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# LIST OF ABBREVIATIONS

|  |  |
| --- | --- |
| **A.I.R.** | *All India Reporter* |
| **All** | *Allahabad* |
| **All E.R.** | *All England Reporter* |
| **AP** | *Andhra Pradesh* |
| **Bom** | *Bombay* |
| **C.L.R.** | *Commonwealth Law Reporter* |
| **Cal** | *Calcutta* |
| **Co.** | *Company* |
| **Comm**. | *Commissioner* |
| **CWN** | *Calcutta Weekly Notes* |
| **Del** | *Delhi* |
| **Edn.** | *Edition* |
| **e.g.** | *exemplum gratia (for example)* |
| **K.B.** | *Kings bench* |
| **Lah** | *Lahore* |
| **LR** | *Law Reporter* |
| **Mad** | *Madras* |
| **MANU** | *manupatra* |
| **M.P.** | *Madhya Pradesh* |
| **Pat** | *Patna* |
| **PC** | *Privy Council* |
| **p.** | *Page* |
| **Para.** | *Paragraph* |
| **Pun** | *Punjab and Haryana* |
| **SC** | *Supreme court* |
| **SCC** | *Supreme court cases* |
| **SCN** | *Show Cause Notice* |
| **U.P.** | *Uttar Pradesh* |
| **W.L.R.** | *Weekly Law Reports* |

# STATEMENT OF JURISDICTION

Shaheen has approached the Hon’ble High Court of Navy Dally under Article 226 of the Constitution of India. The matter has been connected with another related Writ Petition and has been listed for final disposal. Article 226 of the Constitution of India reads as hereunder:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**226. Power of High Courts to issue certain writs.—**

*(1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.*

*(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.*

*(3)...*

*(4)...*

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

# SYNOPSIS OF FACTS

* **Shaheen and Sohail**: Shaheen, a shia Muslim married Sohail, a sunni Muslim. Shaheen is cousin sister of Afreen who is Sohail’s cousin sister on maternal side.
* **Relocation to Navi Dally**: The couple relocated to Navi Dally and started living in a 1 BHK apartment in Greater Palash owned by Amir, Sohail’s brother, a permanent citizen of UK, but the maintenance charges of the flat were paid by Sohail. They have got a flat in lottery in Vistar Vihar Extension –Phase 3. Sohail set up a registered partnership enterprise Sohail & Sahil Associates with Sohail’s college friend Sahil.
* **The Dispute**: After relocation to Navi Dally, Shaheen wanted to have a child and stay at home while Sohail thought it was too early leading to many heated arguments. Afreen was unsuccessful in intervening between two. On November 10, 2010, Sohail and Shaheen had a heated argument over the same issue. After the argument, Sohail returned after 2 hours from a walk and divorced Shaheen with three pronouncements of “*talaq*”. Afreen was a witness to this and continues to live in the said apartment. Sohail moved out of the house and started living at a rented guest house from his partnership firm.
* **Filing of the suit**: Shaheen filed an application under Domestic Violence Act, 2005 before Magistrate in Navy Dally to refrain Sohail and Afreen from dispossessing her from her apartment and approached civil court to get a declaration that the divorce is a nullity which was defended by Sohail. Sohail argued that Domestic Violence Act, 2005 to the extent that it gives rights to women beyond the period of *iddat* is against his fundamental right to practise his religion while Afreen argued that she can’t be made respondent under Domestic Violence Act.
* **Writ petitions**: Shaheen filed a writ petition challenging the order of the Civil Judge, District Court of Navy Dally. Sohail filed a writ petitions challenging the Domestic Violence Act, 2005. Both matter have been connected by an order of the Navy Dally High Court and are listed together for final disposal.

# Statement Of Issues

The Appellants respectfully asks the Hon’ble Supreme Court of India, the following Questions:

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**\_\_\_\_\_\_\_\_\_\_\_**

**ISSUE – I**

**WHETHER THE DIVORCE NOT BEING IN CONFORMITY WITH ISLAMIC LAW BE DECLARED AS A NULLITY?**

**ISSUE – 2**

**WHETHER DOMESTIC VIOLENCE ACT, 2005 TO THE EXTENT THAT IT GIVES RIGHTS TO WOMEN BEYOND THE PERIOD OF IDDAT IS AGAINST ARTICLE 25 OF THE CONSTITUTION?**

**ISSUE – 3**

**WHETHER THE COURT SHOULD REJECT SHAHEEN’S APPLICATION UNDER THE DOMESTIC VIOLENCE ACT AND WHETHER AFREEN CAN BE MADE RESPONDENT UNDER THE SAME ACT?**

**\_\_\_\_\_\_\_\_\_\_\_**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

# Summary of Arguments

**Nullity of Divorce**

It is humbly submitted that many scholars of Mahomedan law have held that triple-*talaq* has no Quranic basis, in fact, divorce has been characterized as very badly and marriage has been dscribed as a *Sunnat.* Triple-*talaq* is expressly barred under Shia law. Further, the *Quran* prescribes a certain procedure to be followed before divorcing the wife, which has been upheld by many courts in the country and which was not followed by Sohail.

