

To:

1.8.2020

Hon'ble Mr. Justice Sharad Arvind Bobde

The Chief Justice of India, Supreme Court, New Delhi,

Subject: To treat the matter as urgent and list the WP(C) 202/2018 and connected matters for hearing through video conferencing

Respected Sir,

1. The applicant has filed above stated writ petition to declare Polygamy, Halala, Mutah, Misyar and Sharia Court illegal and unconstitutional for being violative of Articles 14, 15, 21 and 25 of the Constitution, and also seeking a declaration that Polygamy is an offence under S. 494, IPC and Halala, Mutah and Misyar is offence under S. 375 of the IPC.
2. On 26.03.2018, three Judges Bench of this Hon'ble Court issued notice and directed the registry to place the matter before Hon'ble Chief Justice of India for constitution of larger Bench for dwelling the 5 key issues viz. Polygamy, Halala, Mutah, Misyar and Sharia Court.
3. On 02.012.2019, the petitioner mentioned the matter for urgent listing and the three Judges Bench of this Hon'ble Court was pleased to direct the registry to list the matter immediately after winter vacation.
4. Muslim Personal Law permits Muslim men to have up to four wives at once. Therefore, by virtue of Muslim Personal Law, S.494 is rendered inapplicable to Muslims, and no Muslim wife has the avenue of filing a complaint against her husband for the offence of bigamy. This is in blatant contravention of Articles 14, 15 and 21 of the Constitution.
5. This Hon'ble Court had not only observed that gender discrimination against Muslim women needs to be examined, but had also been pleased to direct that a PIL be separately registered for which notices were directed to be issued to the Ld. Attorney General and the National

Legal Services Authority, New Delhi. Referring to *John Vallamattom v. Union of India, (2003) 6 SCC 611*, it was observed in *Prakash and Others v. Phulavati and Others, Civil Appeal No. 7217 of 2013 decided on 16.10.2015*, that laws dealing with marriage and succession are not a part of religion, the law has to change with time, and international covenants and treaties could be referred to examine validity and reasonableness of a provision. Accordingly, Court directed that issue of gender discrimination against Muslim women under Muslim personal laws, specifically the lack of safeguards against arbitrary divorce and second marriage by a Muslim husband during the currency of first marriage notwithstanding the guarantees of the Constitution, may be registered as a PIL and heard separately.

6. Perusal of the decisions of this Hon'ble Court in *Prakash v. Phulavati, Javed and Others v. State of Haryana and Others*, and *Smt. Sarla Mudgal, President, Kalyani and Others v. Union of India and Others* illustrates that the practice of polygamy has been recognised as injurious to public morals and it can be superseded by the State just as it can prohibit human sacrifice or the practice of *sati*. In fact, in *Khursheed Ahmad Khan v. State of Uttar Pradesh and Others, (2015) 8 SCC 439*, this Hon'ble Court has also taken the view that practices permitted or not prohibited by a religion do not become a religious practice or a positive tenet of the religion, since a practice does not acquire the sanction of religion merely because it is permitted.
7. It is accordingly submitted that a ban on polygamy has long been the need of the hour in the interest of public order and health. It is further submitted that this Hon'ble Court has already expressed the view that polygamy is not an integral part of religion and Article 25 merely protects religious faith, but not practices which may run counter to

public order, morality or health. The practice of *polygamy* is neither harmonious with the modern principles of human rights and gender equality, nor an integral part of Islamic faith. Many Islamic nations have banned or restricted/regulated such practice, while it continues to vex the Indian society in general and Indian Muslim women in particular. It is submitted that the practice also wreaks havoc on the lives of many women and their children, especially those belonging to the weaker economic sections of the society. While Muslim women cannot engage in a polyandrous marriage, Muslim men claim to have a right to re-marry. Such discrimination and inequality hoarsely expressed in the form of polygamy is abominable when seen in light of the progressive times of the 21st century.

