A.F.R.

Court No. - 48

Case :- APPLICATION U/S 482 No. - 11716 of 2017

Applicant :- Aaqil Jamil And 2 Others
Opposite Party :- State Of U.P. And Another
Counsel for Applicant :- Rishikesh Tripathi
Counsel for Opposite Party :- G.A.

Hon'ble Surya Prakash Kesarwani,J.

''यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवता
यत्र तास्तु न पूज्यन्ते सर्वास्ताफलाः क्रियाः''

1. The present application under Section 482 Cr.P.C. has been filed by the applicants with the prayer to quash the entire proceeding of Criminal Complaint Case No. 2393 of 2016 (Smt. Sumaila Vs. Aaqil Jamil and others), under Sections 498-A, 323, 504, 506 IPC and Section 3/4 Dowry Prohibition Act, pending in the court of Addl. Chief Judicial Magistrate, Court No. 10, Agra. Further prayer has been made to stay the further proceedings of aforesaid criminal complaint case.

2. Vakalatnama filed by Sri Ashish Goyal, Advocate on behalf of opposite party no. 2 is taken on record.

3. Heard Sri Rishikesh Tripathi, learned counsel for the applicants, Sri Ashish Goyal, learned counsel for opposite party no. 2 and the learned AGA appearing for the State.

Submissions:

4. Learned counsel for the applicants submits that the applicant no. 1 is the husband, who has divorced the opposite party no. 2 on 08.11.2015 and also obtained a 'Fatwa' from “Darool Ifta Jama

Masjid, Agra” on 10.11.2015, whereby the Mufti City, Agra has affirmed the Talaqnama and pronounced that the opposite party no. 2, after being divorced, has become impure (Haraam) for the applicant no. 1. He submits that after the Talaq, the applicant no. 1 had sent a notice to the opposite party no. 2 that in presence of persons/ officers at "Parivar Paramarsh Kendra, Agra" on 08.11.2015, he had divorced her by saying thrice that "I divorce you Sumaila Afgani", and thus made her free to lead her life in the manner she wants. It is also mentioned in the notice that on 10.11.2015 he has obtained a 'Fatwa'. He, therefore, submits that since the applicant no. 1 has divorced the opposite party no. 2 on 08.11.2015 and as such the application dated 19.11.2015 filed by opposite party no. 2 under Section 156(3) Cr.P.C. making certain allegations, is malicious and abuse of process of court and therefore, the impugned summoning order dated 28.11.2016 in Complaint Case No. 2393 of 2016 passed by the learned Addl. Chief Judicial Magistrate, Court No. 10, Agra deserves to be quashed. He further submits that once the applicant no. 1 has divorced the opposite party no. 2 on 08.11.2015, the question of commission of offence under Section 498-A , 323, 504, 506 IPC and Section 3/4 Dowry Prohibition Act does not arise at all. In support of his submissions, he referred to the pleadings of paras 5, 12, 13 and 14 of the affidavit accompanying the Application, the copy of the intimation of Divorce and the copy of the Fatwa. He submits that after the aforesaid validly given Talaq given by the applicant no. 1 to the opposite party no. 2 on 08.11.2015, all her actions including the impugned complaint case proceeding are null and void.

5. Learned A.G.A. supports the impugned order.

6. Learned counsel for opposite party no. 2 submits that in fact the

applicants used to beat the opposite party no. 2 mercilessly. They were not giving her food to pressurize her parents for dowry. They have forcibly obtained her signature and thumb impression on blank papers. On some papers, they forced and compelled the opposite party no. 2 to write and sign as dictated by them. Thereafter, they have ousted the opposite party no. 2. He refers to the application of opposite party no. 2 dated 19.11.2015 in which the true incidents have been mentioned. He submits that the story of divorce is totally false and in any case it is wholly illegal and unconstitutional being violative of Articles 14, 15 and 21 of the Constitution of India and thus wholly null and void. He refers the statement of the complainant/ opposite party no. 2 recorded under Section 200 Cr.P.C. as well as the statement of witnesses under Section 202 Cr.P.C. He submits that the impugned summoning order dated 28.11.2016 has been passed in accordance with law after due consideration of the facts and evidences on record and therefore, the impugned order does not suffer from any infirmity.

Discussion and Findings:

7. I have carefully considered the submissions of learned counsels for the parties and perused the record. With the consent of learned counsels for the parties the following **question** has been framed for determination:-

Question:

(I) "Whether in view of the alleged Talaq dated 08.11.2015 and the Fatwa dated 10.11.2015, the complaint case filed by the opposite party no. 2 is malicious and abuse of process of court and consequently the entire proceedings of Complaint Case No. 2393 of 2016 deserves to be quashed?

Facts:

8. Briefly stated facts of the present case are that according to the applicant no. 1 (husband), he was married with the opposite party no. 2 on 12.11.2011. A son namely Rihan was born on 30.07.2012 from their wedlock. It is alleged that since 10.09.2015 the opposite party no. 2 is residing with her parents due to some dispute between her and the applicants. It is further alleged that a complaint was made with the Senior Superintendent of Police, Agra and the matter was referred to Parivar Paramarsh Kendra, Police Lines, Agra, where the matter was compromised on 04.10.2015. It is alleged that the applicant made a complaint on 23.10.2015 to the Nodal Officer, Parivar Paramarsh Kendra, Agra and thereupon both the parties were called upon for compromise on 08.11.2015, where the applicant no. 1 had divorced the opposite party no. 2 by saying thrice that “I divorce you Sumaila Afgani”. It is alleged that he further spoke to the opposite party no. 2 that now you are free to lead your life in the manner you want. Thereafter, he obtained a Fatwa from Mufti City, Agra on 10.11.2015 who approved the divorce (Talaq). Following the said incident, the applicant sent a notice dated 16.11.2015 to the opposite party no. 2 that he has divorced her and the divorce has been approved by the Mufti City, Agra.

9. On the other hand, the opposite party no. 2 filed an application being Case No. 2393 of 2016 before the Additional Chief Judicial Magistrate, Court No. 10, Agra on 19.11.2015 making allegations as follows:-

10. She alleged that in her Nikah on 12.11.2011 with the applicant no. 1 at Agra in accordance with Muslim Customs, her father and relatives gave the applicant in dowry one Alto Car, Almirah, Double Bed, Sofa Set, Dining Table, Fan, Dressing Table, Sewing Machine,

