IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SUO MOTU WRIT PETITION (CIVIL) NO. 2 OF 2015

IN THE MATTER OF:

In Re: Muslim Women's Quest for Equality …Petitioner

VERSUS

Jamiat Ulama-i-Hind & others …Respondents

AND
IN THE MATTER OF :-

WRIT PETITION (CIVIL) NO. 118 OF 2016

Shayara Bano … Petitioner

VERSUS

Union of India & others …Respondents

WRITTEN SUBMISSIONS FOR SURREJOINDER BY MR. KAPIL SIBAL, SENIOR ADVOCATE

FILED BY:
Ejaz Maqbool, Advocate for the Respondent No.3 in Suo Motu Writ Petition (Civil) No.2 of 2015 and Respondent No.8 in Writ Petition (Civil) No.118 of 2016

WRITTEN SUBMISSIONS ON BEHALF OF MR. KAPIL SIBAL, SR. ADVOCATE

SUBMISSIONS QUA THE CONTENTION OF MR. MUKUL ROHATGI, LEARNED ATTORNEY GENERAL FOR INDIA

1. The principles of "constitutional morality" are enshrined in Part III of the Constitution. The rule of law, fundamental to democracy, requires all principles of "constitutional morality" enforced through permissible constitutional processes.

2. The permissible constitutional route with reference to Article 25 is for the legislature to frame a law under Article 25(2) (a) or (b). The provisions of such a legislation could then be tested on the principles of "constitutional morality" as canvassed by the Union of India.

3. Article 25 entitles individuals to freedom of conscience and the right to freely profess, practice and propagate their religion. *Sri Venkataramana Devaru* v. *State of Mysore*, 1958 SCR 895 Vol II Tab 25.

4. This in fact entitles a wife to contend that accepting triple *talaq* pronounced at one time by the husband is consistent with the right conferred on her by Article 25(1) and that such a right is fully protected.

5. The State, however, is entitled under Article 25(2) (b) to make any law providing for social welfare and reform. The constitutionality of such a law will then be tested.

6. Article 25(2)(a), however, allows the State to make a law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.

7. Pronouncing triple *talaq* at one time is neither an economic, nor a financial, nor political not any other secular activity. Consequently, the question of whether this is an essential religious practice or not will never arise in the context of Article 25(2)(a).

8. *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat*, (2005) 8 SCC 534 Vol XII Tab 131 deals with a law relating to ban of slaughter of bovine animals which was challenged but the ground in relation to the ban impacting an essential religious practice was not dealt with. The ban was upheld as it was found to be legitimate under Article 19(6) of the Constitution.

9. The judgement in *M. Ismail Faruqui* v. *Union of India*, (1994) 6 SCC 360 Vol VII Tab 19 related to a Presidential Reference with respect to the vesting of land at Ayodhya. The Court declined to answer the Reference. The facts of the case have no bearing on the issues arising before the Court in this hearing. The Court merely in para 77 set out the meaning of Article 25 and nothing more.

10. *Commissioner of Police* v. *Acharya Jagdishwaranda*, (2012) 4 SCC 770 Vol XI Tab 127 related to *Anand Margis* claiming that *tandav* dance at a public place was an essential religious practice which was illegally sought to be regulated by the State of West Bengal by virtue of the order of the Commissioner. The Court ultimately decided that the *Anand Margi* sect was seeking to reopen an issue which had already been decided by the Supreme Court holding that *tandav* dance with skulls, snakes and tridents was not an essential practice. However, the Court allowed *tandav* dance to take place subject to regulatory measures set out in the judgement.

11. None of the above three cases relate to the facts of our case. There is no law or government order which has been passed in the context of Article 25 requiring the Court to render any decision.

Submissions qua the contention of Ms. Indira Jaising, Sr. Advocate

12. That part of personal law which is statutory is family law. Consequently, all personal law which is non-statutory continues to be personal law.

13. Entry 5 of List III of the Constitution in fact sets out the ambit of personal law qua which Parliament and State legislatures are entitled to legislate. The personal law of a community is protected in the absence of a legislative enactment.

14. Personal laws cannot be challenged under Article 14 for the reason that the said Article deals with State action.

15. Law in force under Article 372 merely clarifies that apart from the existing laws which continue after coming into force of the Constitution in the absence of alteration or repeal, judgements rendered by Courts with reference to the Common Law will also be valid after the coming into force of the Constitution. *Superintendent & Legal Remembrancer, State of West Bengal* versus *Corporation of Calcutta 1967 (2) SCR 1970,* Volume – *III Tab 51.*

16. This however, is subject to the other provisions of the Constitution and Article 13 of the Constitution also starts with the phrase "unless the context otherwise requires". Clearly, therefore, judgements rendered under common law are valid but cannot be tested on the anvil of Part III of the Constitution.

17. The judgement of the Privy Council in *Rashid Ahmed* v. *Anisa Khatun,* AIR 1932 PC 25 Vol I Tab 5 enunciates the law that triple *talaq* is valid. Such a judgment would be valid under Article 372 unless set aside by this Court. But it cannot *ipso facto* be tested on the ground that it violates Articles 14, 19 or 21 of the Constitution.

18. *Charu Khurana* v. *Union of India*, (2015) 10 SCC 1 Vol XVII Tab 170 relates to the bye-laws of a trade union registered under the Trade Unions Act, which disentitled women to be members of the Cine Costume Makeup Artists And Hairdressers Association. Clearly, the rule was discriminatory and therefore the challenge was upheld. This too has no bearing on the issues to be decided by this Hon'ble Court.

19. Reliance on *Sri Venkataramana Devaru* v. *State of Mysore*, 1958 SCR 895 Vol II Tab 25 is entirely misplaced because that judgement relates to the Madras Temple Entry Authorization Act, 1947 under which the excluded classes were given the right consistent with Article 25(1) of the Constitution to enter the temple which was sought to be negated by the temple authorities being a religious denomination under Article 26(b). The Court enforced the right of the excluded classes, as being a fundamental right of the individual to practice and propagate his/her religion which would override the right of the denomination to exclude the right to worship of the excluded classes under Article 26(b). In this context, the Court relied on Article 17 of the Constitution as well.