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JUDGMENT

GUL MOHAMMAD KHAN, CHIEF JUSTICE.-The petitioner challenges, through these petitions, the section 197 of the Criminal Procedure Code and section 6(5) of the Criminal Law Amendment Act, 1958, on the ground that they are repugnant to the Injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet. Section 197 Cr.P.C., reads as under:-

"(I) When any person who is a Judge within the meaning of section 197 of the Pakistan Penal Code or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of the Central Government or a Provincial Government, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except when the previous sanction--

- (a) in the case of a person employed in connection with affairs of the Federation, of the President and
- (b) in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province.

(2) The President or Governor, as the case may be may determine the person by whom, the matter in which, the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

Section 6(5) also similarly provides for sanction of the executive authority before any trial in a criminal Court of law can take place.

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2. It is contended that these sections are against the principles of justice and equality and also the concept of independence of judiciary as provided in the Holy Quran and even the Constitution. It was further objected that these sections also create a special privileged class of citizens who are considered superior to other citizens and are thus void.

3. We issued notices to the Federal as well as the Provincial Governments. A public notice was also issued. We heard Hafiz S.A.Rahman, the Standing Counsel for the Federal Government, Mian Muhammad Ajmal, Additional Advocate General, N.W.F.P, Mr.Nawaz Abbasi, Assistant Advocate General, Punjab, Mir Rahman Khan Khalil, Additional Advocate General, N.W.F.P., Mr.Iftikhar Hussain Chaudhary, Standing Counsel for the Federal Government and Mr.Muhammad Bashir Kiyani, Advocate, on behalf of A.G.Baluchistan. We also heard Dr.Muhammad Tufail and Dr.Muhammad Tufail Hashmi, Juris-consults of this Court, all of whom took great pains to assist the Court.

4. The first objection taken on behalf of the respondents was that the provision incorporated in the above sections are of procedural nature and, therefore, this Court has no jurisdiction to go into the case in view of Article 203B of the Constitution. This contention, however, has no merit as already held by this Court in S.S.M.No.370 of 1984 where a similar objection of jurisdiction was raised. The relevant portion of the judgment may be reproduced hereunder for ready reference:-

"The learned Deputy Attorney General submitted that this is a matter which pertains to procedure of Courts and as such is not within the jurisdiction of this Court. This argument has not impressed us since where the right of public is involved, the matter cannot be considered to be only procedural. It is a

Sharia right of a person to seek redress of his legal grievance, in a Court of law. The point is not without authority. Sections 401 and 402-A and 402-B Cr.P.C conferred jurisdiction upon the President or the Provincial Governments to remit sentences of and grant pardon to the offenders. The question whether this section is procedural or not and whether it was excluded from the jurisdiction of the Shariat Bench of the High Court came up before the Shariat Bench of Peshawar High Court in Gul Hassan Khan Vs. Government of Pakistan (PLD 1980 Peshawar I (14)). It was held that it was not procedural at all."

5. Mr.Khalid Abdullah Chungwani, Advocate, Dera Ghazi Khan, also argued that these are not procedural but substantiative provisions and relied on observations of the Supreme Court in various cases. In Syed Ahmad Vs. the State (PLD 1958 SC(Pak)27(31) the observations of the Supreme Court are as under:-

"It has been said in certain cases that the question whether section 197 Criminal P.C., is attracted in a given case must be decided by reference only to the statements made in the petition of complaint. It seems to us that such a view might have the effect of destroying a substantial right which is vested in the Government of protecting its servants from harassment and persecution by misrepresentation of their actions so as to give them the appearance of offences."

The finding of the Supreme Court in this case thus was that it is a substantive right of a public servant and the Government.

The Supreme Court in S.M.H.Rizvi Vs. Abdul Salam (PLD 1960 SC

358 (364-B) observed as under:-

"The purpose of section 197, Criminal Procedure Code appears to be to define a sphere in which departmental or administrative law should be applicable at the option of Government to the conduct of public servants. The limits of the applicability of such administrative law are to be set in each case by the ordinary Criminal Courts, on the basis of their opinion as to whether the action in question was performed by the offending official "while acting or purporting to act in the discharge of his official duty."

6. The precise question whether section 197 Cr.P.C., was a procedural or a substantive provision came up before the Federal Court in the case of Mahbub Khan Vs. the Crown (PLD 1954 FC 248 (261-F) which is as under:-

"The provision in the Prevention of Corruption Act, 1947 requiring the sanction of certain high authorities as a condition precedent to the prosecution of public servants is clearly one designed for the protection of such persons, and in that sense can be regarded as a right allowed to them by statute. In respect of statutes which take away rights under existing laws, there is a presumption that they are not intended to have retrospective effect."

