

SYNOPSIS & LIST OF DATES

This is a Writ Petition under Article 32 of the Constitution of India praying for a direction against the Union of India and others seeking a writ or order or direction in the nature of mandamus declaring the practices of nikah halala and polygamy under Muslim personal laws as illegal, unconstitutional for being violative of Articles 14, 15, 21 and 25 of the Constitution, and for a direction to all Respondents declaring the Talaq pronounced by the Respondent No. 7 against the Petitioner herein is void abinitio for being illegal, unconstitutional, and violative of Articles 14, 15, 21 and 25 of the Constitution and to pass such further orders as this Hon'ble Court may deem appropriate to provide a life of dignity to Muslim women. This petition is filed by the Petitioner in her individual capacity.

The Petitioner is a Chairperson of Women Resistance Committee and a practicing advocate of High Court of Calcutta and this Hon'ble Court. As a chairperson of the Women Resistance Committee, the Petitioner fought against the violations of the human rights especially, for the rights of the poor and needy and the women. The petitioner is public activist in many ways and dedicated to work for the people who are suffering from the illegalities of the bureau crates.

It was at the instance of the Petitioner organization and the chairperson of the Petitioner's Organization that the famous triple talaq case filed for the victim Ishrat Jahan. The said write petition no. 665/2016 clearly shows the efforts taken by the Petitioner organization for protecting the Ishrat Jahan and her 4 children. It is also a fact that the Petitioner's organization working for the upliftment of the

backward muslim community people especially for ladies in all over India. After triple talaq case, the Petitioner organization filing the present writ petition by challenging nikah halala, polygamy, nikah mutah and nikah misyar.

It is a clear fact that in the earlier triple talaq case for Ishrat Jahan, the main prayer was seeking a writ or order or direction in the nature of mandamus declaring the practices of nikah halala and polygamy under Muslim personal laws as illegal, unconstitutional for being violative of Articles 14, 15, 21 and 25 of the Constitution, and for a direction to all Respondents declaring the Talaq pronounced by the Respondent No. 7 against the Petitioner herein is void abinitio for being illegal, unconstitutional, and violative of Articles 14, 15, 21 and 25 of the Constitution and to pass such further orders as this Hon'ble Court may deem appropriate to provide a life of dignity to Muslim women. Therefore, after hearing all the parties, the constitution bench of this Hon'ble Court held at para 10 "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."

Therefore, the Petitioner feels that as this Hon'ble Court already entertained in the same nature writ petition (c) Nos. 227, 235 & 202 /2018 etc. etc. It is a fact that the Petitioner had done a lot of research work in the triple talaq case and it

is also a fact that the Petitioner working hard for the upliftment of the muslim women and therefore, it is necessary to approach this Hon'ble Court by the present writ petition.

Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 reads:

“Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law. marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).”

It is submitted that this provision, in so far as it seeks to recognise and validate nikah halala and polygamy, is void and unconstitutional as such practices are not only repugnant to the basic dignity of a woman as an individual but also violative of the fundamental rights guaranteed under Articles 14, 15, 21 and 25 of the Constitution. Further, the Constitution neither grants any absolute protection to the personal law of any community that is arbitrary or

unjust, nor exempts personal laws from the jurisdiction of the Legislature or the Judiciary.

The Muslim personal laws of India permit the practice of Nikah Halala and polygamy, which permits Muslim man to practice nikah halala, nikah mutah and nikah misyar and marry with upto 4 women. Therefore, this is directly degrading women to get position inferior to that of men and it treats women as a property and it can be used as per their will. This is directly conflicting the provisions of the constitution under artc. 14, 15, 20 & 25. The discrimination between men and women as regards the permission to have multiple spouses grossly offence the right to dignity of women which is integral part of the life and personal liberty.

Unfortunately, in the 21st century this evil practices are happening in the Muslim community and therefore, the rights of Muslim women and their children is seriously affected. Therefore, these practices are grossly injuries to fundamental rights of a Muslim women and therefore it is completely violating Article 14, 15, 21 & 25 of the Constitution of India.

A perusal of the decisions of this Hon'ble Court in Prakash v. Phulavati (supra), Javed and Others v. State of Haryana and Others, (2003) 8 SCC 369, and Smt. Sarla Mudgal, President, Kalyani and Others v. Union of India and Others, (1995) 3 SCC 635 illustrates that the practice of polygamy has been recognised as injurious to public morals and it can be superseded by the State just as it can prohibit

human sacrifice or the practice of *sati*. In fact, in *Khursheed Ahmad Khan v. State of Uttar Pradesh and Others*, (2015) 8 SCC 439, this Hon'ble Court has also taken the view that practices permitted or not prohibited by a religion do not become a religious practice or a positive tenet of the religion, since a practice does not acquire the sanction of religion merely because it is permitted.

