

## IN THE SUPREME COURT OF INDIA

W.P (CIVIL) 118 OF 2016

IN THE MATTER OF:

SHAYARA BANO

PETITIONER

VERSUS

UNION OF INDIA &amp; ORS.

RESPONDENTS

WRITTEN SUBMISSIONS ON BEHALF OF RESPONDENT NO. 9- MS.

ZAKIA SOMAN

**A. Meaning and Types of Divorce under Muslim Personal Law**

1. Under Islamic Law Divorce is of primarily three types. *Talaq*, which comprises of modes of divorce at the instance of husband. *Khula*, which is divorce at the instance of the wife and third is *Mubarat*, which is mutual consent divorce. *Talaq* itself is of three types. These are *Talaq Ahsan and Talaq Hasan*, both of which are approved by the Quran and Hadith and the third type which is *Talaq-i-Bidat*, which is neither recognized by the Quran nor the Hadith. The present petitions are concerned exclusively with the third of these three sub-sets of talaq, which is *talaq-i bidat*.
2. A short explanation of the three types of talaq as per Mulla's Mohammedan Law, Section 311 as also Fyzee's Muslim Law is as follows:
  - a. ***Talaq-i-Ahsan***
3. *Ahsan* is a single pronouncement of *talaq* by the husband followed by a period of abstinence for the *iddat* period. *Iddat period* is equivalent to 90 days- i.e. three menstrual courses in case the wife is menstruating

or three lunar months in case she is not. If there is resumption of cohabitation or intimacy within that period, the divorce is revoked. If there is no resumption, then the divorce becomes final on expiry of *iddat*/90 days.

**b. *Talaq-i-Hasan***

4. *Hasan* arises if, after the first pronouncement as above, there is resumption of cohabitation within that month or a revocation. The first *talaq* is thereby revoked. Yet, after such intimacy, if during the second month there has been no intimacy the husband pronounces another '*talaq*'. For the divorce to attain finality this is not sufficient-a further month has to pass and a third *talaq* has to be pronounced whether during or after the *iddat*. If after the third *talaq* is not pronounced- or there is resumption of cohabitation before the third *talaq* is pronounced, whether during or after *iddat*/three months, the divorce does not come into force. However, if the third *talaq* is pronounced the divorce is irrevocable. In sum *Ahsan* is one pronouncement of *talaq* followed by abstinence thereafter during *iddat*, whereas *Hasan* is three pronouncement one-each in three successive months interspersed with abstinence.

**c. *Talaq-i-bidaat***

5. *Talaq bid'a/ bidaat* (innovated or not approved is instantaneous divorce). This form is not permitted by either the *Quran* the *Hadith* and is in fact contrary to *quranic* prescriptions. This practice can be traced to 2<sup>nd</sup> Century after the advent of Islam and is sought to be recognized only by few Sunni schools- the Hanafis most prominently. Even these

schools that seek to recognize it, claim it as a sinful form of divorce and seek to justify it on the ground that “it is bad in theology but good in law”. *Talaq-i-bidat* is also of two kinds- Uttered in one definitive *talaq* pronouncement such as “*I talaq you irrevocably*” or three simultaneous pronouncements i.e. “*talaq, talaq, talaq*” at one go, the divorce is said to be effected instantaneously and irrevocably. While both the types of *talaq-i-bidat* are colloquially referred to as *triple talaq*, the same is a misnomer because of two reasons. First, because *Talaq-i-bidat* can be effected by either three pronouncements or one pronouncement, as explained above. Second, because even *Talaq Hasan* has three pronouncements, the difference being that in case of *Talaq Hasan* these three pronouncements are interspersed in three 30 days periods, over a total of 90 days. Thus, the correct terminology for *Talaq-i-bidat* is instantaneous *talaq* and not *triple talaq*, which is a misnomer.

