

Case Comment: Khursheed Ahmed Khan v State of UP

- Tejas Kothari*

The Right to Public morality is of greater importance than the freedom of religion.

Abstract- Although Muslim men can have up to 4 wives as per their personal laws, polygamy as a practice is a criminal offence in India. This case establishes that constitutional rights prevail over personal law practices in case of a conflict. Although this practice may have held significance during its time, its relevance in today's time has decreased. The lens of public morality shows us that bigamy is discriminatory against other religions and genders and the lens of essential religious practice proves why this practice has never been essential under Islamic law.

Through time we have realised, that a successful marriage plays a significant role in laying down the foundation of a family, which then helps in forming a society without which no civilisation can function. Consequently, the 'institution' of marriage which is a highly regarded relation between two individuals, holds great importance to the state, which has the responsibility to protect specific 'personal laws,' primarily due to the provisions of sections 25 and 26 of the Constitution of India.¹ This needs to be established before any discussion on public morality, and the practice of polygamy in Muslim marriages can take place.

The case of Khursheed Ahmed holds the utmost importance to any citizen of India, because it played a big role in paving the way for courts to tackle many of the disparities that still exist in our personal and Constitutional laws. Relying on other landmark jurisprudence, it helped lay down the rationale behind why any non-essential religious practice (ERP) cannot get the backing of the Fundamental Right to freedom of religion if it violates principles of Public morality.

In this case, the appellant was removed from his job for the UP government as he married a woman while already being married to another woman, Sabina Begum. This went against rule 29(1) of the conduct rules, which prohibited acts of bigamy. The appellant argued that he had divorced his first wife in 1999 before marrying again in 2005. However, all the evidence was against him. This included the inquiry conducted by the police and the counter affidavit filed by his first wife which denied a divorce and said that the appellant had stated before the SSP in 2006 that both his wives were living comfortably with him. Consequently, the Supreme Court (SC) upheld the High

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¹ SC, Smt. Sarla Mudgal, President, ... vs Union of India & Ors, 1995 SCC (3) 635

Court (HC) decision of dismissing the writ petition based on facts when the appellant raised the point that the Conduct Rules were violative of Article 25 of the Constitution, since his religion allowed him to have up to 4 wives. The SC eventually argued that the greater good of the state holds more value in case of conflict with any religious practice and that polygamy was not a 'religious faith or belief' or a mandate under Muslim law. Consequently, the appellant wasn't exempted from the conduct rules.²

Relying upon the judgement of *Sarla Mudgal vs UOP*³, this case reiterates the fact that any second marriage without properly dissolving the first marriage would be void as per section 494 of the Indian Penal Code (IPC) and the accused could be punished for the same. This might raise a question as to what happens with regards to the Muslim personal law practice that allows a man to have up to 4 wives. The answer to this relies on the understanding of India's religious composition which is secular because it gives all religions their due regard and respect. Overall, we are not a Hindu, Muslim, Christian or Jewish state unlike any theocratic country which may be classified based on a 'particular' personal law. Of course, since there are so many religions, there would be a majority, which in our case is the Hindu religion, but this does not undermine the importance of India being a secular country,⁴ whose basis of determination is primarily the Constitution. Since no other religion legally allows this concept of polygamy, the courts must do substantial justice to "secure the good of all its citizens irrespective of their religious beliefs," as was held in *Ziauddin Burhammudin Bukari Vrs. Brijmohan Ramdas Mehra and Bros*⁵. There are various advantages to a secular state including the fact that it shows a step towards human development and allows people to acknowledge the concepts of peaceful co-existence. This is because it aims to suppress notions of superiority by recognizing different faiths and opinions which would eventually lead to socio-cultural advancement.⁶

To make a fair assessment, we must understand why the religious practice of polygamy came into existence and why it was made a part of Muslim law in the first place. Prophet Muhammad, who was considered as the embodiment of the Quran, was born during a time when women had no rights and infanticide was prevalent. He was determined to establish a community which gave women property rights, social and marital rights and in this regard, he married several women. Some of these were widows in desperate need of physical and economic shelter (*Ihsan*)⁷ since the

² SC, Khurshed Ahmad Khan vs State of U.P.& Ors, CIVIL APPEAL NO.1662 OF 2015

³ Ibid 4

⁴ Legislative Department | Ministry of Law and Justice | GoP". legislative.gov.in. N.p. n.d. Web. 16 May. 2020.