Mattress-Pillow, Washing Machine, A.C., Cooler, T.V., Geaser, Refrigerator, Utensils (about 350 in number), One Golden Necklace big, One Golden Necklace small, Gold Teeka, Gold Locket, Two Gold Chain, Five Gold Rings, Two Necklace Set of Silver, Two Set Payals of Silver,, Four Silver Rings, Silver Hathfool, Bride-Groom's Bracelet and Rs. 2 lacs cash, etc. and spend about Rs. 20 lacs in marriage. Even after giving so much articles, her husband and in-laws were not satisfied and they started demanding Rs. 5 lacs more to purchase a big luxury car. On non fulfillment of demand, the applicants started beating and misbehaving with her. In the meantime, she gave birth to a son on 30.07.2012. Still the applicants continued to insist for additional dowry of Rs. 5 lacs and due to non fulfillment of demand, they used to beat her, did not give her food and confined her in a room. Consequently, she communicated the happenings to her father who gave to the applicants a sum of Rs. 3 lacs on 02.01.2015 and a sum of Rs. 2 lacs on 12.05.2015 after withdrawing it from the bank. Still the behaviour of her husband and in-laws was not good and they used to beat her. They compelled her to sign on some stamp papers and some blank papers and forcibly got her thumb impression and signature on some blank papers. On 02.09.2015 her father-in-law, mother-in-law and brother-in-law Faisal and the husband beaten her and ousted her from their house and told her that unless her father transfers his plot in his name, they shall not keep her. Under these circumstances, the opposite party no. 2 came to her parents' house. After three days the applicant no. 1 came to her parents house and brought her to his home under conspiracy and thereafter, moved a false application on 22.09.2015 to Senior Superintendent of Police, Agra and thereupon a counseling was made in Parivar Paramarsh Kendra, Agra on 04.10.2015 they were called upon to reappear for counseling on 06.11.2015. When she went to her husband's house to

take some clothes of her son, she was beaten by the applicants and certain other persons. They snatched her ornaments and sprinkled kerosene oil but some how she escaped with her son and came out of the house. Several peoples of the locality collected there. She called upon her brother on phone and thereafter, she went to lodge FIR at P.S. Mahila Thana Rakabganj where her report was not registered for several days on one pretext or the other. Consequently, she moved an application on 17.11.2015 before the Superintendent of Police, Agra and Deputy Inspector General of Police, Agra through registered post but no action was taken.

11. On these allegations, she moved the complaint before learned Addl. Chief Judicial Magistrate on 19.11.2015. Her statement under Section 200 Cr.P.C. was recorded in which she affirmed the application version of beating her by husband, mother-in-law and father-in-law and demand of dowry. Statement of witnesses under Section 202 Cr.P.C. were also recorded and the witnesses affirmed the complaint version. On these facts and evidences, the learned Addl. Chief Judicial Magistrate, Court No. 10, Agra considered the matter and passed an order under Section 204 Cr.P.C. on 28.11.2016 summoning the applicants under Section 498-A, 323, 504, 506 IPC and 3/4 Dowry Prohibition Act. Aggrieved with this order, the applicants have filed the present application.

12. In the present set of controversy it is not necessary for this Court to decide conclusively as to whether the applicant no. 1 has divorced to the opposite party no. 2 on 08.11.2015 or not? Or whether the alleged divorce is valid? However, since submissions have been made by learned counsels for the parties based on the aforesaid alleged divorce and Fatwa as a foundation to challenge the complaint

case including the summoning order and as such to deal with their submissions for the purposes of the impugned summoning order under Section 204 Cr.P.C., the question of divorce raised by the applicant no. 1 is being examined.

13. To consider the submissions on the question of Triple Talaq, it would be appropriate to refer first, certain provisions of Constitution namely the Preambles and Articles 14, 15 and 21 of the Constitution which are reproduced below:

> *"**PREAMBLE***
>
> *WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its 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 the dignity of the individual** and the unity and integrity of the Nation;*
>
> *IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."*
>
> ***Article 14. Equality before law.—**The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*
>
> ***Article* 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.—**(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

Article 21. Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law.

14. Hon'ble Supreme Court in the case of **A.K. Gopalan Vs. The State of Madras AIR 1950 SC 27** observed that the people of India have in exercise of their sovereign will as expressed in the preamble, adopted the democratic ideals **which assures the citizen the dignity of the individuals and other cherished human values as a means to the full evolution and expression of his personality**, and in

delegating to the legislature, the executive and the judiciary their respective powers in the Constitution, reserved to themselves certain fundamental rights, because they have been re-tained by the people and made paramount to the delegated powers, which has been translated into positive law in Part III of the Indian Constitution, the high purpose and spirit of the Preamble as well as the constitutional significance of a Declaration of Fundamental Rights should be borne in mind in construing a provision of Part III of the Indian Constitution. **This declaration is the greatest charter of liberty of which the people of this country may well be proud. The foundation of this republic have been led on the bedrock of justice.**

15. In the case of **State of Bihar Vs. Sir Kameshwar Singh AIR 1952 SC 252** a Constitution Bench of Hon'ble Supreme Court held that our Constitution has not ignored the individual but has endeavoured to harmonise the individual interest with the paramount interest of the community. In the case of **Sajjan Singh Vs. State of Rajasthan AIR 1965 SC 845** a Constitution Bench of Hon'ble Supreme Court (Per Mudholkar J.) observed that if upon a comparison of the preamble with the broad features of the Constitution it would appear that the preamble is an epitome of those features or, to put it differently if these features are an amplification or concretisation of the concepts set out in the preamble. While considering whether the preamble is not a part of the Constitution, it would be of relevance to bear in mind that the preamble is not the common run as such as is to be found in an Act of legislation. It has the stamp of deep deliberation and is marked by precision. Would this not suggest that the framers of the Constitution attached special significance to it? In the case of **Golaknath & Ors Vs. State of Punjab & Anr AIR 1967 SC 1643**, eleven judges Constitution Bench of Hon'ble Supreme Court (Per

Majority) held that preamble contains in a nut shell its ideals and its inspirations. **The preamble is not a platitude but the, mode of its realisation is worked out in detail in the Constitution.** In the case of **His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala & Anr (1973) 4 SCC 225** a thirteen Judges Constitution Bench of Hon'ble Supreme Court held that preamble of the Constitution is an aid in the Constitutional interpretation. **The preamble is meant to embody in every view to well define the key to understanding of the Constitution.** It was further held (Per Sikri, CJ.) that the basic structure of the Constitution consist of supremacy of Constitution of the republican and democratic form of government, secured character of the Constitution, separation of powers between legislature, the executive and judiciary, federal character of the Constitution. **The above basic structure is build on the basic foundation i.e. the dignity and freedom of the individual. This cannot, by any form of amendment, is destroyed. The above foundation and the basic features are judiciary discernible not only the preamble but the whole scheme of Constitution"**. It was further observed (Per Jagan Mohan Reddy, J.) that the elements of the basic structure are indicated in the preamble and translated in the various provisions of the Constitution. The edifice of our Constitution is built upon and stands on several props and on removal of any of them, the Constitution collapses. In the case of **Smt. Indira Nehru Gandhi Vs. Shri Raj Narain 1975 (Supp) SCC 1** a Constitution Bench, while considering the preamble and basic feature of the Constitution, observed that preamble is source of any basic feature. It was further observed (Per Chandrachud J.) that if there be any un-amendable feature of the Constitution on the score that they form a part of basic structure of Constitution, they are that (i) India is a sovereign democratic republic; (ii) Equality of status and opportunity

shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion and that (iv) the nation shall be governed by a Government of laws, not of men. These are the basic pillars of our constitutional philosophy and therefore, the basic structure of the Constitution. In the case of **Jacob M. Puthuparambil & Ors Vs. Kerala Water Authority & Ors (1991) 1 SCC 28** (para 8) Hon'ble Supreme Court observed that preamble promises socio-economic justice, the fundamental rights confer certain justiciable socio-economic rights and the Directive Principles fix the socio-economic goals which the State must strive to attain. These three together constitute the core and conscience of the Constitution. In **Indra Sawhney Vs. Union of India 1992 Supp. (3) SCC 217** Constitution Bench of Hon'ble Supreme Court held that **the preamble to the Constitution is not a mere flourish word but an ideal set up for practice and observance as a matter of law through Constitutional mechanism**.