## **B. Judicial History of Meaning and Validity of Instantaneous *Talaq* in India.**

6. In fact, the introduction of instantaneous *talaq* as a valid form of *talaq* in personal law applicable to Indian Muslims was on account of the acceptance of this concept by certain courts in British India, without fully examining the Koran or Hadith. These courts accepted instantaneous *talaq* on the ground that certain schools considered it “bad in theology but good in law”. **Kindly See: *Rashid Ahmed v Anisa Khatun, (1932) 59 IA 31 (Privy Council)***
7. After the adoption of the Constitution in India, various High Courts have considered this aspect of whether this understanding, that instantaneous *talaq* is “bad in theology but good in law” is acceptable

in light of the *quranic* injunctions and *hadiths* and have also reassessed the whole concept of instantaneous *talaq* as also divorce generally under Muslim Personal Law. One of the earliest such decisions was **A. Yusuf Rather v. Sowramma, AIR 1971 Ker 261**, wherein in the context of *Khula* (divorce at the instance of wife) Krishna Iyer J. questioned some of the views taken by British Courts on Muslim personal law, as being based on an incorrect understanding of Muslim Personal Law. It was observed as follows:

*"7. There has been considerable argument at the bar -- and precedents have been piled up by each side -- as to the meaning to be given to the expression 'failed to provide for her maintenance' and about the grounds recognised as valid for dissolution under Muslim law. 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 formalised 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.... 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." As the learned author, Ahmad A. Galwash notices, the pagan Arab, before the time of the Prophet, was absolutely free to repudiate his wife whenever it suited his whim, but when the Prophet came He declared divorce to be "the most disliked of lawful things in the sight of God. He was indeed never tired of expressing his abhorrence of divorce. Once he said: 'God created not anything on the face of the earth which He loveth more than the act of manumission. (of slaves) nor did He create anything on the face of the earth which he detesteth more than the act of divorce". 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.*” (Emphasis Supplied)

8. Subsequently, in two different judgments of Guwahati High Court, after detailed examination of the Quranic verses, it has been held that capricious and arbitrary unilateral divorce by a Muslim male in the form of *talaq-i-bidat* is not permissible under Muslim Personal Law. In ***Jiauddin Ahmed v. Anwara Begum, (1981) 1 GLR 358***, Baharul Islam J., sitting then as a Single Judge of the High Court held as follows:

*“13. A perusal of the Quranic verses quoted above and the commentaries thereon by well-recognized Scholars of great eminence like Mahammad Ali and Yusuf Ali and the pronouncements of great jurists like Ameer Ali and Fyzee completely rule out the observation of Macnaghten that "there is no occasion for any particular cause for divorce, and mere whim is sufficient", and the observation of Batchelor, J. (ILR 30 Bom. 537) that "the whimsical and capricious divorce by the husband is good in law, though bad in theology". These observations have been based on the concept that women were chattel belonging to men, which the Holy Quran does not brook, Costello, J. in 59 Calcutta 833 has not, with respect, laid down the correct law of talaq. In my view 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 the other from the husband's. If the attempts fail, talaq may be effected.*

*14. The modern trend of thinking is to put restrictions on the caprice and whim of the husband to give talaq to his wife at any time without giving any reason whatsoever. This trend is in accordance with the Quranic injunction noticed above, namely, that normally there should be avoidance of divorce, and if the relationship between the husband and the wife becomes strained, two persons-one from each of the parties should be chosen as arbiters who will attempt to effect reconciliation between the husband and the wife; and if that is not possible the talaq may be effected. In other words, an attempt at reconciliation by two relations-one each of the parties, is an essential condition precedent to 'talaq'.*

9. Subsequently, in ***Musammat Rukia Khatun v. Abdul Khaliq Laskar, (1981) 1 GLR 375***, speaking for a Division Bench of the Guwahati High Court, Baharul Islam J held as follows:

*“11. In our opinion 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 at reconciliation between the husband and 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."*

10. A three Judge bench of this Hon'ble Court in ***Fuzlunbi v. M. Khader Ali***, (1980) 4 SCC 136 observed as follows:

*"20. Before we bid farewell to Fazlunbi it is necessary to mention that Chief Justice Baharul Islam, in an elaborate judgment replete with quotes from the Holy Quoran, has exposed the error of early English authors and judges who dealt with talaq in Muslim Law as good even if pronounced at whim or in tantrum, and argued against the diehard view of Batchelor J. ILR 30 Bom 539 that this view 'is good in law, though bad in theology'. Maybe, when the point directly arises, the question will have to be considered by this court, but enough unto the day the evil thereof and we do not express our opinion on this question as it does not call for a decision in the present case."*

**C. Declaration of Instantaneous *Talaq* as illegal and ineffective by Indian Courts.**

11. Subsequent, to the above judgments there are two streams of decisions by this Hon'ble Court as also the various High courts that has completely clarified the legal position in respect of instantaneous talaq. One set of decisions have culminated in the decision of ***Shameem Ara v. State of U.P & Another***, (2002) 2 SCC 518, wherein this Hon'ble Court has approved the decisions of various High Courts that have held as follows in respect of all forms of divorce at the instance of the Husband, i.e. all forms of *talaq*:

- i. That a Muslim husband does not enjoy an arbitrary, unilateral power to proclaim a divorce and the same does not accord with Islamic traditions., and
- ii. That any proclamation of *talaq* must be for a demonstrated reasonable cause, and

iii. That a *talaq* must be preceded by an attempt at reconciliation, by two arbiters, one each from the side of the married parties.