**Domestic Violence Act being Against Article 25 of the Constitution.**

It is submitted that Article 25 does not confer an absolute right and is subject to social reform among other things and will therefore be subject to beneficial legislations. There is a distinction between religious practices and religious beliefs and Article 25 affords protection only to religious beliefs.

**Rejection of Shaheen’s application under the Domestic Violence Act and Afreen’s status of Respondent.**

It is humbly submitted that Shaheen is a victim of domestic violence. Further, the Greater Palash apartment comes within the definition of “shared household” under the Domestic Violence Act, 2005. Lastly, Afreen can be made a respondent under the Act.

# Arguments Advanced

## WHETHER THE DIVORCE NOT BEING IN CONFORMITY WITH ISLAMIC LAW BE DECLARED AS A NULLITY?

### That Triple-*talaq* is not recognized under the Holy Quran, under any source of Shia Law and that the requisite procedure for *talaq* under the Quran was not followed.

1. It is most humbly submitted that as per Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937[[1]](#footnote-1), Muslim personal law will be applicable to the instant dispute. It is further submitted that a valid marriage has been solemnized between a Sunni male and a Shia female.[[2]](#footnote-2) In *Aziz Bano v. Muhammad* the court cited with approval Ameer Ali’s commentary on the Muhammadan Law which said that Shias and Sunnis may intermarry without any change of sect or communion.[[3]](#footnote-3)
2. It is submitted that Muslim law rests on the four-fold pillars of the *fiqh*, namely[[4]](#footnote-4): the *Quran (kitab),* the *Sunna (hadith)[[5]](#footnote-5),* the *Ijma[[6]](#footnote-6)* and *Qiyas[[7]](#footnote-7).* If the solution of a problem is given in the *Quran* then it is the final ruling of *sharia*. If there is no clear exposition in the *Quran*, we look at the traditions of the Prophet (*hadith)* and if the problem has no solution in either of the two then inly is resort taken to *Ijma*.[[8]](#footnote-8) It is submitted that there is no *Quranic* basis to establish that three divorces on a single occasion should amount to an irrevocable divorce; in fact the Prophet deplores divorce[[9]](#footnote-9) and described marriage[[10]](#footnote-10) as his *Sunnat*.
3. It is beseeched that as per the *Quran,* there must be efforts towards reconciliation between the divorce.[[11]](#footnote-11) This view has been upheld by the court in *Shamim Ara v. State of U.P. and Anr[[12]](#footnote-12)* that (i) a reason for the divorce must be given and (ii) there must be an attempt to reconcile. This case has further been upheld by the many High Courts[[13]](#footnote-13) including the Kerela HC in *Kunimohammed v. Ayishakutty.[[14]](#footnote-14)* The court held that *“To us, it appears that this declaration of law rhymes well with modern notions of marriage and the true Islamic concepts of marriage and divorce… That declaration of law is consistent with modern notions of marriage and rhymes better with the human right to life recognized under Art.21. It rhymes well with the concepts of equality under Art.14 of the Constitution. Any contra interpretation appears to us to be not valid, just or right; but arbitrary, unjust fanciful and oppressive...”*
4. It is submitted that in the instant case, Shaheen being a Shia, this form of *talaq* will be invalid since it is not recognized under Shia law.[[15]](#footnote-15) Further, the divorce must be treated as a nullity since neither was there any attempt to reconciliation nor was any reason assigned for the divorce.[[16]](#footnote-16)

## WHETHER DOMESTIC VIOLENCE ACT, 2005 TO THE EXTENT THAT IT GIVES RIGHTS TO WOMEN BEYOND THE PERIOD OF IDDAT IS AGAINST ARTICLE 25 OF THE CONSTITUTION?

### That Right to Religion is subject to public order, morality and health and subject to the other provisions of Part III of the Constitution of India.

