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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

Sohail 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 triple-*talaq* is a recognized as a principle in Mahomedan law and its application to Indian cases has been affirmed by many judicial interpretations allowing it. Further, principles of Mahomedan Law specifically disallow the judiciary from taking any novel interpretations of Muslim law. Finally, Sohail being a Sunni is well within his rights to divorce by triple-*talaq.*

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

It is submitted that personal laws are not susceptible to the workings of Part III of the Indian Constitution as they cannot be called “laws” or “laws in force” under Article 12. Further, judicial and legislative precedents show that legislature is also not in favour of allowing the functioning of Part III susceptible to personal laws.

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

It is humbly submitted that Shaheen is not a victim of domestic violence. Further,the Greater Palash Apartment cannot be a “shared household” within the meaning of The Domestiv Violence Act, 2005. Lastly, Afreen cannot be made a respondent as she is not I a domestic relationship with Shaheen and being a female relative, no order for her removal can be passed under Section 19 of the domestic Violence Act, 2005.

# Arguments Advanced

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

### That Triple-*talaq* is recognized under the Muslim Personal Law applicable in India.

1. It is most humbly submitted that a valid marriage has been solemnized between a Sunni male and a Shia female.[[1]](#footnote-1) In the case of *Aziz Bano v. Muhammad**[[2]](#footnote-2),* a Shia female (*inter alia*) sought to declare her marriage with a Sunni male as a nullity – the contention was refused by the court since there is nothing against it in the *Quran* or any other source of Islamic law. Section 32 of *Mulla’s Principles of Mahomedan Law*[[3]](#footnote-3) mentions that the rights and obligations of the wife will be governed by the law to which she belonged at the time of marriage.[[4]](#footnote-4) In *Aziz Bano[[5]](#footnote-5)* the court cited with approval Ameer Ali’s commentary on Muhammadan Law on the same point.[[6]](#footnote-6)
2. It is submitted that under all schools of Muslim law, the husband may unilaterally divorce his wife without assigning any cause.[[7]](#footnote-7) Further, of the different modes of *talaq* allowed in Islam, triple-*talaq* is specifically allowed and is known as one of the forms of *talaq-ul-bidaat* being an irrevocable *talaq.*[[8]](#footnote-8) In *Saiyid Rashid Ahmad and Anr. v. Mt. Anisa Khatun and Ors.[[9]](#footnote-9),* the court with approval the views of Sir R. K. Wilson, in his Digest of Anglo-Mahomedan Law (5th Edition) that the triple-*talaq* is a valid form of divorce under *talaq-ul-bidaat*. In *Ahmad Giri v. Mst. Begha[[10]](#footnote-10),* the court cited with approval Ameer Ali's Mohammadan Law, Vol. II (1929 Edition) and refused to negate the validity of *talaq-ul-bidaat.* Not only this, it also went so far as to warn the lower judiciary from giving any novel or innovative interpretations of the *sharia* as judicial officers are not learned in the *sharia.*[[11]](#footnote-11) This warning has been reiterated by the Supreme Court in *Ahmedabad Women’s Action Group (AWAG) and Ors. v. Union of India[[12]](#footnote-12)* in deciding whether Muslim personal law may be amended by judicial interference. It ruled that personal laws are a matter of state policies with which the Court does not have any concern.
3. Further, rules of interpretation of Mahomedan law do not allow interpretations of the *Quran* in opposition to express rulings of Mahomedan commentaries of great antiquity and high authority.[[13]](#footnote-13) Similarly, *hadiths* or other ancient texts should not be interpreted so as to deduce new rules or interpretations which the ancient doctors of the law have not themselves drawn.
4. It is averred therefore that Sohail being a Sunni is within his rights to give a triple-*talaq* and that court cannot and must not interpret settled and recognized provisions of Muslim personal law.

## 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 Personal Laws of the Parties are not susceptible to Part III of the Constitution.