16. In **Raghunathrao Ganpatrao Vs. Union of India 1994 Supp. (1) SCC 191** a Constitution Bench of Hon'ble Supreme Court considered the preambles and Articles 14 and 15 and observed that that **one of the objectives of the Preamble of our Constitution is 'fraternity assuring the dignity of the individual** and the unity and integrity of the nation.' It will be relevant to cite the explanation given by Dr. Ambedkar for the word 'fraternity' that 'fraternity means a sense of common brotherhood of all Indians.'

17. In the case of **Kuldip Nayar & Ors Vs. Union of India & Ors (2006) 7 SCC 1** (para 332) a Constitution Bench of Hon'ble Supreme Court held that preamble of the Constitution is an integral part of the

Constitution.

Dignity of Women,Discrimination and Article 14, 15 & 21:

18. To remind the elevated position and dignity of women in Indian culture, it would be appropriate to quote a Shlok from Smritis as under:

> *''यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवता*
> *यत्र तास्तु न पूज्यन्ते सर्वास्ताफलाः कियाः''*
> ***"Yatra naryastu Pujante ramante tatra dewatah***
> ***Yatra tastu na pujyante sarvastatraphalah kriyah"***

A free translation of the aforesaid is reproduced below:

> ***"Where woman is worshipped, there is abode of God. All the actions become unproductive in a place, where they are not treated with proper respect and dignity."***

19. In the case of **Ghisalal Vs. Dhapubai (2011) 2 SCC 298** (para 25) Hon'ble Supreme Court considered the provisions of Section 7 and 16 of the Hindu Adoption and Maintenance Act, 1956 with regard to **mandatory consent of wife for adoption and Article 14 and 15 of the Constitution and held that mandate of wife's consent for adoption and conferring independent right upon a female Hindu to adopt a child, Parliament sought to achieve one of the facets of the goal of equality enshrined in the Preamble and reflected in Article 14 read with Article 15 of the Constitution.**

20. In the case of **Voluntary Health Association of Punjab Vs. Union of India & Ors (2013) 4 SCC 1** Hon'ble Supreme Court while considering the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition

of Sex Selection) Rules, 1996 framed under the Act by the competent authorities and Article 14, 15, 21 and 32 of the Constitution **expressed the means and dignity of women and female child and needs for women empowerment and gender equality.** In the said case [Per Dipak Misra, J. (concurring)] it was further held (in para 19) that **a woman has to be regarded as an equal partner in the life of a man.** It has to be borne in mind that she has also the equal role in the society i.e. thinking, participating and leadership. In **Voluntary Health Association of Punjab (supra)** in paras 20, 23 to 31 it was further observed/ held as under:

> ***"20. It would not be an exaggeration to say that a society that does not respect its women cannot be treated to be civilized. In the first part of the last century Swami Vivekanand had said:*** *-*
>
> > ***"Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind."***
>
> *23. In Madhu Kishwar v. State of Bihar [(1996) 5 SCC 125] this Court had stated that* ***Indian women have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination.***
>
> *24. The way women had suffered has been aptly reflected by an author who has spoken with quite a speck of sensibility: -*
>
> > *"Dowry is an intractable disease for women, a bed of arrows for annihilating self-respect, but without the boon of wishful death."*
>
> *25. Long back,* ***Charles Fourier had stated***
>
> > *"The extension of women's rights is the basic principle of all social progress".*

26. Recapitulating from the past, I may refer to certain sayings in the Smritis which put women in an elevated position. This Court in Nikku Ram's case (supra) had already reproduced the first line of the "Shloka". The second line of the same which is also significant is as follows: -

''यत्र तास्तु न पूज्यन्ते सर्वास्तत्राफलाः क्रियाः''

Yatra tastu na pujyante sarvastatraphalah kriyah

A free translation of the aforesaid is reproduced below:-

"All the actions become unproductive in a place, where they are not treated with proper respect and dignity."

27. Another wise man of the past had his own way of putting it:

''भर्तृभ्रातृ पितृजाति श्रवश्रुश्वसुर देवरैः।
बन्धुभिश्च स्त्रियः पूज्यां भूषणाच्छादनाशनैः।।''
Bhartr bhratr pitrijnati swasruswasuradevaraih
Bandhubhisca striyah pujyah bhusnachhadanasnaih.

A free translation of the aforesaid is as follows:-

"The women are to be respected equally on par with husbands, brothers, fathers, relatives, in-laws and other kith and kin and while respecting, the women gifts like ornaments, garments, etc. should be given as token of honour."

28. Yet again, the sagacity got reflected in following lines: -

''अतुलं तृ तत्तेजः सर्वदेवशरीरजम्।
एकस्थं तदभून्नारी व्याप्तलोकश्रयं त्विषा।।''
Atulam yatra tattejah sarvadevasarirajam
Ekastham tadabhunnari vyaptalokatrayam tvisa.

A free translation of the aforesaid is reproduced below:-

"The incomparable valour (effulgence) born from the physical frames of all the gods, spreading the three worlds by its radiance and combining together took the

form of a woman."

29. From the past, I travel to the present and respectfully notice what ***Lord Denning*** *had to say about the equality of women and their role in the society: -*

> *"A woman feels as keenly, thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom – to develop her personality to the full as a man.* ***When she marries, she does not become the husband's servant but his equal partner.*** *If his work is more important in life of the community, her's is more important of the family. Neither can do without the other. Neither is above the other or under the other. They are equals."*

30. I have referred to certain pronouncements of this Court, the sayings of the sagacious ones, thinkers, poets, philosophers and jurists about the child and women only to emphasise that they play a seminal role in the society.

31. The innocence of a child and the creative intelligence of a woman can never ever be brushed aside or marginalized. ***Civilization of a country is known how it respects its women. It is the requisite of the present day that people are made aware that it is obligatory to treat the women with respect and dignity so that humanism in its conceptual essentiality remains alive. Each member of the society is required to develop a scientific temper in the modern context because that is the social need of the present."***

(Emphasis supplied by me)

Gender Discrimination – Violative of Fundamental Freedoms and Human Rights:

21. In the case of **Valsamma Paul (Mrs.) Vs. Kochin University (1996) 3 SCC 545** (para 26) Hon'ble Supreme Court has considered the **gender discrimination** and held as under:

> *"26. Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedoms have been reiterated in the Universal declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are inter-dependent and have mutual reinforcement.* ***The human rights for women, including girl child are, therefore, inalienable, integral and an indivisible part of universal human rights.*** *The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth-cultural, social and economical.* ***All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. Convention for Elimination of all forms of Discrimination Against Women (for short, "CEDAW") was ratified by the U.N.O. On 18.12.1979 and the Government of India had ratified as an active participant on 19.061993 acceded to CEDAW and reiterated that discrimination against women violates the principles of equality of rights and respect for human dignity and it is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; it hampers the growth of the personality from society and family, making more difficult for the full development of potentialities of women in the service of the respective countries and of humanity."***
>
> *(Emphasis supplied by me)*

22. In the case of **Charu Khurana & Ors Vs. Union of India & Ors (2015) 1 SCC 192**, Hon'ble Supreme Court considered the **gender equality of woman and discrimination,** although in a different contest; and held as under:

> *3. Giving emphasis on the role of women, Ralf Waldo Emerson, the famous American Man of Letters, stated "A sufficient measure of civilization is the influence of the good women". Speaking about the democracy in America, Alexa De Tocqueville wrote thus: "If I were asked .... to what singular prosperity and growing strength of that people (Americans) ought mainly to be attributed. I should reply; to the superiority of their women". One of the greatest Germans has said: "The*

Eternal Feminine draws us upwards".

