

## **TRIPLE TALAQ JUDGMENT - ARE WOMEN THE REAL BENEFICIARIES\***

Flavia Agnes\*\*

The Allahabad High Court's judgment has raised yet another controversy within Muslim Personal Law. The reactions are varied. The Muslim orthodoxy and the Muslim Personal Law Board has criticised it on the ground that it violates the Constitutional provisions of minorities under Articles 25-28 of the Constitution. Secular forums and some Muslim women's organisations have welcomed it as a positive step which safeguards women's rights. Islamic legal scholars while condemning the practice of triple talaq and the inertia of the Muslim Personal Law Board to declare such practice as invalid, have nevertheless expressed their concern that the judgment might result in hampering the development of reform from within the community. Some scholars have also questioned whether a retrospective judgment in a land ceiling issue was the proper forum to tackle the grave and sensitive issue of validity of triple talaq.

But there is hardly any discussion on the effect on this judgment on the woman concerned and her rights to property and also about the precedence it has created in the realm of marriage relations and women's right to property and matrimonial home. The publicity creates an erroneous impression that the High court has upheld a Muslim woman's petition challenging the triple talaq and in the process safeguarded the rights of Muslim women. It is in this context that certain clarifications regarding the case are necessary.

The U.P. Imposition of Ceiling on Land Holding (Amendment) Act was passed in 1972. Under this act in the year 1974, notice was issued to Rahmatullah in respect of access land in his possession. In November, 1974 Rahmatullah filed his objections stating that the land which belongs to his wife, whom he has divorced in 1969, has been erroneously and illegally included as his land. In 1980 Khatoon Nisa stated before the authority that she has been divorced by her husband eleven years ago.

Overriding the objections, in August, 1982 an order was passed holding the land to be surplus land. Rahmatulla and Khatoon Nisa filed separate appeals against the order. In August, 1984 the appeal was admitted, the order of the Prescribed Authority was set aside and the case was remitted for fresh trial to ascertain whether Rahmatulla and Khatoon Nisa are divorced according to law or whether the plea of divorce is raised only to save the land from the land ceiling act.

In 1986 after fresh trial the Prescribed Authority reconfirmed its order. Again both Rahmatulla and Khatoon Nisa filed appeals. In April, 1993 the Additional Commissioner, Faizabad dismissed both the appeals and held that since there has not been a divorce or a judicial separation through a court order between Rahmatulla and Khatoon Nisa, their income can be clubbed together. The talaqnama and evidence of Khatoon Nisa's father and other witnesses was held to be not sufficient proof of divorce. The court held that since the names of the parties appear in the same voter's list and since they live in the same house and village this is sufficient proof that the couple is not divorced.

The controversial judgment was passed in the matter of two writ petitions filed by Rahmutlah and Khatoon Nisa filed against the above order. The issue before the court was whether an orally divorced wife is qualified for the same benefits under the act as a judicially separated or divorced wife. On 15th April, 1994 Justice Hari Nath Tilhari of Lucknow Bench of Allahabad High Court held that a customary divorce either under the Shariat Law or the Hindu Marriage Act is not is not a valid divorce if it violates the provisions of the Constitution and since triple talaq is discriminatory against women a divorce by triple talaq is not a valid divorce. The effect of the judgment is that the woman who has been divorced twenty five years ago is held to be married even against her own depositions before the state authorities. Further the judgment held that since she is not legally divorced she and her husband are not entitled for exemption granted to a couple

who is divorced or separated through a court order and hence their land can be acquired by the state under the land ceiling act.

The judgment has grave adverse implications to the woman concerned. At one level Khatoon Nisa is divorced by her husband according to a valid form of divorce under the provisions of the Applications of Shariat Act of 1937 and as a consequence under the provisions of the Muslim Women's (Protection of Rights on Divorce) Act of 1986 she is not entitled to maintenance. At the other level she is deemed to be married for the purpose of land ceiling act and will lose her right to the land which at present stands in her name.

The court has held triple talaq as invalid. But would the situation of Muslim woman be any different if she is not divorced in one sitting but in three consecutive sittings. But what is more crucial to women is that once they are divorced under the Muslim women's act they lose their right to maintenance. And no court in the country has declared the Muslim women's act as unconstitutional and granted divorced women right to maintenance.

The judgment has also other implications for women. Khatoon Nisa herself has pleaded in all court proceedings that she has been divorced. Since all laws permit a divorce by consent of the parties, even assuming that the divorce was to gain certain economic benefits, can a court hold such a divorce as invalid when a woman herself has not challenged it. When parties to a marriage have a right to voluntarily enter into a marriage contract, can the state have the power to compel them to remain married just because it is to the advantage of the state. The judgment provides the state with the authority to interfere with the most intimate aspects of people's life against the wishes of the parties concerned.

The Bombay High Court had given a ruling in a case of similar nature. In a petition for divorce by mutual consent, the Family Court, Bombay refused to grant the couple a decree of divorce on the ground that the dissolution of marriage was sought with an ulterior motive of saving the property from prospective creditors and held that the petition was an eye-wash as there were no real difference between the parties. The Family Court had reached this conclusion in spite of the fact that the parties had appeared before the court voluntarily and had deposed that they had mutually agreed upon divorce. The High Court set aside the judgment of the Family Court and expressed surprise as to how the trial judge had arrived at the conclusion that the divorce is an eye wash in the absence of any evidence to the contrary so long as all the legal requirements for a valid divorce have been complied with.<sup>1</sup>

When laws are framed the specificity of minority communities is ignored. The land ceiling act exempts women who are divorced or temporarily separated through a court order. The concept of judicial separation is not recognised under Muslim law. So while concessions are made to Hindu women whose law recognises the concept of temporary separation, no concessions are made to communities whose personal law recognises customary forms of divorce. A Muslim man has no other recourse to divorce than the customary provisions under the application of Shariat Act.

