Hindu dominance never arose. It is pertinent to State the Report of the Commission on Marriage and Family Laws, which was appointed by the Government of Pakistan in 1955, and which should have demolished, once for all, the plea that the Shariat is immutable.

61. It is not out of context to state the eminent thinker and philosopher words on Sharia that *“The question which is likely to confront Muslim Countries in the near future, is whether the Law of Islam is capable of evolution – a question which will require great intellectual effort, and is sure to be answered in the affirmative.”*

62. It is further submitted that Polygamy is totally prohibited in Tunisia and Turkey. In countries like Indonesia, Iraq, Somalia, Syria, Pakistan and Bangladesh, it is permissible only if authorized by the prescribed authority. Unilateral Talaq has been abolished in Egypt, Jordan, Sudan, Indonesia, Tunisia, Syria and Iraq etc. In Pakistan and Bangladesh, any form of extra judicial Talaq shall not be valid unless confirmed by an arbitration council but in India, it is continuing. The Dissolution of Muslim Marriage Act 1939 provided Muslim women to obtain dissolution in certain cases, which they do not have under the Shariat. Under the Act, marriage with another woman would be treated as an act of ‘cruelty’ to bar a husband’s suit for restitution of conjugal rights. The Act has been adopted in Pakistan and Bangladesh with amendments. The statement of objects and reasons of the Act, which has been conceded by Muslims in India, Pakistan and Bangladesh is illuminating: *“There is no provision in the Hanafi Code of Muslim Law enabling a married Muslim women to obtain a decree from the Court dissolving her marriage in case a husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her un-provided for and under other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India.”*

**63.**A uniform law of maintenance was adopted by Section 488 of the Cr.P.C.

When Section 125 of the CrPC extended to divorced women, Muslims contended that it should not be applied to them as it was contrary to Shariat but this Hon'ble Court turned down this contention and also rejected the argument that according to Sharia, husband's liability to provide for maintenance to divorced wife is limited to period of iddat and held that Section 125 of CrPC overrides personal law.

**64.**To overcome this decision, Parliament enacted Muslim (Protection of Rights of Divorce) Act 1986. In spite of legislation, this Hon'ble Court has held that 1986 Act actually codifies what has been stated in Shah Bano's Case. It was held that as regards to divorced Muslim women's right, the starting point should be Shah Bano's Case, and not the original texts or any other material – all the more so when varying versions as to the authenticity of the source or shown to exist. It was held that the law declared in Shah Bano's Case, was after considering '*Holy Quran*' and other Commentaries and texts. It was observed that the rationale behind Section 125 of CrPC is to avoid vagrancy or destitution on the part of a Muslim women. Articles 14, 15, 21 were also taken into consideration.

**65.**In regard to tribal women, the Court recognized the laws as patriarchal and declined to give direction regarding customs and other inheritance laws which discriminated women. The Court protected rights of women by suspending the exclusive rights of male succession until the women chose other means of livelihood. This enactment cannot, therefore, be cited in support of the contention that Muslim Personal Law is immutable and cannot be subjected to legislation.

**66.** On 1.7.2016, the Central Government asked the Law Commission of India to examine issue of Common Civil Code.

**67.** On 7.10.2016, Law Commission sought public opinion to reform family laws in context of Article 44 of the Constitution. The Commission appealed to members of religious, minority and social groups, NGOs, political parties and government agencies, to present their views through a questionnaire on a range of issues, including the practice of *triple talaq* and right to property for woman. The relevant part of the Commission appeal is thus:

*“.....The objective behind this endeavour is to address discrimination against vulnerable groups and harmonize the various cultural practices. The Commission invites suggestions on all possible models and templates of a common civil code The Commission hopes to begin a healthy conversation about the viability of a UCC and will focus on family laws of all religions and the diversity of customary practices, to address social injustice rather than plurality of law...The Commission will consider the opinions of all stakeholders and general public for ensuring that the norms of no one class, group of community dominate the tone or tenor of the family law reforms.....The responses can be sent within 45 days to the Law Commission..”*

**68.** In its questionnaire, the Law Commission has sought public opinion on issues like - whether the UCC should include all of some of the subjects, including marriage, divorce, adoption, guardianship and child custody, maintenance, successions and inheritance; whether the existing personal laws and customary practices need codification; whether codification can ensure gender equality; and whether the UCC should be optional.

## GROUNDS

- A. Because Section 2 of the Muslim Personal Law Application Act, 1937, is arbitrary and violative of Articles 14, 15 and 21 of the Constitution and also injurious to public order, morality and health, insofar as it seeks to recognize and validate the practice of Polygamy and Nikah-Halala.
- B. Because Polygamy & Nikah-Halala is injurious to public order, morality and health and can be superseded by State just it prohibited *Sati Pratha*.
- C. Because the Laws dealing with marriage and succession are not a part of religion and has to change with time, international covenants, treaties. Hence, this Hon'ble Court may examine its validity and reasonableness.
- D. Because the Constitution has primacy over the Common Law and Common Law has primacy over the Personal Law. Therefore, India needs a Uniform Civil Code in spirit of Article 44 of the Constitution and Provisions of the Indian Penal Code should be applicable for all citizens.
- E. Because on 07.10.2016, the Law Commission of India sought public opinion on Uniform Civil Code in spirit of Article 44 of the Constitution. However, it has not submitted its report to the Government till date.
- F. Because this Hon'ble Court said that Polygamy and Nikah-Halala would be taken up after concluding Triple Talaq issue. However, surprisingly, petition was disposed of without hearing Polygamy and Nikah-Halala.
- G. Because Government has not taken action against decision of Muslim Personal Law Board to setup parallel Courts to decide cases under Shariat, even though setting up of such parallel Court will not only sound a death knell to Article 44 but also to provisions in Constitution providing for one system of judiciary for the entire nation. It is a retrograde step cutting at the roots of the Constitution of India.

**PRAYER**

Keeping in view the above stated facts and circumstances and appalling effects of Polygamy and Nikah-Halala on basic rights guaranteed under Articles 14, 15 and 21 of the Constitution, it is prayed that this Hon'ble Court may be pleased to issue a writ, order or direction or a writ in the nature of mandamus to:

- a) DECLARE Section 2 of Muslim Personal Law (Shariat) Application Act, 1937, arbitrary and violative of Articles 14, 15, 21 and 25 of the Constitution, insofar as it seeks to recognize and validate practice of Polygamy and Nikah-Halala;
- b) DECLARE that provisions of the Indian Penal Code, 1860, are applicable on all Indian Citizens and Triple-Talaq is a cruelty under Section 498A of the IPC, Nikah-Halala is Rape under Section 375 of the IPC, and Polygamy is an offence under Section 494 of the IPC;
- c) direct the Law Commission of India to publish its Report on Uniform Civil Code in spirit of Article 44 of the Constitution read with Article 14, 15 and 21 of the Constitution of India;
- d) take such other steps as this Hon'ble Court may deem fit and proper in facts and circumstances of the case and allow the cost to petitioner.

**DRAWN ON:05.3.2018**

**(ARCHANA PATHAK DAVE)**

**FILED ON:09.3.2018**

**ADVOCATE FOR PETITIONER**