12. The above decision is applicable to all the three types of *talaq*, i.e. *Talaq-i-ahsan*, *talaq-i-hasan* and *talaq-i-bidat*. The ***Shamim Ara*** judgment settled the law that no form of Muslim *Talaq* can be considered valid if it is not proved with clarity that it was for a reasonable cause and all the preceding attempts at resolving and reconciling differences were carried out before the pronouncement was made. Further, the pronouncement itself as well as its communication to the wife required convincing proof. Subsequent assertions in pleadings of a divorce pronounced in the past as it were, was unacceptable. This ruling was by itself a guard against a spur of the moment divorce. It laid to rest the position taken by some schools that even an instantaneous *talaq* proclaimed in a state of intoxication or anger or in jest was valid.
13. To come to the above conclusion in the ***Shamim Ara Judgment***, this Hon'ble Court approved a whole range of earlier decisions of the various High Courts such as ***A. Yusuf Rawther v. Sowramma*** AIR 1971 Ker 261 (Kerala High Court), ***Rukia Khatun v. Abdul Khaliq Laskar*** (1981) 1 GLR 375 (Gauhati High Court) , ***Zeenat Fatema Rashid v. Mohd. Iqbal***, II (1993) DMC 49 (Gauhati High Court); ***Saleem Basha v. Mumtaz Begum***, 1998 Cri. LJ 4782 (Madras High Court) and ***Zulekha Begum v. Abdul Rehman***, II (2000) DMC 99 (Karnataka High Court). It was recognized that this was indeed the Quranic position as recorded in Sura IV verses 128-130 Sura II verses 229 -232 and Sura IV verse 35. Subsequent to the ***Shamim Ara*** Judgment, a whole range of other decisions have followed this position.

14. The other set of decisions have taken the issue of instantaneous *talaq* frontally, directly and exclusively. These set of decisions have held that *talaq* by the Husband in one sitting whether through a single irrevocable pronouncement or through three simultaneous pronouncements does not have the effect of granting divorce to the wife.
15. In ***Masroor Ahmed v. State (NCT of Delhi), 2008 (103) DRJ 137***, the High Court of Delhi (Justice Badar Durrez Ahmed) has after examining the whole conspectus of Muslim personal law and judicial decisions in this respect held as follows:

*“Sanctity and effect of Talaq-e-bidaat or triple talaq.*

*24. There is no difficulty with ahsan talaq or hasan talaq. Both have legal recognition under all fiqh schools, sunni or shia. The difficulty lies with triple talaq which is classed as bidaat (an innovation). Generally speaking, the shia schools do not recognise triple talaq as bringing about a valid divorce. There is, however, difference of opinion even within the sunni schools as to whether the triple talaq should be treated as three talaqs, irrevocably bringing to an end the marital relationship or as one rajai (revocable) talaq, operating in much the same way as an ahsan talaq.*

*25. When a difference of opinion is discernible within a particular school, normally the dominant opinion is taken as representative of the school. But, this does not mean that a qazi, when required to render a decision in a specific case, cannot, in the interest of justice and equity, adopt the view of the minority within the school. It is also interesting to note that traditionally the qazi gave the ruling based upon the school which he followed. So, if he was a follower of the hanafi school he decided cases on the basis of hanafi fiqh. Consequently, if a dispute were to be brought to a qazi who followed shafei fiqh he would decide according to shafei precepts. In India, the secular courts while applying muslim law to muslims in accordance with Section 2 of the 1937 Act have adopted the principle of applying the fiqh to which the parties belong. Meaning thereby, that hanafi principles would be applied to adherents of the hanafi school and ithna ashari law to ithna asharis and so on. This, however, has not been strictly followed, perhaps in ignorance. Clearly, a qazi or a judge is permitted to apply a minority view within a school of fiqh to adherents of that school. He is also permitted to apply a view taken by a school of law of which the parties are not members of. This can be done in the interest of justice and equity and to avoid hardship to any one or both the parties provided, of course, that what the judge proposes to do is not contrary to a basic tenet of Islam or the Quran or a ruling or saying or act of prophet Muhammad.*