⁵ SC, Ziauddin Burhammudin Bukari Vrs. Brijmohan Ramdas Mehra and Bros AIR 1975 SC 1788

⁶ SC, S. R. Bommai Vs. Union of India, AIR 1994 SC 1918

⁷ Life and Character of the Seal of Prophets (sa) – Volume II defines ihsan which is a purpose of marriage where a person must be safeguarded from various ailments, evils and illicit deeds.

wars had drastically reduced the number of men in the society.⁸ Consequently, polygamy came ‘as a solution in the time of crisis. The Quran based this principle around the fact that “unless a man can treat several wives equally, he should never enter into polygamy.”⁹ Believers argue that the modern critique of this practice which says that polygamy is an institutionally encouraged “lustful agreement” is just an uninformed rumour.¹⁰ However, we are only interested on why the practice shouldn’t hold supremacy over Constitutional provisions in today’s time even if it may have relevance in Muslim law. We will look at the practice of bigamy from two lens: the lens of public morality and that of essential religious practices.

The judgement of this case draws rationale from *State of Bombay vs Narasu Appa Mali*, which established that only religious faith and belief are absolutely protected under Article 25 of the Constitution while religious practices are subject to the test of public morality.¹¹ Now, Article 25(1) states that all citizens of India have the freedom and right to freely “profess, practice and propagate religion.”¹² As we know, religions often have a set of practices in the form of rituals, observances, ceremonies or modes of worship that form the basis of that religion, along with the sermons and scriptures.¹³ For instance, Muslims are prescribed to fast during the month of Ramadan and visit Mecca at least once in their lifetime.¹⁴ Based on this test and as established in a plethora of Indian cases,¹⁵ this freedom is “subject to public order, morality and health.”¹⁶ As was discussed in the *Ananda Marga* case,¹⁷ religious practices must conform to society's morality and interest. Consequently, religious practices such as human sacrifices, child marriage, sati have been criminalised as they went against this principle of public order and morality.¹⁸ Under *Appa Mali*, polygamous relationships disturb the public order as they lack fairness and are discriminatory. They discriminate against women, who have no right to marry more than one man and against all other religions, under which this practice is illegal. The case of *Sabrimala* mentions that

⁸ “Muhammad: Legacy of a Prophet Muhammad and Women, battle of Uḥud (625)”. pbs.org. n.p. n.d. Web. 16 May. 2020)

⁹ “Why does Islam allow polygamy?”. alislam.org. n.p. 24 January 2020. Web. 16 May. 2020.

¹⁰ “As Supreme Court decides on banning polygamy, a look at how Muslim countries deal with the practice”. Scroll.in. n.p. 30 March 2018. Web. 16 May. 2020

¹¹ SC, *State of Bombay vs Narasu Appa Mali*, AIR 1952 Bom 84, (1951)

¹² The Indian Constitution, 1950, Article 25

¹³ The Commissioner, Hindu Religious Endowments 1954:1024

¹⁴ Sawm, third pillar of Islam, Hajj, fifth pillar of Islam; “Beliefs and Practices”. harvard.edu. n.p. n.d. Web. 16 May. 2020

¹⁵ Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Tirtha Swamiar of Shri Shirur Mutt, AIR 1954 SC 282, at 289.

¹⁶ Ibid 13

¹⁷ SC, *Acharya Jagadishwananda Avaduta Vrs. Commissioner of Police*, 1984 AIR 512

¹⁸ Indian Penal Code, 1860, section 295 to 298; intended for keeping peace and protection of people against violence than for the protection of religion.

exclusionary practices are contrary to Constitutional morality.¹⁹ Moreover, data shows that in most places around the world, sex ratios have now been skewed against women.²⁰ In the modern world, which is increasingly recognizing the importance of equality, this practice is an anomaly based on an outdated principle²¹ that goes against Article 13(1) of the Constitution.²² This brings us back to why we established that marriage is a social institution, in which the state is major stakeholder. Most religions admit that monogamy is the most ideal and respected form of marriage because of the issues that occur with polygamy.²³ Many men get married to another wife without the consent of the first wife which blatantly makes the contract of marriage in Islam void. Still, since these women are financially dependent on their husbands, they have no choice but to continue in the marriage.²⁴ A man may falsely show the court that he can take care of multiple wives simultaneously or might just enter such marriages illegally to reduce his burden at work.²⁵ In both cases, women's rights are completely ignored which goes against the principles of Constitutional morality and public order. This principle was used by the SC when it decriminalised homosexuality.²⁶