1. It is humbly submitted that Article 25(1) guarantees to every person, “the freedom of conscience” and “the right freely to profess, practice and propagate religion.” In *Javed & Ors. v. State of Haryana*[[17]](#footnote-17), the court analyzed Article 25(2)(b) and held while distinguishing between “religious practices” and “religious beliefs” that if religious practices run counter to public order, morality or health or a policy of social welfare then the latter prevails over religious practices.[[18]](#footnote-18). Further, in *N. Adithyan v. Travancore Devaswom Board & Ors.[[19]](#footnote-19)* the court held that any customs or usage offending human rights, dignity and social equality cannot be upheld by the courts of the country. Further, due to Article 44[[20]](#footnote-20) of the constitution, courts must favour interpretation of statutes so as to foster uniformity in personal laws. In *John Vallamattom v. Union of India[[21]](#footnote-21),* the court compared Article 25 and 44 and held that marriage, succession and like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26. It further observed, while regretting that Article 44 has not been given effect to, that legislations which bring such matters within the ambit of Article 25 and 26 are suspect legislations.
2. In *Shabana Bano v. Imran Khan[[22]](#footnote-22),* the court read relevant portions from *Shah Bano[[23]](#footnote-23)*, *Danial Latifi[[24]](#footnote-24)* and *Iqbal Bano[[25]](#footnote-25),* held that it is crystal clear that the Section 125 of Cr.PC being a beneficial piece of legislation, benefits under it must accrue to the divorced Muslim woman, concluding that she is entitled to maintenance beyond the *iddat* period. The same reasoning can be supplanted for application of benefits under the Domestic Violence Act, 2005 beyond *iddat*.

### That the Domestic Violence Act, 2005 is applicable to Muslim women.

1. It is humbly submitted that in *Syed Md. Nadeem @ Mohsin and Ors. v. State and Anr.[[26]](#footnote-26)*, it appeared that due to the provisions of the Muslim Women Act some of the provisions of the Domestic Violence Act will not apply to Muslims, but owing to similar provisions in the Hindu Marriage Act, 1955 but the same would be a slippery slope. Further, owing to Section 36[[27]](#footnote-27) of the Act, benefits under other provisions of the Act will be in addition to existing ones.[[28]](#footnote-28)Also, the Act uses the word “aggrieved person” allowing a wide import of the term, thus covering any female.

## WHETHER THE COURT SHOULD REJECT SHAHEEN’S APPLICATION UNDER THE DOMESTIC VIOLENCE ACT AND WHETHER AFREEN CAN BE MADE RESPONDENT UNDER THE SAME ACT?

### The court should grant relief to Shaheen under the Domestic Violence Act, 2005.

1. It is humbly submitted that Shaheen is a victim of domestic violence which has been inflicted upon her by Sohail and Afreen. There is a reasonable apprehension that she will be dispossessed from her shared household by the respondents. Further, under the Domestic Violence Act, 2005 the cousin can be made a respondent.

### That the cousin can be made a respondent under the Act

1. Under section 2 the Act, a complaint can be filed against any relative of the husband who have perpetrated the violence.[[29]](#footnote-29) The Hon'ble Apex Court in *Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade And Others*[[30]](#footnote-30), held that no restrictive meaning has been given to the expression “relative”, nor has the said expression been specifically defined in the Act. In such circumstances, it is clear that the legislature never intended to any exclude female relatives of the husband from the ambit of a complaint that can be made under the provisions of the Act.

### That the apartment in Greater Palash comes under the definition of “shared household” under section 2(s) of the Act.

1. It is asseverated that the Act expressly excludes the consideration of ownership rights as a condition for determining whether or not a particular property is a shared household[[31]](#footnote-31). Human rights of the person of the wife have little to do with her ownership rights in property.[[32]](#footnote-32) This has been affirmed in the Object and Reasons of the Act. Section 17 enacts a right to residence in favour of women. The enactment being a beneficial one, the Court should seek to uphold the parliamentary intention rather than confining leading to defeating the object of the law.[[33]](#footnote-33)
2. It is submitted that Sohail is the *de-facto* owner of the Greater Palash apartment. He pays the electricity charges, water tax, house tax and maintainence.[[34]](#footnote-34) Amir is a permanent resident of United Kingdom and has not lived in the said flat. It is an established principle of law that what cannot be done directly, cannot be achieved indirectly through stratagem. If the Court can look beyond the facts, and in a given case, conclude that the overall conspectus of circumstances, suggests manipulation by the husband or his relatives, to defeat a right inherent in the wife, to any order under Section 19, such “lifting of the veil” should be resorted to.[[35]](#footnote-35) It is clear that the Sohail transferred the house under his brother’s name, intending to defeat Shaheen’s right to reside there, and prior to Shaheen’s dispossession, both parties resided jointly in the household.[[36]](#footnote-36)
3. Without prejudice to the above, equating “joint family” in the Act to a “Hindu Undivided Family” would change the secular nature of the Act. It is to avoid this anomaly that Parliament clarified that irrespective of title of the “respondent” to the “shared household”, a protection order can be made under Section 19(1)(a).[[37]](#footnote-37) It has been ruled by the Supreme Court, in several judgments, that a judgment is not to be read as a statute, since the factual matrix is also important.[[38]](#footnote-38) It is important therefore to distinguish the present case from the *S.R. Batra v. Taruna Batra[[39]](#footnote-39)* on basis of a material difference in facts.