26. *It is accepted by all schools of law that talaq-e-bidaat is sinful. Yet some schools regard it as valid. Courts in India have also held it to be valid. The expression - bad in theology but valid in law - is often used in this context. The fact remains that it is considered to be sinful. It was deprecated by prophet Muhammad. It is definitely not recommended or even approved by any school. It is not even considered to be a valid divorce by shia schools. There are views even amongst the sunni schools that the triple talaq pronounced in one go would not be regarded as three talaqs but only as one. Judicial notice can be taken of the fact that the harsh abruptness of triple talaq has brought about extreme misery to the divorced women and even to the men who are left with no chance to undo the wrong or any scope to bring about a reconciliation. It is an innovation which may have served a purpose at a particular point of time in history but, if it is rooted out such a move would not be contrary to any basic tenet of Islam or the Quran or any ruling of the Prophet Muhammad.*

27. In this background, I would hold that a triple talaq (talaq-e-bidaat), even for sunni muslims be regarded as one revocable talaq. This would enable the husband to have time to think and to have ample opportunity to revoke the same during the iddat period. All this while, family members of the spouses could make sincere efforts at bringing about a reconciliation. Moreover, even if the iddat period expires and the talaq can no longer be revoked as a consequence of it, the estranged couple still has an opportunity to re-enter matrimony by contracting a fresh nikah on fresh terms of mahr etc.”

16. Thus, as per the above decision, *talaq-i-bidaat* will have the same effect as *talaq ahsan* and thus has lost its instantaneous nature, as also its irrevocable nature. Thus, even when instantaneous *talaq* is pronounced it will not immediately effect divorce and operate only as *talaq-i-ahsan*, which is reasonable and not even under challenge in the present proceedings.

17. Similarly, in a recent decision **Nazeer v. Shemeema, (2017) 1 KLT 300** it has been held as follows:

*“11. Triple talaq as practiced in India had its beginning during the period of second Caliph Umar. During his period, certain women complained of action of their husbands pronouncing three talaqs in haste and treated it as single divorce for an excuse to take back the wife. Considering the rampant misuse of talaq, and its oppressive character, with an intention to put an end to the practice of taking back wives in a triple talaq pronounced in haste, by executive decision, Caliph Umar ordered that such talaq is irrevocable. In English Tafsir of Sayyid Abdul Ala Maududi discussed this practice in Chapter 65.....*

...A renowned Islamic scholar in India Moulana Wahidul Khan in his Urdu Book *Hikmatul Islam* refers to this practice allowing triple talaq by Caliph Umar.

This pragmatic method of divorce was followed in the early period of Islam. But towards the end of the period of the first Caliph, Hazrat Abu Bakr, some men, out of anger, began issuing three utterances of divorce in one sitting. At this time, this practice was an exception, but by the time of the latter half of the period of the Caliphate of Hazrat Umar, the second Caliph, it had become increasingly common.

In the face of this, and in his capacity as Caliph, Hazrat Umar decided to take action against this misuse of the law. Hence, in the case of some men he accepted their issuing three utterances of divorce in one sitting as constituting an irrevocable divorce. But along with this he also arranged for these men to be physically punished by being whipped on their backs.

This practice of Hazrat Umar was not based on any divine revelation. Rather, it was his own executive order, the intention behind- which was to lessen, through stern punishment, such a form of divorce. And this is precisely what happened as a result. (Translation: Yoginder Singh - *Islamic Voice* Dec. 2008).

Dr. Thahir Mahmood in *Muslim Law in India and Abroad* also refers to this aspect as follows: (P. 132).

"There is no verse in the Qur'an that can be interpreted or stretched to mean approval of the so-called triple talaq. As regards the Hadith, the Prophet was infuriated when somebody pronounced triple talaq and had condemned it as "Playing with the book of God while I am still Alive".

Years after the Prophet's demise his second Caliph, Umar, gave effect to triple talaq in some cases at the insistence of the wives, but after inflicting on the husband the traditional punishment of flogging. It is shocking that his action should have been treated as a binding precedent for giving effect to such an unlawful and repulsive action in every case, even against the wishes of a repentant husband and the aggrieved wife."

Thus from a conspectus of understanding of Islamic law as above, it can be found that:

(i) Triple talaq in one utterance is not valid according to Qur'anic injunction.