4. ***Lord Denning in his book Due Process of Law has observed*** *that a woman feels as keenly thinks as clearly, as a man. She in her sphere does work as useful as man does in his.* ***She has as much right to her freedom - develop her personality to the full – as a man. When she marries, she does not become the husband's servant but his equal partner.*** *If his work is more important in life of the community, her's is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals.*

5. At one point, the U.N. Secretary General, Kofi Annan, had stated "Gender equality is more than a goal in itself. It is a precondition for meeting the challenge of reducing poverty, promoting sustainable development and building good governance."

6. ***Long back Charles Fourier had stated "The extension of women's rights is the basic principle of all social progress."***

7. At this juncture, we may refer to some international conventions and treaties on gender equality. ***The Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, is the United Nations' landmark treaty marking the struggle for women's right. It is regarded as the Bill of Rights for women.*** *It graphically puts what constitutes discrimination against women and spells out tools so that women's rights are not violated and they are conferred the same rights.*

8. The equality principles were reaffirmed in the Second World Conference on Human Rights at Vienna in June 1993 and in the Fourth World Conference on Women held in Beijing in 1995. ***India was a party to this Convention and other Declarations and is committed to actualize them.*** *In 1993 Conference, gender-based violence and all categories of sexual harassment and exploitation were condemned.* ***A part of the Resolution reads thus:*** *-*

"The human rights of women and of the girl child are

> ***an inalienable, integral and indivisible part of universal human rights.*** *The World Conference on Human Rights urges governments, institutions, intergovernmental and non-governmental organizations to intensify their efforts for the protection of human rights of women and the girl child."*

9. The other relevant International Instruments on Women are : (i) Universal Declaration of Human Rights (1948), (ii) Convention on the Political Rights of Women (1952), (iii) International Covenant on Civil and Political Rights (1966), (iv) International Covenant on Economic, Social and Cultural Rights (1966), (v) Declaration on the Elimination of All Forms of Discrimination against Women (1967), (vi) Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974), (vii) Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women (1995), (viii) Universal Declaration on Democracy (1997), and (ix) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999).

10. In Valsamma Paul (Mrs) v. Cochin University, a two-Judge Bench observed thus: ((1996) 3 SCC 545)

> *"26. Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedoms have been reiterated in the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and an indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth — cultural, social and economical.* ***All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. Convention for Elimination of all forms of Discrimination Against Women (for short, "CEDAW") was ratified by the UNO on 18-12-1979 and the Government of India had***

> ***ratified as an active participant on 19-6-1993 acceded to CEDAW and reiterated that discrimination against women violates the principles of equality of rights and respect for human dignity and it is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; it hampers the growth of the personality from society and family, making more difficult for the full development of potentialities of women in the service of the respective countries and of humanity."***
>
> *(Emphasis supplied by me)*

23. In a well researched judgment in the case of **Lance Naik/ Tailor Mohammad Farroor @ Farooq Khan Vs. Chief of the Army Staff & Ors (2016 SCC OnLine AFT 450)**, the Armed Forces Tribunal, Regional Bench, Lucknow considered the provisions of the Constitution of India and other things with respect to Triple Talaq and concluded as under:

> 134. In view o*f above, we conclude our findings as under:*
>
> *(i) Constitution is the mother of all law and has overriding effect over Personal Law as well as other provisions, practices or usage which offend the constitutional right of persons, collectively or individually.*
>
> *(ii) Nikah (supra) is based on offer and acceptance between man and woman. Unless both agree, there cannot be Nikah. On the same analogy, declaration of talaq or divorce by the husband must be done in the presence of the woman, i.e. the wife, and only in case both agree, talaq would be executed. In the event of disagreement, the option left is to file a Regular Suit for divorce wherein the Court may look into the grounds of both the parties and may accept or refuse the grant of talaq keeping in view the factual matrix on record.*
>
> *(iii) The sweep of Articles 14 and 21 of the Constitution covering rationality and fairness along with dignity and quality of life shall override the right conferred by Articles 25 and 26 of*

the Constitution. No lady can be compelled to marry again in case she wants to marry her husband again after talaq as a condition to marry another person before remarriage with earlier husband is humiliating and against the dignity of a lady protected by Article 21 of the Constitution and constitute offence (supra)

(iv) Under the Muslim Law, marriage is a contract and contract cannot be rescinded unilaterally Personal Law or Constitution of India does not entitle the husband to rescind contract, orally, by notice or by ex parte decisions, hence seems to be unsustainable, otherwise also it shall be bad in law.

(v) In appropriate case, a person may be charged under the Penal Code (supra) for abusing his position as husband whether it is for the purpose of divorce or remarriage.

(vi) Under the garb of Personal Law, individual or collective rights of the citizens protected by Part III (Articles 14 and 21) of the Constitution of India may not infringed

(vii) It is duty of the Government as well as the Court to protect fundamental rights of the citizens which includes compliance of principles of natural justice affecting civil rights, quality, dignity and other facets of life necessary for human living.

(viii) Fundamental rights (Articles 14, 15, 16, 21 and 22) have got overriding effect over Articles 25 and 26 and Personal Law; either it is Hindu or Muslim or any religion. No person can be persecuted, tortured, humiliated or dishonoured in the garb of Personal Law. Nothing can be done which may affect dignity and quality of life of man or woman under the garb of Personal Law.

(ix) In none of the cases on behalf of the applicant or by the parties this point has been considered that Personal Law, usage or custom in case detrimental to fundamental rights or statutory mandate guaranteed by Part III of the Constitution may not be lawful. It is un-Islamic, inhuman and unconstitutional.

(x) Declaration of oral triple talaq by ex parte proceedings, action or otherwise may not be given force by Government machinery or the courts while dealing with the subject matter

being contrary to constitutional ethos, particularly Part III of the Constitution.

(xi) Order passed by the Army authorities for grant of maintenance to respondent No 6 in pursuance to power conferred by Section 96 of the Army Act, 1954 read with Army Orders is perfectly within jurisdiction and calls for no interference.

(xii) Women of every religion of the country are protected by Constitution of India and no person has right to go against constitutional spirit in the shadow of Personal Law. The method and manner of worship of God Almighty or the Prophet is the pith and substance of every religion. It may not be interfered by the courts subject to conditions flowing from Articles 25 and 26 of the Constitution. But so far as custom, tradition or usage is concerned, it may be interfered in case it is violative of fundamental rights guaranteed by Part III (Articles 14 and 21) of the Constitution.

24. In **Maneka Gandhi Vs. Union of India (1978) 1 SCC 248** and also in the case of **Olga Tellies Vs. Bombay Municipal Corporation (1985) 3 SCC 545**, Hon'ble Supreme Court held that the concept of right to life and personal liberty, granted under Article 21 of the Constitution could include “the right to live with dignity”.