1. It is submitted that the Supreme Court has reiterated many a times that personal laws of an individual are not subject to Part III of the Constitution. In *Krishna Singh v. Mathura Ahir[[14]](#footnote-14)*, the court upheld the same and further urged them to enforce the law from recognized and authoritative sources of Hindu Law. Later in *Maharishi Avdhesh v. Union of India[[15]](#footnote-15)*, a challenge on the Muslim Women (Protection of Women on Divorce) Act, 1986 had been denied stating that even codified personal law cannot be tested on the touchstone of fundamental rights. Later in *Ahmedabad Women’s Action Group v. Union of India[[16]](#footnote-16),* the court held that it cannot interfere with personal laws as they are a matter of state policy.
2. In *State of Bombay v. Narasu Appa Mali**[[17]](#footnote-17),* the court held that the constitution drafters, in spite of knowing that there exist different personal laws for different communities, still left them out of Part III of the Constitution due to the practical difficulties of evolving a uniform civil code acceptable to all communities and the building of a social climate conducive to it. These concerns were echoed by the Supreme Court[[18]](#footnote-18) in and observed that this may in fact be counterproductive to the unity and integrity of the nation. It was also observed in *Narsu Appa Mali* and affirmed later in *Madhu Kishwar and Ors. v. State of Bihar[[19]](#footnote-19)* that Article 14 does not mandate an all-embracing approach to every legislation – each community is a different class and whether they are prepared to accept the social reform is the matter for consideration.
3. It is submitted that in *Mohd. Ahmed Khan v. Shah Bano Begum & Ors.**[[20]](#footnote-20)* the court extended Section 125 of the Cr.PC to Shah Bano but the landmark judgement was quickly made ineffective with the introduction of Muslim Women (Protection of Rights on Divorce) Act, 1986. Further, in *Danial Latifi and Anr. v. Union of India[[21]](#footnote-21),* the court noted the lesson learned from *Shah Bano[[22]](#footnote-22),* that it will not be wise to start from a clean slate, forgetting the history of the enactment and therefore refused to give any rights beyond the confines of Mohamedan Law.
4. It is submitted that in the instant case, rights conferred by the Domestic Violence Act, 2005 go beyond the mandate of Mahomedan Law and are therefore against Article 25 of the Constitution. It cannot be argued that the provisions of the latter law are against Fundamental Rights as Part III of the constitution does not extend to personal laws. Judicial authorities and legislations have evinced that the Muslim community is not yet ready to accept any drastic social reform.

## 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 reject the application of Shaheen under the Domestic Violence Act, 2005.

1. It is asseverated that Shaheen is not a victim of domestic violence. Further, the facts of the case do not merit a residence order. Afreen cannot be made a respondent under the Domestic Violence Act, 2005. Without prejudice to the other arguments, since there has been a valid divorce, the Act does not apply to the parties.

### That the Greater Palash apartment is not a shared household under section 2(s) of the Act

1. The Supreme Court in *S.R. Batra v. Taruna Batra[[23]](#footnote-23)* authoritatively pronounced that under the definition of “shared household” in section 2(s) of the Act, a wife could not claim residence or receive an injunction from dispossession of property where the mother-in-law owned the house. A 'shared household' would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member.[[24]](#footnote-24) In the present case, the Greater Palash apartment belongs to husband’s brother Amir[[25]](#footnote-25). The apartment might have been their matrimonial home never their shared household, so no claim from the wife lies.
2. In *Vimlaben Ajitbhai Patel v. Vatslaben Ashokbhai Patel[[26]](#footnote-26)*, the Hon’ble Supreme Court, inter alia, observed as under: *“It is well-settled that apparent state of affairs shall be taken as the real state of affairs. It is not for an owner of the property to establish that it is his self- acquired property and the onus would be on the one who pleads contra."* From the fact sheet it is clear that the husband was living only as a permissive licensee in the flat and had no legal right therein.[[27]](#footnote-27) Thus the apartment cannot be called as a shared household.

### That the wife is not a victim of domestic violence household” under section 2(s) of the Act.

1. In *Samar Ghosh v. Jaya Ghosh[[28]](#footnote-28)* Hon’ble Supreme Court held that, *“mere trivial irritations, quarrels, normal wear and tear of the married life... is not emotional abuse”.* Married life should be assessed as a whole and a few isolated instances would not constitute mental or emotional harm.[[29]](#footnote-29) Thus, in the present case, a few heated exchanges over contradictory lifestyles would not amount to domestic violence.
2. When there was no jural relationship of man and his wife between the parties, a case under the Act prima-facie is not maintainable.[[30]](#footnote-30) An act of domestic violence cannot be committed on a divorced wife, who is not living with her husband or family and is free to live wherever she wants.[[31]](#footnote-31) If the domestic relationship does not continue in the present, a person cannot be made a “respondent” under the Act on the ground of a past relationship.[[32]](#footnote-32) A wife has no right to marital home after divorce.[[33]](#footnote-33)
3. Sympathy or sentiment can be invoked only in favour a person who is entitled thereto. It should never be taken into consideration as a result whereof the other side would suffer civil or evil consequences.[[34]](#footnote-34) The definition of domestic violence pre-supposes that the woman is living with the person who committed violence and domestic relationship is not dead buried or severed. This does not speak of past violence which a woman suffered before grant of divorce.

### That the cousin cannot be made a respondent under the Act.

1. It is respectfully submitted that under Section 19, order for removal can’t be obtained against a female relative. Further, nothing in fact suggests that the conduct of the cousin amounted to domestic violence and that she played the role of a conciliator. Even the claim for alternative accommodation can only be made against the husband and not against the husband's in-laws or other relatives.[[35]](#footnote-35) For the purpose the Act, where the object is to protect a woman from domestic violence, "family" has to be defined as a collective body of persons who live in one house under one head or management[[36]](#footnote-36). This test is not fulfilled by the cousin. She has lived with the couple only for one month and cannot be said to have had a domestic relationship with the wife.[[37]](#footnote-37)
2. Further, the Act is applicable only against the ‘respondents’ who had been in ‘domestic relationship’ with the ‘aggrieved person.’[[38]](#footnote-38). Amir, the husband’s brother, has never been in a domestic relationship or had a moral or legal responsibility/obligation towards his brother's wife. Thus, no order can be passed against his property.[[39]](#footnote-39)

# 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 valid.
* That the benefits conferred beyond the period of *Iddat* are averse to Article 25.
* That Afreen cannot be made a respondent under the domestic violence act.