This Hon'ble Court in *Shamim Ara versus State of Uttar Pradesh & Another*, (2002) 7 SCC 518, wherein this Hon'ble Court considered valid *talaq* in Islamic law and, referring to these decisions as "illuminating and weighty judicial opinion available in two decisions of Gauhati High Court recorded by Baharul Islam, J", observed that *talaq* must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife.

The observations of the Constitution Bench in *Danial Latifi & Another v. Union of India*, (2001) 7 SCC 740, are of utmost relevance. This Hon'ble Court stated that when interpreting provisions where matrimonial relationship was involved it has to consider the social conditions prevalent in our society, where a great disparity exists in the matter of economic resourcefulness between a man and a woman whether they belong to the majority or the minority group, since our society is male dominated both economically and

socially and women are invariably assigned a dependent role irrespective of the class of society to which they belong. This Hon'ble Court further observed that solutions to societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity, decency of life, and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or sectarian, racial or communal constraints.

In *Shamim Ara Versus State of U.P.* Reported in 2002 (7) SCC 518 at page 507 para 60 clearly held "we do not agree with the view propounded in the decided cases referred to by Mulla and Dr. Tahir Mahmood in their respective commentaries, wherein a mere plea of previous *talaq* taken in the written statement, though unsubstantiated, has been accepted as proof of *talaq* bringing to an end the marital relationship with effect from the date of filing of the written statement". Therefore in the case in hand, even otherwise, there is not having any evidence for a valid *talaq* also.

That "This Hon'ble Court in *Comptroller and Auditor General of India Vs. K.S. Jagannathan*, AIR 1986-2-679 SCC has held that the courts have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the government" Therefore in the case in hand, even otherwise, there is not having any evidence for a valid *talaq*.

1937: Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 reads:

“Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law. marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).”

26.10.2009 The Petitioner organization registered under Registration of Society Act vide Registration No. [].

2012 The Hon'ble Chief justice Court of the Supreme Court issued urgent notice including the fax message to the chief secretary of Karnataka state for restraining the Devdasi Practice.

2015 This Hon'ble Court by disposing the above writ petition in Devdasi case issued guidelines / directions to the concerned states and the govt. of India

12.08.2016: Vide writ petition (c) No 665/2016 at the instance of the Petitioner Ishrat Jahan, a victim of triple talaq, approached this Hon'ble court with the main prayer as follows:

“seeking a writ or order or direction in the nature of mandamus declaring the practices of talaq-e-biddat, nikah halala and polygamy under Muslim personal laws as illegal, unconstitutional for being violative of Articles 14, 15, 21 and 25 of the Constitution, and for a direction to all Respondents declaring the Talaq pronounced by the Respondent No. 7 against the Petitioner herein is void abinitio for being illegal, unconstitutional, and violative of Articles 14, 15, 21 and 25 of the Constitution and to pass such further orders as this Hon'ble Court may deem appropriate to provide a life of dignity to Muslim women.

It is a fact there are number of incidents reported in the different parts of the country. In regard to the nikah halala and other fake marriages etc. etc.

2017: Therefore after hearing the above triple talaq case, the constitution bench of this Hon'ble Court held at para 10 “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.”

02.02.2018: This Hon'ble Court considered the illegality of nikah halala etc. and the same is referred to the constitution bench.

25.04.2018: As the main issue is pending before this Hon'ble court and the Petitioner did not approach for the same relief in any other forum or court, filed the present Writ Petition.

3. Ministry of Minority Affairs,
Represented by the Secretary,
11th Floor, Paryavaran Bhawan,
CGO Complex, Lodhi Road,
New Delhi - 110 001

... Respondent No. 3

TO,

The hon'ble chief justice of india
and his companion judges of
the supreme court of india

The humble petition of the
petitioner above named

MOST RESPECTFULLY SHOWETH:

- I.** This is a Writ Petition under Article 32 of the Constitution of India praying for a direction against the Union of India and others seeking a writ or order or direction in the nature of mandamus declaring the practices of nikah halala, nikah mutah, nikah misyar and polygamy under Muslim personal laws as illegal, unconstitutional for being violative of Articles 14, 15, 21 and 25 of the Constitution, and for a direction all Respondents declaring the Talaq pronounced by the Respondent No. 7 against the Petitioner herein is void abinitio for being illegal, unconstitutional, and violative of Articles 14, 15, 21 and 25 of the Constitution and to pass such further orders as this Hon'ble Court may deem appropriate to provide a life of dignity to Muslim women. This petition is filed by the Petitioner in her individual capacity.
- II.** That the reply information as required under the public Interest Litigation guidelines are as under:
 - a.** That the Petitioner Organization herein approached this Hon'ble Court through its Chair Person