25. **Concept of equality enshrined in Article 14, concept of non discrimination on the ground of sex etc. enshrined in Article 15(2) and the concept of right to life and personal liberty which includes the right to live with dignity as enshrined in Article 21 read with preamble of the Constitution, are the foundation and the basic features of the Constitution. Breach of any of these, by any law or practice, shall render such law or practice to be unconstitutional.** Whether it is collective right of citizens or individual right, both are protected by philosophy and ethos of the Constitution. In the garb of Personal Law, citizens cannot be deprived constitutional protection.

The equality clause is not merely the equality before the law but embodies the concept of real and substantive equality which strikes at the inequalities arising on account of vast social and economic differentiation. Horizons of the constitutional law are expanding. The right to life and personal liberty under Article 21 of the Constitution, has been expanded by Hon'ble Supreme Court in the case of Chameli Singh Vs. State of U.p. 1995 (Supp) 3 SCC 523 by declaring that **decent and civilized life is fundamental right** which also includes food, wather and decent environment. In Francis Coralie vs. Union Territory 1981 (1) SCC 608 while interpreting Article 21 of the Constitution of India, Hon'ble Supreme Court held that **the right to life includes the right to live with human dignity** and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. **The right to life or personal liberty under Article 21 of the Constitution enlarge its sweep to encompass human personality in its full blossom.** It includes right to livelihood, better standard of living, hygienic conditions in the work place and leisure. In Ghisalal (supra), Hon'ble Supreme Court held that mandate of wife's consent for adoption and conferring independent right upon a female Hindu to adopt a child, Parliament sought to achieve one of the facets of the goal of equality enshrined in the Preamble and reflected in Article 14 read with Article 15 of the Constitution.

26. In **Voluntary Health Association of Punjab (supra),** Hon'ble Supreme Court held that woman has to be regarded as an equal partner in the life of a man. **A society that does not respect its women, cannot be treated to be civilized. Civilization of a country is**

known how it respects its women. It is the requisite of the present day that people are made aware that it is obligatory to treat the women with respect and dignity so that humanism in its conceptual essentiality remains alive.

27. In **Valsamma Paul (supra),** Hon'ble Supreme Court held that **all forms of discrimination on ground of gender is violates of fundamental freedom and human rights.** It was further observed that Convention for Elimination of all forms of Discrimination Against Women (for short, "CEDAW") was ratified by the U.N.O. On 18.12.1979 and the Government of India had ratified as an active participant on 19.061993 acceded to CEDAW and reiterated that **discrimination against women violates the principles of equality of rights and respect for human dignity** and it is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; it hampers the growth of the personality from society and family, making more difficult for the full development of potentialities of women in the service of the respective countries and of humanity. **Lord Denning in his book "Due Process of Law" has observed that a woman has as much right to her freedom that develop her personality to the full that as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals. Charles Fourier** had stated "The extension of women's rights is the basic principle of all social progress". **Lance Naik/ Tailor Mohammad Faroor @ Farooq Khan (supra)**, it has been held that Nikah is based on offer and acceptance between man and woman. Unless both agree, there cannot be Nikah.

On the same analogy, declaration of talaq or divorce by the husband must be done in the presence of the woman, i.e. the wife, and only in case both agree, talaq would be executed. In the event of disagreement, the option left is to file a Regular Suit for divorce wherein the Court may look into the grounds of both the parties and may accept or refuse the grant of talaq keeping in view the factual matrix on record. In view of Articles 14 and 21 of the Constitution, no lady can be compelled to marry with another person first, in case she wants to marry her earlier husband again after 'talaq'. Such a process is not only humiliating but also against the dignity of women protected by Article 21 of the Constitution. **Under the garb of Personal Law, individual or collective rights of the citizen protected by Part III (Articles 14 and 21) of the Constitution may not be influenced.**

28. The fundamental rights granted under Articles 14 and 21 of the Constitution, as aforesaid, are well available to Muslim Women too and they are entitled to live with dignity and to oppose the arbitrary and unsustainable exercise of power of Talaq by her Muslim husband merely on pronouncement of words thrice at a time, "Talaq, Talaq, Talaq" which has been allegedly done by the applicant no. 1 herein, as per his alleged intimation of Talaq to opposite party no. 2 dated 16.11.2015.

<u>Triple Talaq and Plight of Muslim Women in India:</u>

29. In Writ Petition No. 744 of 1992 decided on 27.12.2002 **(A.S. Praveen Aklhar Vs. The Union of India) 2002 SCC OnLine Mad 836** (para 21) a Division Bench of Hon'ble Madras High Court noted the argument of the petitioner reproducing a report titled **"Voice of Voiceless – Status of Muslim Women in India"** by Syeda SaiyidainHameed, a member of the National Commission for Women

which reflects to some extent the plight of Muslim Women in India as under:

> *"21. Counsel for the petitioner placed before us a report titled "Voice of the Voiceless - Status of Muslim Women in India" by Syeda Saiyidain Hameed, a member of the National Commission for Women. That report refers to Muslim women as the weakest link in the generally disempowered chain of Indian womanhood as under:*
>
> > *"Since marriage in Islam is a contract, it may be dissolved at any time. A Muslim husband of sound mind may divorce his wife whenever he so desires without assigning any reason. The presence of the wife is not even necessary for pronouncing a divorce nor any notice need be given for that purpose. The most popular form of talaq practised in India is Talaq-al-Bid'at, literally translated as "the divorce of the wrong innovation." It allows instantaneous talaq; three pronouncements in a single sitting - "1 divorce, I divorce you, I divorce you".* ***In every single of its the Public Hearings NCW found innumerable instances of triple talaq. It was pronounced by men in a single breath, without reason or warning.*** *Women were left stranded with children while the husbands having uttered the three words walked away to start a new life. In cases taken up by the Commission, the talaqs were spoken over the telephone or communicated through a postcard. …"*
> >
> > *"Muslim women too have the right to seek dissolution of marriage under the system of Khula, but this right is very rarely invoked for the simple reason that her seeking divorce would completely deprive of whatever she may get from her husband, most importantly, a place to live. This in itself is a great disincentive.* ***It is significant that during the Public Hearings not a single women raised the question of of Khula, its usefulness or the need to improve upon it and the right of women to seek it. The deponenents only expressed their anguish at the tyranny of the triple talaq, which was the single most potent cause of their devastation."*** *"The demand for dowry has never been a part of the Muslim Personal Law but its practice as a social norm has acquired oppressive*

proportions among Muslims. During the public hearings NCW found itself listening to cases of dowry related atrocities from deponents all over the country. Marriage are held up if dowry demand is not met. Cases of dowry torture, dowry death and bride burning among Muslims are found in each and every State – without exception." "The suffering and deprivations of Muslim women is largely similar to those of the poor and oppressed women of other communities.

