
SHAMIM ARA V. STATE OF UP

Esha Rathi & Vidhi Basrani, Jindal Global Law School

INTRODUCTION

Shamim Ara¹ and Abrar Ahmed² were married according to Muslim Sharia Law. On behalf of herself and her two minor children, Shamim Ara filed an application³ complaining of desertion and cruelty but was not granted any maintenance⁴ on the ground that Abrar Ahmed had already divorced her⁵; the divorce said to have been given was a triple-talaq.⁶

Shamim Ara denied being divorced at any time⁷, thus preferring a revision before the High Court.⁸ Since the triple-talaq was not given in Shamim Ara's presence, nor was the same communicated to her, it was held that the communication would stand completed⁹ upon the filing of the written statement in the present case, therefore entitling her to claim maintenance until that date, whereafter the said entitlement shall cease.¹⁰

The present case is an appeal by special leave, filed by Shamim Ara, concerning the High Court judgement. The issue arising is whether the appellant, Shamim Ara, can be said to have been divorced on account of the written statement being filed in these proceedings.¹¹

The Court rejected the opinions in the decided cases referred to by Mulla and Dr Tahir Mahmood in their respective commentaries.¹² Firstly, the Court opined a liberal view of talaq ending the marital relationship between Muslim spouses and heavily loaded in favour of Muslim husbands has met with criticism and disapproval by eminent jurists as bad in law.¹³

¹ The appellant.

² The respondent.

³ Under Section 125 of the Cr.P.C.

⁴ This judgement was delivered by the Presiding Judge of the Family Court at Allahabad.

⁵ Shamim Ara v. State of U.P. and Ors., AIR 2002 SC 3551 ¶ 1.

⁶ The triple talaq was not stated in the written statement; the triple talaq was given in the presence of 4-5 persons of the neighborhood and not Shamim Ara herself.

⁷ As per Abrar Ahmed, he had divorced Shamim Ara in 1987 owing to which, he had not paid Shamim Ara or his sons anything for their maintenance since 1988.

⁸ Shamim Ara v. State of U.P. and Ors., AIR 2002 SC 3551 ¶ 5.

⁹ As of 5.12.1990.

¹⁰ Shamim Ara v. State of U.P. and Ors., AIR 2002 SC 3551 ¶ 5.

¹¹ Shamim Ara v. State of U.P. and Ors., AIR 2002 SC 3551 ¶ 6.

¹² Shamim Ara v. State of U.P. and Ors., AIR 2002 SC 3551 ¶ 18.

¹³ Shamim Ara v. State of U.P. and Ors., AIR 2002 SC 3551 ¶ 11.

The Court also noted that none of the ancient holy books or scriptures of Muslims mentions in its text such a form of divorce as has been accepted by the High Court and the Family Court.¹⁴ Lastly, the Court based its opinion on the progressive interpretation of laws which seem to have taken the stage in today's case laws.¹⁵

Thus, the Court held that a mere plea taken in the written statement of a divorce having been pronounced¹⁶ sometime in the past could not by itself be treated as effectuating talaq. A plea of the previous divorce taken in the written statement cannot at all be treated as a pronouncement of talaq.¹⁷

BACKGROUND

Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quran laid down.¹⁸ A Sharia tradition allows a Muslim man to divorce his wife by simply stating the word 'divorce' three times in a row.¹⁹ This practice is called instant triple-divorce or oral divorce.²⁰

The Quran does not sanction instant triple-divorce; it thereby remains an un-Islamic convention.²¹ As observed in *Must. Rukia Khatun v. Abdul Khalique Laskar*, the correct law of talaq as ordained by the Quran is that the talaq must be for a reasonable cause, preceded by an attempt of reconciliation.²²

As per Mulla's commentary on Mahomedan Law, if a man says to his wife that she has been divorced earlier, it leads to a divorce between them, even if there is no proof of the same. As observed in *Ghansi Bibi v. Ghulam Dastagir*, when the pronouncement of the divorce by means of triple-talaq comes to the knowledge of the wife, it results in the dissolution of the marriage.²³

¹⁴ Shamim Ara v. State of U.P. and Ors., AIR 2002 SC 3551 ¶ 7.