### That the court should pass a protection order under Section 18 and residence order under Section 19 of the Act

1. Shaheen has been in a “domestic relationship”[[40]](#footnote-40) with the husband and is a victim of domestic violence and has suffered “verbal and emotional abuse” and “mental harm”.[[41]](#footnote-41) Unilateral decision of the husband or wife to refuse to have children may amount to mental cruelty.[[42]](#footnote-42) If husband deliberately and consistently refuses to satisfy wife's natural and legitimate craving to have a child, the deprivation reduces her to despair and it maturely affects her mental health.[[43]](#footnote-43)
2. It is humbly submitted that the Court may pass a protection order under section 18 to protect access to the victim’s assets. Further, the Court may pass a residence order under section 19 protect her from being dispossessed. As per *Evneet Singh,* the wife is entitled to residence in a property commensurate with her lifestyle and her current residence. Thus, till alternate accommodation is available, wife should be entitled to reside in the shared household.

# Prayer

W

herefore in the light of the issues raised, argument advanced, reasons given and authorities cited, this Hon’ble Court may be pleased to:

**To Hold**

* That the Divorce is a nullity.
* That benefits conferred beyond the period of *Iddat* are not averse to Article 25.
* That Afreen can be made a respondent under the domestic violence act.

**To Pass**

* A protection order under Section 18 of the Domestic Violence Act, 2005.
* A residence order under Section 19 of the Domestic Violence Act, 2005.

**To Set Aside**

The order passed by the Ld. Civil Judge, District Court of Navy Dally.

**Miscellaneous**

And any other relief that this Hon’ble court may be pleased to grant in the interests of justice, equity and good conscience

*All of which is respectfully submitted*.