**To Set Aside**

The order passed by the Ld. District Magistrate 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 Sohail & Others**

1. MULLA, *Principles of Mahomedan Law*, Lexis Nexis-Butterworths 19th edn, 15th reprint, New Delhi*,* Section 258 at p. 226 [↑](#footnote-ref-1)
2. (1925) 47 All*.* 823; 89 I.C. 690; (’25) A.A. 720 [↑](#footnote-ref-2)
3. *Supra* note 1 [↑](#footnote-ref-3)
4. *See also: Nasrat Hussain v. Hamidan* (1882) 4 All. 205 [↑](#footnote-ref-4)
5. Discussion on genesis of rule, ¶ 9-12. [↑](#footnote-ref-5)
6. *Supra* note 2 at ¶ 13: *“...Shias and Sunnis may intermarry without any change of sect or communion...”* [↑](#footnote-ref-6)
7. *Supra* note 1, Section 308 at p. 258 [↑](#footnote-ref-7)
8. *Supra* note 1, Section 311(3)(i) at p. 261: *“...three pronouncements made during a single* tuhr *...”* [↑](#footnote-ref-8)
9. AIR 1932 PC 25 [↑](#footnote-ref-9)
10. AIR 1955 J&K 1 [↑](#footnote-ref-10)
11. The court again cited with approval the views of Sir R. K. Wilson, in his Digest of Anglo-Muhammadan Law (5th Edition). [↑](#footnote-ref-11)
12. (1997) 3 SCC 573 [↑](#footnote-ref-12)
13. *Supra* note 1, Section 34 at p. 22. [↑](#footnote-ref-13)
14. (1981) 3 SCC 689 [↑](#footnote-ref-14)
15. 1994 Supp (1) SCC 713 [↑](#footnote-ref-15)
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18. *Pannalal Bansilal and Ors. v. State of Andhra Pradesh* (1996) 2 SCC 498 [↑](#footnote-ref-18)
19. AIR 1996 SC 1864 [↑](#footnote-ref-19)
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21. (2001) 7 SCC 740 [↑](#footnote-ref-21)
22. *Supra* note 8 [↑](#footnote-ref-22)
23. (2007) 3 S.C.C.169; cited with authority in *Vimlaben Ajitbhai Patel v. Vatslaben Ashokbhi Patel* (2008) 4 SCC 649; *Umesh Sharma v. State* 2010(115)DRJ88 [↑](#footnote-ref-23)
24. *Neetu Mittal v. Kanta Mittal and Ors.,* AIR 2009 (Del) 72 [↑](#footnote-ref-24)
25. Refer to ¶ 3 of the factsheet [↑](#footnote-ref-25)
26. 2008 (4) SCC 649 [↑](#footnote-ref-26)
27. *Shumita Didi Sandhu Vs. Mr. Sanjay Singh Sandhu* 2007(96)DRJ697 [↑](#footnote-ref-27)
28. (2007) 4 SCC 511 [↑](#footnote-ref-28)
29. *Gurbux Singh v. Harminder Kaur* AIR 2011 SC 114 [↑](#footnote-ref-29)
30. *A.Sreenivasa Rao And Others vs State Of A.P* MANU/AP/0143/2011 [↑](#footnote-ref-30)
31. *Harbans Lal Malik v. Payal Malik* 171(2010)DLT67 (“Harbans case”) [↑](#footnote-ref-31)
32. *Ibid.* [↑](#footnote-ref-32)
33. *B.P. Achala Anand v. S Appi Reddy* AIR 2005 SC 986; *Ruma Chakraborty v. Sudha Rani Banerjee and Anr.* AIR 2005 SC 3357 [↑](#footnote-ref-33)
34. *Vimlaben Ajitbhai Patel v. Vatslaben Ashokbhi Patel* (2008) 4 SCC 649 [↑](#footnote-ref-34)
35. *S.R. Batra v. Taruna Batra* (2007) 3 S.C.C. 169 [↑](#footnote-ref-35)
36. *Harbans* case *supra* [↑](#footnote-ref-36)
37. *ADIL and Ors. v. State and Anr*. 2010(119)DRJ297 [↑](#footnote-ref-37)
38. *Razia Begum v. State, NCT of Delhi* 172(2010)DLT619 [↑](#footnote-ref-38)
39. See *Harbans Lal Malik v. Payal Malik* 171(2010)DLT67 [↑](#footnote-ref-39)