¹⁵ Shamim Ara v. State of U.P. and Ors., AIR 2002 SC 3551 ¶ 16.

¹⁶ The Court described proclaimed as to proclaim, to utter formally, to utter rhetorically, to declare to, utter, to articulate.

¹⁷ Shamim Ara v. State of U.P. and Ors., AIR 2002 SC 3551 ¶ 18.

¹⁸ Shamim Ara v. State of U.P. and Ors., AIR 2002 SC 3551 ¶ 14.

¹⁹ While the Quran provides for reconciliation and arbitration, the Sharia law has no such provision; Sharia law outright establishes that instant oral, unilateral divorce is a valid form of divorce.

²⁰ BBC Staff, *Triple Talaq: India criminalizes Muslim 'instant divorce'*, BBC (July 30, 2019), <https://www.bbc.com/news/world-asia-india-49160818#:~:text=India's%20parliament%20has%20approved%20a,including%20email%20or%20text%20message>.

²¹ Mohammad Azeemullah, *Islam Does Not Sanction Triple Talaq in One Sitting*, THE WIRE (Oct. 20, 2016), <https://thewire.in/law/islam-triple-talaq-one-sitting>.

²² *Must. Rukia Khatun v. Abdul Khalique Laskar*, (1981) 1 GLR 375.

²³ *Ghansi Bibi v. Ghulam Dastagir*, (1968) 1 M.L.J. 566.

In *Pathayi v. Moideen*, it was held that the divorce does not even need to be addressed to the wife, and it takes effect the moment it comes to her knowledge.²⁴

Dr Tahir Mahmood has noticed a few decided cases wherein it has been held that a statement made by the husband during the course of any judicial proceedings did effect in a talaq.²⁵ In *Jiauddin Ahmed v. Mrs Anwara Begum*, a plea of the previous divorce, i.e., the husband having divorced the wife on someday much previous to the date of filing of the written statement in the Court was taken and upheld.²⁶

ANALYSIS

This case was a well-celebrated one as a victory for Muslim women. It is appropriate for two reasons. Firstly, it is in line with liberal laws of other religious personal laws. Secondly, it is in line with the Holy Quran. Prior to this decision, most Muslim women were at the complete mercy of their Muslim husbands' whims regarding divorce²⁷, as observed in the above judgements. The uncodified Muslim Law has made way and space for such unjust laws. It takes away the power from state court judges to directly adjudicating Muslim divorces as compared to divorces in other personal laws.²⁸ On the other hand, liberalization of divorce rights for Hindus and Christians has occurred via amendments of their personal law codes giving state court judges more authority to pronounce the divorce.²⁹ Through this judgment, the Court has adjudicated and decided on the validity of a Muslim divorce, which is far more intervention than before. This consistency and uniformity with other just principles show that the judgment is sound and appropriate.

Moreover, it is important to point out that the judgement is a step in the right direction in terms of interpreting Quranic laws. The judgment clearly pointed out that the correct 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.³⁰ An appropriate interpretation of the Muslim personal law, created to maintain the traditions of that religion, would be for it to

²⁴ *Pathayi v. Moideen*, 1968 KLT 763.

²⁵ *Shamim Ara v. State of U.P. and Ors.*, AIR 2002 SC 3551 ¶ 10.

²⁶ *Jiauddin Ahmed v. Mrs. Anwara Begum*, (1981) 1 GLR 358.

²⁷ Jeffrey A. Redding, *Shamim Ara and the Divorce Politics of a Secular and Modern India*, SHARIASOURCE 1, 2 (2018).

²⁸ *Id.* at page 5.

²⁹ Jeffrey A. Redding, *Shamim Ara and the Divorce Politics of a Secular and Modern India*, SHARIASOURCE 1, 5 (2018).

³⁰ *Shamim Ara v. State of U.P. and Ors.*, AIR 2002 SC 3551 ¶ 15.

be true to the Holy Quran, the most important source of Muslim law. By staying in line with the Quran, the judgment has proved to be sound and appropriate.