**Counsels for the Shaheen & Others**

1. *See also:* MULLA, *Principles of Mahomedan Law* (Lexis Nexis-Butterworths 19th edn, 15th reprint, New Delhi, 2007), Section 2 at p. 1. [↑](#footnote-ref-1)
2. *Ibid.,* Section 258 at p. 226; *See also: Aziz Bano v. Muhammad* (1925) 47 All*.* 823; 89 I.C. 690; (’25) A.A. 720 – marriage not declared a nullity as nothing against it in the *Quran*. [↑](#footnote-ref-2)
3. Discussion on genesis of rule in *Aziz Bano*, *Ibid.,* from ¶ 9-12. [↑](#footnote-ref-3)
4. *Supra* note , Section 33 at p. 22. [↑](#footnote-ref-4)
5. Meaning the percepts, actions and sayings of the Prophet Mahomed, not written down during his lifetime, but preserved by tradition and handed down by generations. [↑](#footnote-ref-5)
6. Meaning the concurrence of opinion of the companions of Mahomed and his disciples. [↑](#footnote-ref-6)
7. Being analogical deductions derived from comparisons of the first three sources [↑](#footnote-ref-7)
8. FURQAN AHMED, *Triple Talaq: An Analytical Study with Emphasis on Socio-Legal Aspect* (Regency Publication, New Delhi, 1994) at p. 41 [↑](#footnote-ref-8)
9. “*Divorce is most detestable in the sight of God; abstain from it”*; *“Divorce shakes the throne of God”* comes from the *Hadith*, *“Al-talaqu indallah-i abghad al mubahat”* found in many authentic collections of tradition. [↑](#footnote-ref-9)
10. Tahir Mahmood, *Muslim Law of India* (LexisNexis-Butterworths, New Delhi, 3rd edn., 2002) at p. 48. [↑](#footnote-ref-10)
11. Verse (4:34, 35) as cited by FAIZUR RAHMAN, *“Instant Divorce is alien to Islam’s spirit”*, Indian Express, Kochi edn., June 17th, 2008; *An Enlightenment Commentary into the Light of the Holy Quran* (The Scientific and Religious Center, Iran, 2nd edn., 1995) [↑](#footnote-ref-11)
12. (2002) 7 SCC 513; cites with approval: *Sri Jiauddin Ahmed v. Mrs. Anwara Begum* (1981) 1 GLR 358; *Rukia Khatun v. Abdul Khalique Laskar* (1981) 1 Gau. L.R. 375; [↑](#footnote-ref-12)
13. *Riaz Fatma v. Mohammed Sharif* I (2007) DMC 26; 135 (2006) DLT 205; *Ummer Farooque v. Naseema* 2005 (4) KLT 565; *Nur Ali (Md) v. Thambal Sana Bibi* 2007 (1) GLT 508 [↑](#footnote-ref-13)
14. 2010 (2) KHC 63 [↑](#footnote-ref-14)
15. *Supra* note 1, Section 311 at p. 262; *See also:* *Ali Nawaz v. Mohd. Yusuf* P.L.D. 1963 S.C. 51 [↑](#footnote-ref-15)
16. Refer *Compromis* ¶ 4. [↑](#footnote-ref-16)
17. AIR 2003 SC 3057 [↑](#footnote-ref-17)
18. Also upheld in *Srinivasa Aiyar v. Saraswathi Ammal*,AIR 1952 Mad 193; *State of Bombay v. Narasu Appa Mali* AIR 1952 Bom 84: (validity of the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 and the same Act of Bombay, respectively.) [↑](#footnote-ref-18)
19. (2002 8 SCC 106) [↑](#footnote-ref-19)
20. **Uniform civil code for the citizens**.—The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. [↑](#footnote-ref-20)
21. (2003) 6 SCC 611 [↑](#footnote-ref-21)
22. AIR2010SC305 [↑](#footnote-ref-22)
23. *Mohd. Ahmed Khan v. Shah Bano Begum and Ors* (1985) 2 SCC 556 [↑](#footnote-ref-23)
24. *Danial Latifi and anr. v. Union of India,* AIR2001SC3958 [↑](#footnote-ref-24)
25. *Iqbal Bano v. State of U.P. and Anr*, (2007) 6 SCC 785 [↑](#footnote-ref-25)
26. MANU/DE/2460/2011 [↑](#footnote-ref-26)
27. **36. Act not in derogation of any other law**.-The provisions of this Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force. [↑](#footnote-ref-27)
28. *Khushi Mohd. and Ors. v. Smt. Aneesha* 2011 (3) Crimes 7; MANU/RH/0485/2011 [↑](#footnote-ref-28)
29. *Smt. Sarita v. Smt. Umrao* 2008 (1) R. Cr. D 97 [↑](#footnote-ref-29)
30. (2011) 3 SCC 650 [↑](#footnote-ref-30)
31. See sections 2(s) and 17 of the Act [↑](#footnote-ref-31)
32. *Ishpal Singh Kahai v. Ramanjeet Kahai* WP 576 of 2011 Bombay High Court [↑](#footnote-ref-32)
33. *Eveneet Singh v Prashant Chaudhri* 177(2011)DLT124; *Gajendra Singh v. Minakshi Yadav* MANU/RH/0338/2011 [↑](#footnote-ref-33)
34. Refer to ¶3 of the factsheet; *Ajay Kumar Madanlal Bajla v. Mrs. Neha Vishal Bajla* 2011(3)ALLMR303 [↑](#footnote-ref-34)
35. *Supra* note 35 [↑](#footnote-ref-35)
36. *P. Babu Venkatesh & Ors. v. Rani* 2008-2-LW(Crl)451 [↑](#footnote-ref-36)
37. *Supra* note 35 [↑](#footnote-ref-37)
38. *Saratchandra Mishra v State of Orissa*(2006) 1 SCC 638, *Ramesh Daga v Rameshwari Bai*,(2005) 4 SCC 772 [↑](#footnote-ref-38)
39. (2007) 3 S.C.C. 169 [↑](#footnote-ref-39)
40. See sections 2(a) and 2(f) of the Act [↑](#footnote-ref-40)
41. See section 3(d) and Explanation I of section 3 of the Act [↑](#footnote-ref-41)
42. *Samar Ghosh v. Jaya Ghosh* (2007) 4 SCC 511; *Suman Kapoor v. Sudhir Kapoor* AIR 2009 SC 589 [↑](#footnote-ref-42)
43. *Satya v. Siri Ram* AIR 1983 P H 252 [↑](#footnote-ref-43)