The Public Hearings, however, brought out some important differences. All women suffer when they are divorced or deserted. The Muslim Woman, suffers not only when she is divorced or abandoned but lives her entire married life under the dread that her husband has the arbitrary power to divorce her and throw her out of the house along with the children at his slightest fancy. At any moment he may bring into the house another woman as his second, third or forth wife; the woman has to say in this regard. This burden of insecurity colours the entire life of a married Muslim woman. Sometimes she is threatened by her in-laws that a second marriage will be arranged (for more dowry or male heir) and she will either have to accept dividing her meagre resources with the second wife or be slapped with a tripe talaq. All doors are firmly shut in her face, the law, which is applicable to women of all other communities, is not for her. She must accept being on the streets after instantaneous triple talaq and taken mehr (if any) because her personal alw permits it and she must accept her husband's multiple wives because that too is part of her personal law. *As for mehr and maintenance, whereas it is equally a part of her personal law, it is hardly ever recognised as an injunction by the men, who flout it, first by getting the Qazi to insert the most nominal amount in the Nikahnama and second by refusing to pay maintenance, regardless of its compulsory status. Although "Zero maintenance" is the norm for Muslim women across the length and breadth of the country, very few voices are raised in protest against this gross violation of Personal Law."*

30. In the case of **Shamim Ara Vs. State of U.P. & Anr (2002) 7**

SCC 518 (paras 9 to 14) Hon'ble Supreme Court considered illuminating judgment of Hon'ble V. Khalid, J. in **Mohammed Haneefa Vs. Pathummal Beevi 1972 KLT 512** (para 5), illuminating judgment, virtually a research document of the eminent judge and jurist V.R. Krishna Iyer, J., in **A. Yousuf Rawther Vs. Sowramma, 1968 KLT 763** (paras 6, 7) and two other illuminating judgments of Hon'ble Guahati High Court in **Jiauddin Ahmed Vs. Mrs. Anwara Begum, (1981) 1 GUA 358** and **Must. Rukia Khatun Vs. Abdul Khalique Laskar, (1981) 1 GUA 375** and showing respectful agreement, held as under:

> *"9. In Dr. Tahir Mahmood's 'The Muslim Law of India' (Second Edition, at pp.113-19), the basic rule stated is that a Muslim husband under all schools of Muslim Law can divorce his wife by his unilateral action and without the intervention of the Court. This power is known as the power to pronounce a talaq. A few decided cases are noticed by the learned author wherein it has been held that a statement made by the husband during the course of any judicial proceedings such as in wife's suit for maintenance or restitution of conjugal rights, or the husband's plea of divorce raised in the pleadings did effect a talaq.*
>
> *10.* ***Such liberal view of talaq bringing to an end the marital relationship between Muslim spouses and heavily loaded in favour of Muslim husbands has met with criticism and strong disapproval at the hands of eminent jurists.***
>
> *11. V. Khalid, J., as His Lordship then was, observed in Mohammed Haneefa Vs. Pathummal Beevi, 1972 K.L.T. 514 para 5)*
>
> > *"…. I feel it my duty to alert public opinion towards a painful aspect that this case reveals. A Division Bench of this court, the highest court for this State, has clearly indicated the extent of the* ***unbridled power of a muslim husband to divorce his wife.*** *I am extracting below what Their Lordships have said in Pathayi v. Moideen.*

"The only condition necessary for the valid exercise of the right of divorce by a husband is that he must be a major and of sound mind at that time. He can effect divorce whenever he desires. Even if he divorces his wife under compulsion, or in jest, or in anger that is considered perfectly valid. No special form is necessary for effecting divorce under Hanafi law .. The husband can effect if by conveying to the wife that he is repudiating the alliance. It need not even be addressed to her. It takes effect the moment it comes to her knowledge."

Should muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity. The question is whether the conscience of the leaders of public opinion of the community will also be disturbed."

12. In an illuminating judgment, virtually a research document, the eminent judge and jurist V.R. Krishna Iyer, J., as His Lordship then was, has made extensive observations. The judgment is reported as A. Yousuf Rawther Vs. Sowramma, AIR 1971 Kerala 261. It would suffice for our purpose to extract and reproduce a few out of the several observations made by His Lordship:(AIR pp 264-65, paras 6-7)

6. The interpretation of a legislation, obviously intended to protect a weaker section of the community, like women, must be informed by the social perspective and purpose and, within its grammatical flexibility, must further the beneficent object. And so we must appreciate the Islamic ethos and the general sociological background which inspired the enactment of the law before locating the precise connotation of the words used in the statute.

7. ….....Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are

inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture __ law is largely the formalized and enforceable expression of a community's cultural norms __ cannot be fully understood by alien minds. ***The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions." (para 7) "It is a popular fallacy that a Muslim male enjoys, under the Quaranic Law, unbridled authority to liquidate the marriage.*** *"The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, 'if they (namely, women) obey you, then do not seek a way against them'." (Quaran IV:34). The Islamic "law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously." (para 7) "Commentators on the Quoran have rightly observed __ and this tallies with the law now administered in some Muslim countries like Iraq __ that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quoran laid down and the same misconception vitiates the law dealing with the wife's right to divorce." (para 7)* ***"After quoting from the Quoran and the Prophet, Dr. Galwash concludes that "divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting a reconciliation have failed, the parties may proceed to a dissolution of the marriage by 'Talaq'*** *or by 'Khola'. . . . . Consistently with the secular concept of marriage and divorce, the law insists that at the time of Talaq the husband must pay off the settlement debt to the wife and at the time of Kholaa she has to surrender to the husband her dower or abandon some of her rights, as compensation."*

13. There is yet another illuminating and weighty judicial opinion available in two decisions of Gauhati High Court

recorded by Baharul Islam, J. (later a Judge of the Supreme Court of India) sitting singly in Sri Jiauddin Ahmed Vs. Mrs. Anwara Begum, (1981) 1 GLR 358 and later speaking for the Division Bench in Must. Rukia Khatun Vs. Abdul Khalique Laskar, (1981) 1 GLR 375. In Jiauddin Ahmed's case a plea of previous divorce, i.e. the husband having divorced the wife on some day much previous to the date of filing of the written statement in the Court was taken and upheld. The question posed before the High Court was whether there has been valid talaq of the wife by the husband under the Muslim law? The learned Judge observed that though marriage under the Muslim law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But inspite of the sacredness of the character of the marriage-tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution. (Para 6). ***Quoting in the judgment several Holy Quranic verses and from commentaries thereon by well-recognized scholars of great eminence, the learned Judge expressed disapproval of the statement that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men, which the Holy Quran does not brook. The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters __ one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected.*** *(Para 13). In Rukia Khatun's case, the Division Bench stated that the correct law of talaq, as ordained by Holy Quran, is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay view which, in their opinion, did not lay down the correct law.*

(Emphasis supplied by me)

31. As per the prevailing understanding of “Shariah” in India, talaq is broadly categorized into 'talaq al sunnah' and 'talaq al bid'ah'. The

first form is the divorce in accordance with the Quranic procedure as explained by the Prophet. The second is a sinful innovation 'bid'ah' supposedly justified by the Caliph Umar under which a husband is authorized to repudiate his marriage by pronouncing thrice word 'talaq', in quick succession in the presence of his wife who then ceases to be his spouse with immediate effect. This situation has been totally altered by several Muslim countries of the world by reforming their laws. The Moroccan Family Court (Dooudawana) of 2004, for instance, put the husband and wife on an equal footing and states that neither of them, especially the husband, can pronounce divorce unilaterally except under judicial supervision. The Code explains and restricts the abusive arbitrary practices of the husband in exercising repudiation. It contains mechanism for reconciliation and mediation both through the family and the Judge. It invalidates irregular pronouncement of divorce by the husband. Pakistan enacted a similar legislation in 1961 namely “The Muslim Family Laws Ordinance”. Contravention of the procedure provided in the Ordinance is punishable with simple imprisonment for a term which may extend a year or with fine which may extend to Rs. 5,000/- or both. Algeria, Indonesia, Iran and Tunisia have de-recognized husband's right to unilateral divorce by legislating that all divorce must go through a court. In Turkey and Iran, both husband and wife enjoy equal rights for seeking divorce. Turkey, Indonesia, Irak, Iran and Bangladesh have legally banned one sided divorce which gave husband arbitrary powers to break marriages, while countries like Egypt, Sudan, Jordan, Tunisia, Morocco, Pakistan and Bangladesh have banned the practice of triple talaq long ago.