(ii) It was allowed during the period of Caliph Umar by an executive order to alleviate the grievances of the women and not as a right to conferred upon the husband. This executive action was exercised in a specified time in a special circumstances and therefore, it cannot apply as the general law regarding divorce by the husband.

(iii) Violation of Qur'anic injunction regarding triple talaq in one utterance is punishable under penal law. (Emphasis Supplied)

18. Following the logic of the two abovementioned streams of judgments, the following judgments have also upheld the legal position that an instantaneous *talaq* does not constitute a valid *talaq* under Muslim law ***Dagdu Pathan v. Rahimbee Dagdu Pathan*** (2002) 3 ALL MR 365 (Full Bench of Bombay High Court); ***A.S. Parveen Akhter v. Union of India & Ors.*** 2003-1-LW-370 (Madras High Court), ***Najmunbee v. Sk. Sikander Sk. Rehman***, (I 2004) DMC 211- Bombay High Court; ***Mustari Begum v. Mirza Mustaque Baig***, (II (2005) DMC 94-the Orissa High Court; ***Shahzad v. Anisa Bee***,(II (2006) DMC 229) and ***Farida Bano v. Kamruddin***,(II (2006) DMC 698 MP)- Madhya Pradesh High Court; ***Gama Nisha v. Chottu Mian***, (II (2008) DMC 472) -Jharkhand High Court; ***Mariyan Akhter & Anr. v. Wazeer Mohd.***, (2010) 4 JKJ 13 (Jammu & Kashmir High Court); ***M. Mohd. Ibrahim v. M. Inul Marliya***, MANU/TN/3111/2015 (Madras High Court), ***Mohd. Naseem Bhatt v. Bilquis Akhter***, (2016) 1 JKJ 312 (Jammu & Kashmir High Court), ***Shakil Ahmad Jalaluddin Shaikh v. Vahida Shakil Shaikh***, (MANU/MH/0501/2016)- the Bombay High Court.
19. The upshot of these decisions is that by a purely interpretative exercise, the courts in India have already rendered instantaneous *talaq* in one sitting as ineffective. When read along with the *Shamim Ara* line of judgments, the clear and crisp legal position that emerges is that.

- a) The unilateral pronouncement of *talaq* in one sitting either through single irrevocable pronouncement or through three repetitions of the word *talaq* does not have the effect of granting divorce.
- b) Even if three *talaqs* are pronounced at one time they must be treated as a single revocable *talaq* which can be revoked during the mandatory *iddat* period of three lunar months;
- c) That any proclamation of *talaq* must be for a demonstrated reasonable cause
- d) That a *talaq* must be preceded by an attempt at reconciliation, by two arbiters, one each from the side of the married parties.
20. It is, therefore, the submission of the present Respondent before this Hon'ble Court that the above legal position that clearly emerges is fit for adoption and declaration by this Hon'ble Court as it renders instantaneous *talaq* and its arbitrary nature ineffective and is also fully consistent with the constitutional provisions. In fact, Section 2 of the Sharia Application Act, 1937 reads as follows:

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

As per the above provisions, sharia is the overriding rule of decision applicable to muslim marriages. A declaration by this Hon'ble Court that this applicable rule of decision does not permit instantaneous talaq is

sufficient for the decision of the present case and would have the automatic effect of rendering illegal instantaneous talaqs amongst all muslims in India.

**D. Effect on *Nikah Halala* of declaration that instantaneous *talaq* is illegal and ineffective.**

21. The practice of *halala* is that once a divorce has been effected, the man and the woman can remarry each other only if the woman marries and consummates her marriage and divorces another man. In the recent decision of the Bombay High Court in ***Sabah Adnan Sami v Adnan Sami, AIR 2010 Bom 109*** it has been clarified that under Muslim Personal Law, the requirement of *Nikah Halala* attaches to a *Talaq* when it has been pronounced thrice, i.e. stating *talaq* three times in the *talaq-i-bidat* form or in the *talaq i hasan* form. It has been held as follows:

*“18. Thus, in our opinion, where Talak becomes irrevocable through any mode between the parties, for re-marriage between them, it is not necessary that the Halala must be observed. In other words, merely because a talak has become irrevocable, does not mean that in case of every irrevocable Talak, irrespective of its mode, for re-marriage between the same couple, it is necessary that the Halala formality must be complied with by the wife.*