8. Polygamy has been recognised as an evil plague similar to *sati* and has also been banned by law for all. Unfortunately, even in the 21st century, it continues to vex Muslim women notwithstanding that such practice poses extremely serious health, social, economic, moral and emotional risks. It is submitted that religious officers and priests like *imams*, *maulvis*, etc. who propagate, support and authorise the practice are grossly misusing their position, influence and power to subject Muslim women to such gross practice which treats them as chattel, thereby violating their fundamental rights enshrined in Articles 14, 15, 21 & 25.
9. It has been noted in *Smt. Sarla Mudgal* Case that bigamous marriage has been made punishable amongst Christians by the Christian Marriage Act, 1872, amongst Parsis by the Parsi Marriage and Divorce Act, 1936, and amongst Hindus, Buddhists, Sikhs and Jains by the Hindu Marriage Act. However, the Dissolution of Muslim Marriages Act, 1939 does not secure for Indian Muslim women the protection from bigamy which has been statutorily secured for Indian women

belonging to all other religion. It is submitted that the citizens of India who followed religions other than Islam also traditionally practiced polygamy, but the same was prohibited not only because laws dealing with marriage are not a part of religion, but also because the law has to change with time and ensure a life of dignity unmarred by discrimination on the basis of gender. It is further submitted that the failure to secure the same equal rights and life of dignity for Muslim women violates their most basic human and fundamental right to life of dignity unmarred by gender discrimination, which in turn have a critical impact on their social and economic rights to say the least.

10. In *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84, wherein the constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act, was challenged on the ground of violation of Articles 14, 15 and 25 of the Constitution, a Division Bench consisting of Chief Justice Chagla and Justice Gajendragadkar, held that a sharp distinction must be drawn between religious faith and belief and religious practices, since the State only protects religious faith and belief while religious practices that run counter to public order, morality or health or a policy of social welfare must give way to the good of the people of the State. It is submitted that this view has been referred to with approval by this Hon'ble Court in *Khursheed Ahmad Khan* Case.
11. The observations of the Constitution Bench in *Danial Latifi & Another v. Union of India*, (2001) 7 SCC 740, are of utmost relevance. This Hon'ble Court stated that when interpreting provisions where matrimonial relationship was involved it has to consider the social conditions prevalent in our society, where a great disparity exists in the matter of economic resourcefulness between a man and a woman whether they belong to the majority or the minority group, since our

society is male dominated both economically and socially and women are invariably assigned a dependent role irrespective of the class of society to which they belong. This Hon'ble Court further observed that solutions to societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity, decency of life, and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith/beliefs/sectarian, racial/communal constraints.

12. It is submitted that Muslim Personal Law Application Act, 1937, by providing for the application of Muslim personal law in matters relating to marriage where the parties are Muslims, conveys a wrong impression that the law sanctions the practices of Polygamy, Halala, Mutah and Misyar, which is grossly injurious to the fundamental rights of the married Muslim women and offends Articles 14, 15, 21 and 25 of the Constitution. It is, accordingly, submitted that the Muslim Personal Law Application Act, which is subject to the Constitution, is invalid in so far as it seeks to recognise and validate the practices of Polygamy, Halala, Mutah and Misyar. The Constitution neither grants any absolute protection to the personal law of any community that is arbitrary or unjust, nor exempts personal laws from the jurisdiction of the Legislature or the Judiciary. To the contrary, Entry 5 of List III in the Seventh Schedule confers power on the Legislature to amend and repeal existing laws or pass new laws in all such matters which were on August 15, 1947, governed by personal laws.

13. Freedom of conscience and free profession, practice and propagation of religion guaranteed by Article 25 of the Constitution is not absolute and, in terms of Article 25(1), is "*subject to public order, morality and health and to the other provisions of this Part*". It is submitted that a

harmonious reading of Part III of the Constitution clarifies that the freedom of conscience and free profession, practice and propagation of religion guaranteed by Article 25 is subject to the fundamental rights guaranteed by Articles 14, 15 and 21. In fact, Article 25 clearly recognises this interpretation by making the right guaranteed by it subject not only to other provisions of Part III of the Constitution but also to public order, morality and health. It is further submitted that the concept of “constitutional morality” has been expounded by a 5-judge bench of this Hon’ble Court in *Manoj Narula Case* wherein it was observed that the Constitution is a living instrument and principle of constitutional morality essentially means to bow down to the norms of the Constitution and to not act in a manner which is arbitrary or violative of the rule of law. In this context, it was also observed by this Hon’ble Court that the traditions and conventions have to grow to sustain the value of such morality and the democratic values can survive and become successful when the people at large are strictly guided by the constitutional parameters, since commitment to the Constitution is a facet of constitutional morality. It is submitted that the Legislature has failed to ensure the dignity and equality of women in general and Muslim women in particular especially when it concerns matters of marriage, divorce and succession.