With respect to the second lens of judging whether polygamy falls under the category of an essential religious practice, the court relies on the case of *Javed vs State of Haryana*. It states that polygamy is not an integral part of Muslim law and hence does not get the protection of Article 25(1)²⁷. One of the first cases that established the doctrine of essentiality was the Shirur Mutt case in 1954. The 7-judge bench declared that this doctrine would only protect those religious practices which were essential and integral to the religion. Although the term 'religion' is tough to define using a rigid definition, the court held that 'essentiality' was to be determined regarding the doctrines of the very religion itself and according to what the tenets of the religion prescribed.²⁸ By this rationale, we know that Islam has always had restrictions on who could remarry. Only those that were deemed fit by the family courts to maintain a family while providing justice and fairness to all wives equally could remarry. The Quran clearly states that, "if one fears that he will not do justice between them then he should marry only one."²⁹ If we also look at the life of prophet

¹⁹ Page 14, Kantaru Rajeevaru v Indian young lawyers association, REVIEW PETITION (CIVIL) NO. 3358/201

²⁰ World sex ratio 1.018, "World population". countrymeters.info. n.p. n.d. Web. 16 May. 2020., "Gender Ratio". ourworldindata.org. n.p. 13 June 2019. Web. 16 May.2020.

²¹ "The Concept of Polygamy and the Prophets Marriages". al-islam.org. n.p. 21 June 2019. Web. 16 May .2020.

²² Ibid 12

²³ Ibid 3

²⁴ "As Supreme Court decides on banning polygamy, a look at how Muslim countries deal with the practice". Scroll.in. n.p. 30 March 2018. Web. 16 May. 2020.

²⁵ "Indian men marrying multiple wives to help beat drought". CNN.com. n.p. 16 July 2015. Web. 16 May.

²⁶ SC, Navtej Singh Johar & Ors. v. Union of India, Writ Petition (Criminal) No. 76 of 2016 Writ Petition (Criminal) No. 76 of 2016

²⁷ SC, Javed vs State of Haryana, AIR 2003 SC 3057,

²⁸ The Commissioner, Hindu Religious Endowments, Madras Vs Sri Lakshmindra Thirtha Swamiar Of Sri Shirur Mutt, 1954 AIR 282, 1954 SCR 1005

²⁹ Surah an-Nisaa, 4:3

Muhammed, we notice that he was married to one wife till the age of 50 after which he had ten wives till age 63. This clearly shows that the prophet acted according to the circumstances around his time and as mentioned in various sources Prophet wanted to improve women's rights in 7th century and provide a sense of belonging to the large number of unmarried or widowed women after the wars.³⁰ This goes to show that polygamy has never been an 'essential' practice in Islam without which the fundamental principles of the religion would be lost and it is 'certainly not a religious injunction or mandate.'³¹ Moreover, just like the rationale followed in the Triple Talaq and Shamim Ara cases,³² it should not be protected under Article 25. Additionally, as our case tells us, any law favouring monogamy would not reduce the scope of Article 25 for anyone who believes in Muslim Law.³³

The case of Khursheed Ahmad is one of those landmark cases that has recognized how the relevance and functionality of religious customs change over time and that even though there may be various practices that may be permitted under personal law, a stand should be taken in those cases where the society's interests are being threatened, keeping our constitutional values in mind. Polygamy has the potential to jeopardize multiple lives if it goes wrong and this could cause discord in our community

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³⁰ Ibid, Rizvi, Sayyid Muhammad. "The Concept of Polygamy and the Prophets Marriages." *AI*, 21 Aug. 2019, www.al-islam.org/articles/concept-polygamy-and-prophets-marriages-sayyid-muhammad-rizvi.

³¹ Ibid, para 56

³² SC, Shamim Ara v. State of UP; SC negated the right of Muslim men to instantaneously divorce their wives.

³³ Ibid, para 55

8. <https://www.al-islam.org/articles/concept-polygamy-and-prophets-marriages-sayyid-muhammad-rizvi>
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