Fatwa on Rights, Status of Individual Muslims – Not binding:

32. In the case of **Vishwa Lochan Madan Vs. Union of India & Ors (2014) 7 SCC 707**, while considering the preamble and Articles 14, 19, 21, 25 and 26 of the Constitution, and the actions of religious institution and personal law for issuance of direction or opinions such as 'Fatwa' for violation of basic human rights Hon'ble Supreme Court held as under:

> *"13. As it is well settled,* ***the adjudication by a legal authority sanctioned by law is enforceable and binding and meant to be obeyed unless upset by an authority provided by law itself.*** *The power to adjudicate must flow from a validly made law. A person deriving benefit from the adjudication must have the right to enforce it and the person required to make provision in terms of adjudication has to comply that and on its failure consequences as provided in law is to ensue.* ***These are the fundamentals of any legal judicial system. In our opinion, the decisions of Dar-ul-Qaza or the Fatwa do not satisfy any of these requirements.*** *Dar-ul-Qaza is neither created nor sanctioned by any law made by the competent legislature. Therefore, the opinion or the Fatwa issued by Dar-ul-Qaza or for that matter anybody is not adjudication of dispute by an authority under a judicial system sanctioned by law.* ***A Qazi or Mufti has no authority or powers to impose his opinion and enforce his Fatwa on any one by any coercive method. In fact, whatever may be the status of Fatwa during Mogul or British Rule, it has no place in independent India under our Constitutional scheme. It has no legal sanction and can not be enforced by any legal process*** *either by the Dar-ul-Qaza issuing that or the person concerned or for that matter anybody.* ***The person or the body concerned may ignore it and it will not be necessary for anybody to challenge it before any court of law. It can simply be ignored. In case any person or body tries to impose it, their act would be illegal.*** *Therefore, the grievance of the petitioner that Dar- ul-Qazas and Nizam-e-Qaza are running a parallel judicial system is misconceived.*
>
> *16.* ***In our opinion, one may not object to issuance of Fatwa on a religious issue or any other issue so long it does not infringe upon the rights of individuals guaranteed under law.*** *Fatwa may be issued in respect of issues concerning the community at large at the instance of a stranger but if a Fatwa*

is sought by a complete stranger on an issue not concerning the community at large but individual, than the Darul-Qaza or for that matter anybody may consider the desirability of giving any response and while considering it should not be completely unmindful of the motivation behind the Fatwa. Having regard to the fact that a Fatwa has the potential of causing immense devastation, we feel impelled to add a word of caution. We would like to advise the Dar-ul-Qaza or for that matter anybody not to give any response or issue Fatwa concerning an individual, unless asked for by the person involved or the person having direct interest in the matter. However, in a case the person involved or the person directly interested or likely to be affected being incapacitated, by any person having some interest in the matter. ***Issuance of Fatwa on rights, status and obligation of individual Muslim, in our opinion, would not be permissible, unless asked for by the person concerned or in case of incapacity, by the person interested.*** *Fatwas touching upon the rights of an individual at the instance of rank strangers may cause irreparable damage and therefore, would be absolutely uncalled for. It shall be in violation of basic human rights. It cannot be used to punish innocent. No religion including Islam punishes the innocent.* ***Religion cannot be allowed to be merciless to the victim. Faith cannot be used as dehumanising force.***

17. In the light of what we have observed above, the prayer made by the petitioner in the terms sought for cannot be granted. However, we observe that no Dar-ul-Qazas or for that matter, any body or institution by any name, shall give verdict or issue Fatwa touching upon the rights, status and obligation, of an individual unless such an individual has asked for it. In the case of incapacity of such an individual, any person interested in the welfare of such person may be permitted to represent the cause of concerned individual. ***In any event, the decision or the Fatwa issued by whatever body being not emanating from any judicial system recognised by law, it is not binding on anyone including the person, who had asked for it. Further, such an adjudication or Fatwa does not have a force of law and, therefore, cannot be enforced by any process using coercive method. Any person trying to enforce that by any method shall be illegal and has to be dealt with in accordance with law."***

(Emphasis supplied by me)

33. In the case of **Smt. Sarla Mudgal Vs. Union of India (1995) 3 SCC 635**, Hon'ble Supreme Court has judicially noticed it being acclaimed in the United States of America that the practice of Polygamy is injurious to "public morals", even though some religion may make it obligatory or desirable for its followers. The Court said that Polygamy can be superseded by the State just as it can prohibit human sacrifice or the practice of "Suttee" in the interest of public order. **The personal law operates under the authority of legislation and not under the religion and therefore, the personal law can always be superseded by legislation**.

34. In the case of **Javed & Ors Vs. State of Haryana & Ors (2003) 8 SCC 369**, Hon'ble Supreme Court has referred to the aforesaid proposition of law in the case of **Sarla Mudgal (supra)** referred with approval, the law laid down by this Court in **Badruddin Vs. Aisha Begam, 1957 ALJ 300** and the law laid down by Gujarat High Court in **Smt. R.A. Pathan Vs. Director of Technical Education & Ors. - 1981 (22) Guj. LR 289** and held as under:

> *"55. **In Badruddin Vs. Aisha Begam, 1957 ALJ 300, the Allahabad High Court ruled 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 the right to profess, practise and propagate religion and does not involve any violation of Article 25 of the Constitution.***
>
> *58. The law has been correctly stated by the High Court of Allahabad, Bombay and Gujarat, in the cases cited hereinabove and we record our respectful approval thereof. The principles stated therein are applicable to all religions practised by whichever religious groups and sects in India."*

(Emphasis supplied by me)

Scope of interference under Section 482 Cr.P.C.

35. The jurisdiction under Section 482 Cr.P.C. is very wide but it has to be exercise sparingly, carefully and with caution and only when such exercise is justified by the tests laid down in the Section itself. Reference in this regard may be had to the judgments of Hon'ble Supreme Court in the case of **R.P. Kapur Vs. State of Punjab AIR 1960 SC 866, State of Punjab Vs. Kasturi Lal (2004) 12 SCC 195, Dr. Monika Kumar & Anr Vs. State of U.P. & Ors (2008) 8 SCC 81, State of Haryana & Ors Vs. Bhajan Lal & Ors AIR 1992 SC 604, Som Mittal Vs. Government of Karnataka AIR 2008 SC 1528 (2008) 3 SCC 574 (paras 7, 8 & 9)**.