14. Despite the observations of this Hon’ble Court for the past few decades, Uniform Civil Code remains an elusive Constitutional goal that the Courts have fairly refrained from enforcing through directions and the Legislature has dispassionately ignored except by way of paying some lip service. However, it is submitted that laws dealing with marriage and succession are not part of religion and the law has to change with time, which finds support from the views expressed by this Hon’ble

Court in *John Vallamattom* and *Prakash v. Phulavati*. It is further submitted that this Hon'ble Court has already held that the issue of gender discrimination against Muslim women under Muslim personal laws, specifically the lack of safeguards against second marriage by a Muslim husband during currency of first marriage notwithstanding the guarantees of the Constitution, needs to be examined.

15. Article 3 of the Universal Declaration of Human Rights provides that everyone has the right to life, liberty and security of person while Article 7 provides that everyone is equal before the law and is entitled without any discrimination to equal protection of the law. Since the adoption of the Universal Declaration of Human Rights, the universality and indivisibility of human rights have been emphasised and it has been specifically recognised that women's human rights are part of universal human rights. In the year 2000, on the grounds that it violates the dignity of women, the United Nations Human Rights Committee considered polygamy a destruction of the internationally binding International Covenant on Civil and Political Rights and recommended that it be made illegal in States. It is accordingly submitted that it is well recognised in international law that polygamy critically undermines dignity and worth of women.

16. Non-discrimination and equality between women and men are central principles of human rights law. Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (to both of which India acceded on 10.04.1979) prohibit discrimination on the basis of gender and guarantee women and men equality in the enjoyment of the rights covered by the Covenants. Article 26 of the International Covenant on Civil and Political Rights provides for equality before the law and equal

protection of the law, while Article 2(2) of the International Covenant on Economic, Social and Cultural Rights requires States to guarantee that the rights enunciated in the Covenant can be exercised without any discrimination of any kind including on the lines of gender or religion. It is submitted that discrimination and inequality can occur in different ways, including through laws or policies that restrict, prefer or distinguish between various groups of individuals. It is further submitted that to achieve actual equality, the underlying causes of women's inequality must be addressed since it is not enough to guarantee identical treatment with men.

17. The United Nations Economic and Social Council's Committee on Economic, Social and Cultural Rights explained in its General Comment No. 16 of 2005 that the parties to the International Covenant on Economic, Social and Cultural Rights are obliged to eliminate not only direct discrimination, but also indirect discrimination, by refraining from engaging in discriminatory practices, ensuring that third parties do not discriminate in a forbidden manner directly or indirectly, and taking positive action to guarantee women's equality. It is submitted that failure to eliminate *de jure* (formal) and *de facto* (substantive) discrimination constitutes a violation of the rights of women envisaged in such international treaties and covenants. It is further submitted that not only must the practices of polygamy and *nikah halala* be declared illegal and unconstitutional, but the actions of religious groups, bodies and leaders that permit and propagate such practices must also be declared illegal and unconstitutional. In its General Comment No. 28 (2000), the Committee on Civil and Political Rights very clearly issued a declaration against the practice of polygamy by saying that it completely violates the right to equality guaranteed by

Article 3 of the Convention. The Committee noted that *“equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.”*

18. Article 5(a) of the CEDAW explicitly places an obligation on all State Parties to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” In its General Recommendation No. 21 (1994), the Committee on the Elimination of Discrimination against Women elaborated on equality in marriage and family relations, and observed that polygamous marriages contravene a woman’s right to equality with men, and can have very serious emotional and financial ramifications for her and her dependents. The Committee noted “with concern” despite their Constitutions guaranteeing the right to equality, some States parties continued to permit polygamous marriages in accordance with personal/customary law. This, as per the Committee, violated constitutional rights of women, as also Article 5(a), CEDAW.

19. The present matter deserves to be heard at the earliest as the issue is of public importance, gender justice gender equality & dignity of women.

20. In view of the above, it is prayed to list the matter at the earliest.

Thanks & Regards.

Ashwini Upadhyay

Petitioner-in-Person

WP(C) 202 OF 2018