Through this judgement, the Court has abstained from reinforcing the custom of serving a wife with divorce capriciously and whimsically.³¹ The spontaneity of the practice lacks the much-needed procedure or due diligence³² which previous judgements have failed to address in the course of adopting a patriarchal approach. Further, such judgements blatantly overlook the financial strains borne by women who are victims of this unilateral form of divorce and are abruptly left to fend for themselves. The principle laid down in *Shamim Ara v. the State of UP* does not conform with the existing law as the Court strongly disapproves of the process of divorce as prescribed by the Sharia law. In doing so, the Court has recognized the exigency for gender justice and laid down a strong precedent with respect to the atrocities stemming from and around the practice of triple-divorce while protecting the appellant's financial security by upholding her right to receive maintenance from her husband, who is under an obligation to perform the duty.³³

While the case was a step in the right direction, it did remain behind in aspects. Firstly, the discussion of the Court in reversing the previous judgements³⁴, the un-Quranic practice of the talaq without reconciliation and mediation³⁵ and the discussion surrounding checking the unilateral power granted to men³⁶ was merely dicta.³⁷ This is because the Court focused on the question "whether or not a Muslim husband's written submissions to a state court indicating his clear desire to be divorced can from the date of their filing in a state court effectuate a talaq."³⁸ The question of law that acted as the binding precedent was regarding what would amount to a pronouncement. While pronouncement of divorce is extremely important concept

³¹ Sonakshi Awasthi, *This is not the first time Indian courts have invalidated instant triple talaq*, THE INDIAN EXPRESS (Aug. 22, 2017), <https://indianexpress.com/article/india/this-is-not-the-first-time-indian-courts-have-invalidated-instant-triple-talaq/>.

³² Upon the reckless exercise of such power, which a man may subsequently regret, the woman comes to bear the brunt of it in the form of another demeaning and disrespectful practice, i.e., Halala.

³³ *Shamim Ara v. State of U.P. and Ors.*, AIR 2002 SC 3551 ¶ 19.

³⁴ *Shamim Ara v. State of U.P. and Ors.*, AIR 2002 SC 3551 ¶ 16.

³⁵ *Shamim Ara v. State of U.P. and Ors.* AIR 2002 SC 3551 ¶ 14, THE TIMES OF INDIA (Nov. 13, 2019), <https://timesofindia.indiatimes.com/india/law-on-triple-talaq-not-enough-bring-a-codified-muslim-family-law-bmma/articleshow/72044614.cms>.

³⁶ Bharatiya Muslim Mahila Andolan (BMMA) is a grassroots organization that works to educate and empower the Muslim women in India. This Muslim women's activist group started a movement to reclaim their religious and constitutional rights; it ultimately succeeded in drawing the masses' attention towards the atrocities stemming from and around the practice of triple-divorce as prescribed by the Sharia law.

³⁷ Shazia Javed, *3 Seconds Divorce*, NETFLIX (February 1, 2018).

³⁸ Jeffrey A. Redding, *Shamim Ara and the Divorce Politics of a Secular and Modern India*, SHARIASOURCE 1, 2 (2018).

in Muslim marriages and required to be decided upon, the discussions of the validity of arbitrary and unilateral divorces on the whims of the husbands were not binding in nature. Moreover, the question of the invalidity of such unilateral divorces was swayed away from being decided upon. The Court may have decided on one aspect of Muslim divorce laws, and it is significant to note that their ignorance of other divorce issues under Muslim Law is a clear example of the Indian state's threading³⁹ of the divorce needle.⁴⁰ These omissions have clearly impacted the merit of the judgement. This case may have paved its way to the ban and criminalization of triple talaq in 2018⁴¹, but it failed to itself judge on parameters of equality while only claiming on liberalization of the process of laws.

CONCLUSION

Post partition, a section of the Muslim community wanted to hold onto the Sharia law in order to protect their identity, customs, and traditions since there prevailed insecurity regarding the safe future of Muslims staying back in India⁴². The Sharia law became a negotiable point at the cost of Muslim women being oppressed.