36. The jurisdiction under Section 482 Cr.P.C. cannot be exercised by the High Court to embark upon an enquiry whether the allegations in the complaint were likely to be established by evidence or not or whether the evidences in question are reliable or not or whether on a reasonable apprehension of it, accusation would not be sustained. These principles are supported by the law laid down by Hon'ble Supreme Court in the case of **State of Bihar Vs. Murad Ali Khan AIR 1989 SC 1.**

37. In application under Section 482 Cr.P.C., there would be justification for interference to quash the proceedings only when complaint did not disclose any offence or was frivolous, vexatious or oppressive. On this legal principle, reference may be had to the judgments of Hon'ble Supreme Court in the cases of **Dhanalakshmi Vs. R. Prasanna Kumar & Ors AIR 1990 SC 494: 1990 (Supp) SCC 686, Ganesh Narayan Hegde Vs. S. Bangarappa & Ors**

(1995) 4 SCC 41 (para 14, 16, 17), CBI Vs. Ravi Shankar Srivastava & Anr (2006) 7 SCC 188 (para 7, 9, 10). Hon'ble Supreme Court has also laid down the law that allegation of malafide against the informant is of no consequence and cannot by themselves, be the basis to quash the proceedings, vide **State of Orissa & Anr Vs. Saroj Kumar Sahoo (2005) 13 SCC 540** (paras 11 to 17)**, State of Karnataka Vs. M. Devendrappa & Anr (2002) 3 SCC 89** (paras 8, 9). In the case of **M. Vishwanathan Vs. S.K. Tiles and Potteries P. Ltd. & Ors. (2008) 16 SCC 390** (para 13), Hon'ble Supreme Court has held that High Court was not justified to quash the proceedings on the ground that some civil dispute is going on between the parties. In the case of **Iridium India Telecom Limited Vs. Motorola Incorporated & Ors (2011) 1 SCC 74** (para 78) Hon'ble Supreme Court held that High Court has no jurisdiction to examine the basis of allegation. The High Court has no authority or jurisdiction to go into the matter or examine its correctness. The allegation in the complaint will have to be accepted on the face of it and the truth or falsity cannot be entered into by the Court at this stage. In the case of **HMT Watches Limited Vs. M.A. Abida & Anr (2015) 11 SCC 776** (Paras 10, 11), Hon'ble Supreme Court observed that defence of accused, even though appearing plausible, cannot be considered while exercising jurisdiction under Section 482 Cr.P.C. However, documents of unimpeachable character can be considered to decide about continuation of criminal proceedings or whether complaint has been filed only to harass accused. If complaint was with ulterior motive then power under Section 482 can be exercised to prevent abuse of process of court. Sometimes on the same set of facts, civil and criminal proceedings are maintainable.

38. Perusal of the complaint, the statement of the opposite party no.

2 under Section 200 Cr.P.C. and statement of witnesses under Section 202 Cr.P.C. prima-facie make out commission of offence by the applicants under Sections 498-A, 323, 504, 506 IPC and Section 3/4 Dowry Prohibition Act and as such I do not find any infirmity in the impugned summoning order dated 28.11.2016 in Complaint Case No. 2393 of 2016 (Smt. Sumaila Vs. Aaqil Jamil and others), passed by learned Addl. Chief Judicial Magistrate, Court No. 10, Agra.

39. The present application under Section 482 Cr.P.C. cannot be converted into a mini trial. Inherent power of the High Court under Section 482 Cr.P.C. envisaged three circumstances for exercising the jurisdiction , namely (I) to give effect to an order under the Cr.P.C.; (ii) to prevent abuse of process of Court and (iii) to otherwise secure the ends of justice, which I do not find in the present set of facts.

Conclusion:

40. From the above noted judgments and discussions, the position that emerges may be briefly summarized as under:

(i) A society that does not respect its women, cannot be treated to be civilized. It is the need of the present day that people are made aware that it is obligatory to treat the women with respect and dignity so that humanism in its conceptual essentiality remains alive.

(ii) All citizens including Muslim women have fundamental rights under Articles 14, 15 and 21 of the Constitution. Under the garb of Personal Law, individual or collective rights of the citizens protected by Part III of the Constitution may not be infringed.

(iii) All forms of discrimination on the ground of gender is violative of fundamental freedoms and human rights. The human rights of women and of girls are an inalianable, integral and indivisible part of universal human rights.

(iv) Talaq by a Muslim husband to his wife cannot be made in a manner which may infringe her fundamental rights guaranteed under Article 14 and 21 of part III of the Constitution.

(v) The personal law operates under the authority of legislation subject to constitutional limitation, and not under the religion. The personal law can always be superseded by legislation.

(vi) The adjudication by a legal authority sanctioned by law is enforceable and binding and meant to be obeyed unless upset by an authority of law itself. The power to adjudicate must flow from a validly made law. One may not object to issuance of 'Fatwa' on a religious issue or any other issue so long it does not infringe upon the rights of individual guaranteed under law. The **'Fatwa'** issued by whatever body not emanating from any judicial system recognized by law, is not binding on any one including the person who had asked for it.

(vii) The jurisdiction under Section 482 Cr.P.C. can be exercised to give effect to any order under the Code, or to prevent abuse of process of any court or otherwise to secure the ends of justice. While exercising jurisdiction under Section 482 Cr.P.C. the High Court would not ordinarily embark upon an inquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would

not sustain. This jurisdiction has to be exercised sparingly, carefully and with caution and only when such exercise is justified with the test specifically laid down as mentioned above. The High Court cannot embark upon an inquiry whether the allegations in the complaint are likely to be established by evidence or not or whether the evidences in question are reliable or not or whether of a reasonable apprehension of it, accusation would not be sustained. Interference under Section 482 Cr.PC. to quash the proceedings would be justified only when complaint did not disclose any offence or was frivolous, vexatious or oppression. The allegation of malafide against the informant is of no consequence and cannot by themselves, be the basis to quash the proceedings. The High Court has no jurisdiction to examine the basis of allegation or its correctness. Defence of accused, even though appearing plausible, cannot be considered while exercising jurisdiction under Section 482 Cr.P.C. However, documents of unimpeachable character can be considered to decide about continuation of criminal proceedings or whether complaint has been filed only to harass the accused. If the complaint was with ulterior motive, then power under Section 482 Cr.P.C. can be exercised to prevent abuse of process of Court.

(viii) The complaint case in question filed by the opposite party no. 2 does not satisfy any of the three tests of Section 482 Cr.P.C. Perusal of the complaint, the statement of the opposite party no. 2 recorded under Section 200 Cr.P.C. and the statement of witnesses recorded under Section 202 Cr.P., prima-facie make out commission of offences by the applicants under Sections 498-A, 323, 504, 506 IPC and Section 3/4 Dowry

Prohibition Act and as such I do not find any infirmity in the impugned summoning order dated 28.11.2016 in Complaint Case No. 2393 of 2016 (Smt. Sumaila Vs. Aaqil Jamil and others), passed by the learned Addl. Chief Judicial Magistrate, Court No. 10, Agra.

41. In view of the above discussion, since prima-facie commission of offence is made out, as aforesaid, and as such I do not find any good reason to interfere with the impugned summoning order or the impugned proceedings. Consequently, the submissions made by learned counsel for the applicants and the relief sought in this application, deserve to be rejected.

42. In view of the aforesaid, the application fails and is hereby **dismissed**.

Order Date :- 19.4.2017
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