The only point of dispute seems to be whether it is to be done in one sitting or three consecutive months. All the debate has centred around this point. One fails to understand how a woman's situation will improve even if she is divorced through a process of three pronouncements in three months. What is far more relevant to women is that the law and custom both recognise her right to be maintained even after divorce and her belongings and Mehr is returned to her promptly and she is not dispossessed from her matrimonial home when she is divorced.

The Family Courts Act is another example of how specificity of minorities is overlooked when legislations are framed. The Family Courts were meant to provide speedy, informal

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<sup>1</sup> *Leela Mahadeo Joshi v. Mahadeo Sitaram Joshi* AIR 1991 Bom 105

and inexpensive forums to settle matrimonial disputes. But in Bombay the jurisdiction is limited to Hindus and those married under Special Marriages Act. The jurisdiction over matrimonial disputes of minorities is retained with the High Court where the procedures are expensive and far more technical. This has resulted in an increasing number of women turning to Qazis and Maulavis for an amicable settlement under the customary form.

While holding such divorces as invalid, the state has not made any provisions for quick redressal within formal court procedures. The situation for Muslim women in Bombay today is that she has to approach the Family Court for maintenance under S.125 Cr.PC while her marriage is subsisting. If she also wants a divorce she has to file under the Dissolution of Muslim Marriages Act in the High Court. As soon as she obtains a decree of divorce her right to maintenance under S.125 Cr.PC is forfeited. At the end of it in order to claim her belongings, mehr and maintenance during iddat period she has to approach the magistrate's court under the Protection of Muslim's Act. All this under the state enacted legislations which claim to uphold the dignity of Muslim women.

The issue of validity of triple talaq was not challenged by the woman concerned in her Writ Petition. The opposing party was not her husband but the state authorities. It is pertinent to note that not just the advocates of Khatoon Nisa and Rahmutulla and the amicus curae assisting the court, but even the Advocate General appearing for the state had pointed out to the judge that since the issue of triple talaq has not been challenged the judge has no authority to decide this issue. Perhaps it needs to be pointed out that the Advocate General Mr. Bhatnagar who represented the state is not a Muslim. In fact Mr. Bhatnagar had to pay a heavy price. The Avadh bar association passed a resolution to suspend the Advocate General for his comments against the judgment.<sup>2</sup>

While the Allahabad judgment has held triple talaq as unconstitutional in a matter where constitutional validity of the issue was not even challenged, it is pertinent to note that in several cases where constitutional validity of discriminatory personal laws was challenged the court had either skirted the issue or upheld the discriminatory provisions.

In 1983, the Andhra Pradesh High Court had held that the provision of Restitution of Conjugal Rights (S.9 of the Hindu Marriage Act) as unconstitutional as it violates the right to privacy guaranteed by Article 21 of the Constitution in a case filed by actress T. Sareeta.<sup>3</sup>

But subsequently the Delhi High Court distinguished from this judgment and held that the provision serves a useful purpose of reconciliation. It is interesting to note the comments of the judge: Introduction of constitutional law in the home is most inappropriate. It is like pushing a bull into a China shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Article 21 nor Article 14 have any place.<sup>4</sup> Subsequently the Supreme Court upheld this judgment and overruled the Andhra Pradesh judgment.<sup>5</sup>

The Allahabad judgment also assumes that it an essential requirement that the couple should have a separate residence. In fact our demand today is that a woman should have a right to reside in her matrimonial home. Most women are claiming their right to reside in the matrimonial home along with their petition for divorce. What would be the implications of this judgment on such petitions?

The press has compared this judgment to the judgment in Shahbano's case. The comparison is limited only to its discussion of Islam and Muslim personal law. But while Shahbano herself had approached a court for reliefs and had gained personally from the judgment, Khatoon Nisa has been deprived of her land.

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<sup>2</sup> Times of India (Bombay) 19th April, 1994 pg. 1 Avadh Bar to Suspend Advocate General.

<sup>3</sup> *T. Sareeta v. T. Venkatasubhiah* AIR 1983 AP 35

<sup>4</sup> *Harvinder Kaur v Harmender Singh* AIR 1984 Delhi 66

<sup>5</sup> *Saroj Rani v. Sudarshan Kumar Chadha* AIR 1984 SC 1562

While holding that the trip talaq provision which has not challenged as unconstitutional, the judgment does not question the discriminatory aspects of the land ceiling act. The practice of clubbing a woman's property and treating it as the property of the man is detrimental to women's rights. The presumption is based on the premise that husband and wife are one unit and this unit is of a permanent nature. After the property is acquisitioned if the couple is divorced will the couple be entitled to reclaim their property from the state. The act also provides two additional hectares of land for each adult son but no such benefits are provided for adult daughters. The act presumes that either women are not capable of owning property or property is of no concern to adult females. With his preoccupation with the position of rights of women under Personal law, the judge seems to have inclination left to examine the discriminatory aspects of the land ceiling act.

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\*\* Contact: flviaagnes@vsnl.net