The two laws that Muslims have from 1937 and 1939 are colonial laws from the British era, which are still prevalent and have no clarity on issues of divorce, polygamy, age of marriage and so on.⁴³ Muslims remain the largest minority in India and still do not have their codified law⁴⁴, thereby defying the rights that Muslim women should ideally be entitled to as per the Quran and the Constitutional values.⁴⁵

³⁹ The argument here is that the contemporary Indian state does not like divorce yet, as a secular and modern state, it also cannot live without it. As a result, opinions like Shamim Ara help the state thread this needle. As suggested by victims to this practice, if the divorce ought to have taken place as per the Quran instead, with a gap between the three talaqs, both the parties would have been granted with enough time to think the matter through. On the contrary, the practice of triple-talaq sets in stone, a decision made in the heat of the moment; the man does not have any time to dwell over the repercussions of his act and exits the marriage that instant, leaving the woman to fend for herself.

⁴⁰ Jeffrey A. Redding, Shamim Ara and the Divorce Politics of a Secular and Modern India, SHARIASOURCE 1, 4 (2018).

⁴¹ Shayara Bano v. Union of India AIR 2017 9 SCC 1 (SC)

⁴² Shazia Javed, 3 *Seconds Divorce*, NETFLIX (February 1, 2018).

⁴³ Ambika Pandit, *Law on triple talaq not enough, bring a codified Muslim family law: BMMA*, THE TIMES OF INDIA (Nov. 13, 2019), <https://timesofindia.indiatimes.com/india/law-on-triple-talaq-not-enough-bring-a-codified-muslim-family-law-bmma/articleshow/72044614.cms>.

⁴⁴ The Hindu majority in India got their law in 1955 itself, the Parsi population has their own family law codified based on the religious text despite being the smallest minority in India, and so do the Christians.

⁴⁵ Ambika Pandit, *Law on triple talaq not enough, bring a codified Muslim family law: BMMA*, THE TIMES OF INDIA (Nov. 13, 2019), <https://timesofindia.indiatimes.com/india/law-on-triple-talaq-not-enough-bring-a-codified-muslim-family-law-bmma/articleshow/72044614.cms>.

As per one of the founding members of BMMA⁴⁶, Zakia Soman, various governments have discussed issues related to Muslims over the years⁴⁷; such discussions have however, lacked appropriate representation and are carried out with a “few bearded Muslim clergymen, who are actually oppressors in the name of Islam and inflict atrocities upon women”. The purpose stands defeated when the Government listens to the voices of the oppressors and not the oppressed.⁴⁸

In this light, *Shamim Ara v. State of UP* was a revolutionary judgement, ahead of its time, when the practice of triple talaq had not been banned. The ruling acknowledges the gaps in the practice of triple-talaq as prescribed by the Sharia Law, such as substantial reasoning, proof of the talaq being given, and attempt at reconciliation⁴⁹, thus upholding the constitutional values which remained unrecognized in the uncodified Muslim Law.

However, one cannot help but look at the judgement’s failure to examine other issues. Post this case, triple-talaq, the un-Quranic practice was still widely performed. The judgement limited its ratio to pronouncement and interpretation in Muslim divorce.⁵⁰ Thus, while acknowledging the faults in triple-talaq, it remained incomplete to sorts by eliminating a decision on its validity.

⁴⁶ Bharatiya Muslim Mahila Andolan (BMMA) is a grassroots organization that works to educate and empower the Muslim women in India. This Muslim women’s activist group started a movement to reclaim their religious and constitutional rights; it ultimately succeeded in drawing the masses’ attention towards the atrocities stemming from and around the practice of triple-divorce as prescribed by the Sharia law.

⁴⁷ Shazia Javed, *3 Seconds Divorce*, NETFLIX (February 1, 2018).

⁴⁸ The All-India Muslim Personal Law Board or the Ulema Counsel or even any other non-religious body had very few women who participated in the decision-making process.

⁴⁹ As suggested by victims to this practice, if the divorce ought to have taken place as per the Quran instead, with a gap between the three talaqs, both the parties would have been granted with enough time to think the matter through. On the contrary, the practice of triple-talaq sets in stone, a decision made in the heat of the moment; the man does not have any time to dwell over the repercussions of his act and exits the marriage that instant, leaving the woman to fend for herself.

⁵⁰ *Shamim Ara v. State of U.P. and Ors.*, AIR 2002 SC 3551 ¶ 18.