- b.** Occupation & Income: [].
- c.** That there is no pending civil, criminal or revenue litigation between the parties before this Hon'ble court or any other court.
- d.** Than as the same issue is pending in this Hon'ble court in WP (C) Nos. 235, 227 & 202 of 2018, the Petitioner did not approach any other authority for the same relief as this Hon'ble court referred the issues to a constitution bench.
- e.** That the Petitioner never approached before this Hon'ble Court or any other Court with the same prayers.
- f.** That due to the illegal practices like nikah halala, nikah mutah, nikah misyar and polygamy, the innocent muslim women are being subjected for enormous harassment and cruelty therefore, it will affect the muslim women and their fundamental rights guaranteed under the Constitution, these are the facts constituting the cause of action.
- g.** That the original typed copy of the Registration certificate dated 26.10.2009 of the Petitioner Organization has been produced and annexed as Annexure NO. ____ with this Petition.
- h.** It is respectfully submitted that the petitioner has no personal interest in the litigation and that this petition is not guided by self-gain or for gain of any other person/institution/ body and there is no motive

other than that of public interest in filing the present writ petition.

III. That the Brief facts of the case constituting the cause of action in the present case are as follows:

1. The Petitioner Muslim Women's Resistance Committee, a registered organization having its registration No. []. The Muslim women resistance committee (Muslim Khwateen Khilafat Tanzeen) is actively working for the upliftment of the innocent Muslim women and due to the interference of the Petitioner organization there are so many Muslim women escaped from the illegal practices like triple talaq, nikah halala etc. The organization fought against the violations of the human rights especially, for the rights of the poor and needy and the women. The petitioner is public activist in many ways and dedicated to work for the people who are suffering from the illegalities of the bureau crates.

2. That in 1937, Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 reads:

“Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law. marriage, dissolution of marriage, including talaq, ıla, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the

parties are Muslims shall be the Muslim Personal Law (Shariat).”

3. That on 26.10.2009 the Petitioner organization registered under registration of society act vide registration no. []. True typed copy of the Registration Certificate of the Petitioner organization dated 26.10.2009 is annexed hereto annexed as **ANNEXURE P- 1** (Page ___)

4. That onThe Hon'ble Chief justice Court of the Supreme Court issued urgent notice including the fax message to the chief secretary of Karnataka state for restraining the Devdasi Practice. True copy of the order dated ____.2012 is annexed hereto annexed as **ANNEXURE P- 2** (Pages ___).

5. That onThis Hon'ble Court by disposing the above writ petition in Devdasi case issued guidelines / directions to the concerned states and the govt. of India. True copy of the order dated ____.2015 is annexed hereto annexed as **ANNEXURE P-3**(Pages ___ to ___)

6. That on 12.08.2016, vide writ petition (c) No 665/2016 at the instance of the Petitioner Ishrat Jahan, a victim of triple talaq, approached this Hon'ble court with the main prayer as follows:

“seeking a writ or order or direction in the nature of mandamus declaring the practices of talaq-e-biddat, nikah halala and polygamy under Muslim personal laws as illegal, unconstitutional for being violative of Articles 14, 15, 21 and 25 of the Constitution, and for a direction to all Respondents declaring the Talaq pronounced by the Respondent No. 7 against the

Petitioner herein is void abinitio for being illegal, unconstitutional, and violative of Articles 14, 15, 21 and 25 of the Constitution and to pass such further orders as this Hon'ble Court may deem appropriate to provide a life of dignity to Muslim women. True copy of the writ petition no. 665/2016 dated 12.08.2016, without its annexures is annexed hereto annexed as **ANNEXURE P-4** (Pages ___ to ___)

It is a fact there are number of incidents reported in the different parts of the country. In regard to the nikah halala and other fake marriages etc. etc.

7. That in 2017, therefore after hearing the above triple talaq case, the constitution bench of this Hon'ble Court held at para 10 "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."

IV. The present Writ Petition is filed bona fide and in the interest of justice.

V. That the petitioner has not filed any other petition earlier before this Hon'ble Court or any other High Court for same and similar reliefs.

VI. The Petitioner has no adequate or equally efficacious remedy but to approach this Hon'ble Court by way of

the present Writ Petition on the following amongst other grounds:

GROUND

- A.** Life of dignity and equality is undisputedly the most sacrosanct fundamental right guaranteed by the Constitution and it prevails above all other rights available under the laws of India. It is therefore submitted that the solutions to societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity, decency of life, and dictates of necessity in the pursuit of social justice should be decided on considerations other than religion or religious faith or beliefs, or sectarian, racial or communal constraints.
- B.** The 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, nikah halala, and polygamy which is grossly injurious to the fundamental rights of married Muslim women and offends Articles 14, 15, 21 and 25 of the Constitution.
- C.** That a perusal of the decisions of this Hon'ble Court in *Prakash v. Phulavati* (supra), *Javed and Others v. State of Haryana and Others*, (2003) 8 SCC 369, and *Smt. Sarla Mudgal, President, Kalyani and Others v. Union of India and Others*, (1995) 3 SCC 635 illustrates that the

practice of polygamy has been recognised as injurious to public morals and it can be superseded by the State just as it can prohibit human sacrifice or the practice of *sati*. In fact, in *Khursheed Ahmad Khan v. State of Uttar Pradesh and Others*, (2015) 8 SCC 439, this Hon'ble Court has also taken the view that practices permitted or not prohibited by a religion do not become a religious practice or a positive tenet of the religion, since a practice does not acquire the sanction of religion merely because it is permitted.