7. It is thus quite clear from the above that what has been barred is a vested right of an aggrieved person and what is conferred on the public servant and the Government are not the procedural but substantive rights under the two impugned sections. These provisions also deprive the Courts of law of their power to adjudicate upon the grievances of a citizen and worse of all is that the

ouster is based on the option and discretion of the executive. Allah Subhanahu in verse 59 of Chapter IV lays down as under:-

"O ye who believe Obey Allah, and obey the messenger and those of you who are in authority; and if ye have a dispute concerning any matter, refer it to Allah and the messenger if ye are (in truth) believers in Allah and the Last Day. That is better and more seemly in the end."

8. This verse provides the most concise but a complete Constitution for an Islamic State. It confirms sovereignty of Almighty Allah and dictates obedience of the laws of Allah as revealed through and explained and interpreted by the Holy Prophet (PBUH) and demands also of people the obedience of those in authority. However, if any citizen disputes the laws, commands or orders of the men in authority, he is entitled to go to Courts to get adjudicated his dispute in accord with the laws of Allah and His Prophet. The decision of such a dispute by those in authority is clearly excluded. The Courts in this respect are not part of the *اولى الامر* and they have to consider whether the orders etc., of the *اولى الامر* are in accordance with Quran and Sunnah or not. This verse thus not only provides a guarantee for the independence of judiciary from the executive but enjoins the judicial review of the administrative acts on the touchstone of Quran and Sunnah. It is thus a guarantee of the rule of law through valid laws and lays down that not only every person has the right to get his dispute decided but only by a body which is not only not the executive authority but is independent of it. Thus any law circumventing the above concepts is repugnant.

9. It is argued that as according to section 197 Cr.P.C., and section 6(5) of Criminal Law Amendment Act, 1958 an aggrieved person, the prosecutor or even the Court has to first of all to go to an executive authority *'اولى الامر'*

in order to get permission to proceed against the public servant and as the President or as the case may be, the Governor can refuse that permission, these provisions are a clog on the right of an aggrieved person and a restriction on the jurisdiction of the Court and therefore repugnant. It is narrated from the Holy Prophet that the previous nations were destroyed because they had different laws for high ups and the influential and others for the masses.

"انماهلك الذين من قبلكم انهم كانوا اذا سرق فيهم الشريف تركوه واذا سرق فيهم الضعيف اقاموا عليه الحدود"

(Sunan Abu Daud Vol.II, page 223 Print Beirut).

10. The Law Officers, appearing on behalf of the various Governments had no argument to advance in favour of these provisions. In fact, the Supreme Court in PLD 1981 S.C. 573 repeated its previous view mentioned in para 5 above in the case of Syed Ahmad.

11. A written brief was also filed on behalf of the Government. The main apprehension mentioned in it is that doing away with the sanction of the Government would open a flood gate of frivolous litigation and this would not only vex the public servants but reduce their efficiency and independence. We, however, cannot maintain such a provision just for the reason that it is the executive authority which can genuinely defend and protect the public servants from the frivolous and vexatious litigation. Rather such a defence of the public servants viz a viz the Courts/^{create} far worse a situation. According to Quran the dispute is to be decided by the Courts i.e., Quran places more reliance on the Courts and excludes the 'اولى الامر' whereas the above provision displays 'no confidence' against the Courts and confides in the 'اولى الامر'. These provisions thus cannot be upheld.

12. A suggestion was then made that various fori may be provided for different categories of the employees so as to avoid rush of litigation, embarrassment

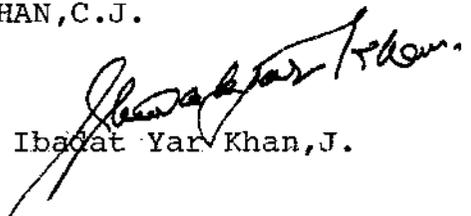
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to the lower Courts and also to afford protection to some high officers in case a litigant just wants to humiliate them in the eye of public. Such a safeguard can, undoubtedly, be provided in the law. The division of judicial power is provided in every law and the level of Courts can also be determined keeping in view the type of a case. The legislature may thus provide levels of the various fori as long as it does not deny or restrict the right of the person to go to the Courts or confronts him with such an obstacle as may amount to defeating that right. The law may thus authorise various levels of Courts commensurate with the levels of public servants to deal with cases against them.

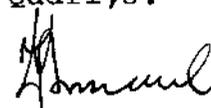
13. The provision of the sanction of the President, the Governor of a Province or any other executive authority is, therefore, repugnant to Quran and Sunnah of the Holy Prophet and it is, therefore, desired that the President shall take steps so that the above laws are suitably amended before the 1st of January, 1990 failing which the provision requiring the previous sanction or a sanction of the President or a Governor of a Province or any executive authority shall cease to have effect.


GUL MOHAMMAD KHAN, C.J.


Shujaat Ali Qadri, J.


Ibaqat Yar Khan, J.

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Fida Mohammad Khan, J.

Approved for reporting

Islamabaddated the

ABDUL RAHMAN / *****



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