*19. Where the husband has repudiated his wife by three pronouncements (Triple Talak), as provided for in the Hasan mode of Talak (See: Section 311(2)) and in Talak-i-badai by three pronouncements (See: Section 311(3)(i)), it is not lawful for him to marry her again until she remarries another man and the later divorced her or he dies after actual consummation of the marriage. In other words, in case of a Talak in the Hasan mode and a Talak in Talak-i-badai by the three pronouncements mode, remarriage is possible only if Halala is observed by the wife. A Talak in the Ahsan mode and a Talak in the Talak-i-badai by a single pronouncement mode, Halala need not be observed. Where the husband has repudiated his wife by three pronouncements, even if re-marriage between them is proved, the marriage is not valid unless it is established that the bar to remarriage by observing Halala was removed. The mere fact that the parties have remarried does not raise any presumption as to the fulfillment of Halala formality. (See: *Akhtaroon-nissa v. Shariutoollah Chowdhry (1867) 7 WR 268.*” (Emphasis Supplied)*

22. If instantaneous *talaq* is declared to have the same effect as *talaq Ahsan*, as is being sought by the applicants herein, and as has already been done by many High Courts, *Nikah halala* would automatically not attach to it and in that context *Nikah Halala* will be rendered non-applicable or otiose.

**E. Constitutionality of Personal Laws need not be gone into if the issue can be decided on other grounds.**

23. One of the settled principles applicable in all common law jurisdictions including India is that courts do not test constitutionality of laws and procedures, if the issue arising between the parties can be decided on other grounds. It is only when the relief being sought cannot be granted without going into the constitutionality of the law or provision do the courts enter the thicket of constitutionality.

24. A Constitution Bench of this Hon'ble Court refused to test the constitutionality of certain provisions and held as follows in ***State of Bihar v. Rai Bahadur & Another, AIR 1960 SC 378***

*"7. On behalf of the appellant Mr. Lal Narain Sinha has contended that the High Court was in error in holding that the proviso to s. 14A violates either Art. 20(1) or Art. 31(2) of the Constitution. He has addressed us at length in support of his case that neither of the two articles is violated by the impugned proviso. On the other hand, the learned Solicitor-General has sought to support the findings of the High Court on the said two constitutional points; and he has pressed before us as a preliminary point his argument that on a fair and reasonable construction, the proviso cannot be applied to the case of the first respondent. We would, therefore, first deal with this preliminary point. In cases where the vires of statutory provisions are challenged on Constitutional grounds, it is essential that the material facts should first be clarified and ascertained with a view to determine whether the impugned statutory provisions are attracted; if they are, the Constitutional challenge to their validity must be examined and decided. If, however, the facts admitted or proved do not attract the impugned provisions there is no occasion to decide the issue about the vires of the said provisions. Any decision on the said question would in such a case be purely academic. Courts are and should be reluctant to decide constitutional points merely as matters of academic importance."*

*“20. In view of this conclusion it is unnecessary to consider the objections raised by the first respondent against the validity of the proviso on the ground that it contravenes Arts. 20(1) and 31(2) of the Constitution....”* (Emphasis Supplied)

25. In the context of personal law itself, a three judge bench of this Hon’ble Court in ***Shabnam Hashmi v. UOI & Ors., (2014) 4 SCC 1*** has recently refused to go into the constitutionality of personal laws when the issue could be decided plainly on interpretation of the statute concerned. The above is the settled position of law and courts both in India and in other jurisdictions do not decide constitutional issues if the issue in dispute can be decided on any sub-constitutional ground.

**Kindly See:**

1. Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, Harvard University Press (2001)
  2. S.P.Sathe, “Judicial Activism: The Indian Experience”, 2000(6) *Washington University Journal of Law and Policy*.
  3. Alexander M Bickel, “Foreword: The Passive Virtues”, 75 *Harv. L. Rev.* 41 1961-1962
26. As explained in detail above, the courts in India have by a purely interpretative exercise held that *talaq-i-bidat* or instantaneous *talaq* is illegal, ineffective and has no force of law. If the same declaration is given by this Hon’ble Court by a process of interpretation of personal law, then the question of going into the constitutionality of personal law does not arise. This is particularly because once it is held by this Hon’ble Court that ‘rule of decision’ applicable to Muslims in India as per Section 2 of the *Sharia Application Act, 1937* does not permit instantaneous *talaq*, the same would be automatically rendered illegal. In the matters pending before this Hon’ble Court, in none of the cases,

the facts comprise of anything other than women being aggrieved by instantaneous talaq and therefore those issues are also academic.

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