D. The observations of the Constitution Bench in *Danial Latifi & Another v. Union of India*, (2001) 7 SCC 740, are of utmost relevance. This Hon'ble Court stated that when interpreting provisions where matrimonial relationship was involved it has to consider the social conditions prevalent in our society, where a great disparity exists in the matter of economic resourcefulness between a man and a woman whether they belong to the majority or the minority group, since our society is male dominated both economically and socially and women are invariably assigned a dependent role irrespective of the class of society to which they belong. This Hon'ble Court further observed that solutions to societal problems of universal magnitude pertaining to horizons of basic human rights, culture,

dignity, decency of life, and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or sectarian, racial or communal constraints.

E. The Dissolution of Muslim Marriages Act, 1939 fails to secure for Indian Muslim women the protection from bigamy, which protection has been statutorily secured for Indian women belonging to all other religions, and is to that extent violative of Articles 14, 15, 21 and 25 of the Constitution.

F. Giving recognition to nikah halala as a valid form of divorce interferes with the Muslim women's right to profess and practice her religion, inasmuch as it unleashes a spiritual offence on her to say the least and is, thus, violative of Articles 14, 15, 21 and 25 of the Constitution.

G. The Constitution neither grants any absolute protection to the personal law of any community that is unjust, nor exempts personal laws from the jurisdiction of the Legislature or the Judiciary.

H. 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(1), "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.

- I.** 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 Muslim women to live with dignity, under equal protection of laws, without any discrimination on the basis of gender or religion.
- J.** The Legislature has failed to ensure the basic dignity and equality of women in general and Muslim women in particular when it concerns matters of marriage and divorce and succession.
- K.** A complete ban on polygamy, nikah halala and unilateral triple-talaq has long been the need of the hour as it renders Muslim wives extremely insecure, vulnerable and infringes their fundamental rights.
- L.** Equality should be the basis of all personal law since the Constitution envisages equality, justice and dignity for women.

M. Failure to eliminate *de jure* (formal) and *de facto* (substantive) discrimination against women including by non-State actors, either directly or indirectly, violates not only the most basic human rights of women but also violates their civil, economic, social and cultural rights as envisaged in international treaties and covenants. It is submitted that not only must the practices of polygamy, talaq-e-bidat and nikah halala be declared illegal and unconstitutional, but the actions of religious groups, bodies and leaders that permit and propagate such practices must also be declared illegal, unconstitutional, and violative of Articles 14, 15, 21 and 25 of the Constitution.

PRAYER

It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to:

- A.** Issue a Writ or Order or Direction in the nature of mandamus to the Respondents declaring Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 unconstitutional and violative of Articles 14, 15, 21 and 25 of the Constitution in so far as it seeks to recognise and nikah halala, nikah mutah, nikah misyar and polygamy as valid;
- B.** Issue a Writ or Order or Direction in the nature of mandamus to the Union of India declaring the

Dissolution of Muslim Marriages Act, 1939 unconstitutional and violative of Articles 14, 15, 21 and 25 of the Constitution in so far as it fails to secure for Indian Muslim women the protection from bigamy which has been statutorily secured for Indian women belonging to other religions;

- C.** Issue a Writ or Order or Direction in the nature of mandamus to the Union of India declaring the practice of polygamy as illegal and unconstitutional as it violates the rights guaranteed by the Constitution including Articles 14, 15, 21 and 25;
- D.** Issue a Writ or Order or Direction in the nature of mandamus to the Union of India declaring any form of divorce under Muslim personal laws as illegal and unconstitutional if the divorce is not preceded by attempts to reconcile the marriage over three successive tuhrs, or ninety days, or any other period of time this Hon'ble Court deems appropriate;
- E.** Pass any other or future order(s) as this Hon'ble Court deems fit in the facts and circumstances of the present case.

**AND FOR THIS ACT OF KINDNESS THE PETITIONER AS
IN DUTY BOUND SHALL ALWAYS PRAY.**

DRAWN BY & FILED BY:

V K BIJU

Advocate for Petitioner

Drawn on: 23.04.2018

Filed on: 25.04.2018