

IN THE SUPREME COURT OF PAKISTAN
(SHARIAT APPELLATE JURISDICTION)

PRESENT

Mr. Justice Iqbal Masih
Mr. Justice Iftikhar Mian
Mr. Justice Saeed Ali Shah
Mr. Justice Far Muhammad Karam Shah
Mr. Justice Maulana Muhammad Taqi Usmani

SHARIAT APPEAL NO. 4 (SHARIAT) OF 1991

AND

SHARIAT APPEAL NO. 6 (SHARIAT) OF 1991.

(On appeal from the judgment and order
of the Federal Shariat Court dated 8.11.90
in Shariat Petition No. 4/I of 1989.)

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SHARIAT APPEAL NO. 4 (SHARIAT) OF 1991

Government of N.W.F.P. APPELLANT

VS.

Mr. I.A. Sherwani and another. RESPONDENTS.

For the appellant:

Mr. M. Asad Khan,
Additional Advocate-General, NWFP
Mr. H. A. Jaffar Kazhar, Advocate-on-
Record (Absent).

For the respondent:

In person.

SHARIAT APPEAL NO. 6 (SHARIAT) OF 1991

Government of Pakistan. ... APPELLANT

VS.

Mr. I.A. Sherwani. ... RESPONDENT

For the appellant:

Hafiz S.A. Rahman, Advocate, Supreme
Court; Iftikhar Muhammad Khan, AOR

For the respondent:

In person.

Dr. Abdul Malik Inani,
Juris-consultant.

Date of hearing:

15.2.1993.

JUDGMENT

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ - حُكْمٌ دَائِمٌ عَلَى رَسُولِهِ الْكَرِيمِ

MAULANA MUHAMMAD TAQI USMANI, JUDGE. - These two

appeals are directed against the judgment of the Federal Shariat

Court dated 8.11.1990 whereby Rule 5 of the Fundamental Rules

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Superintendent
Court of Pakistan

(relating to the Government Servants) and all the parallel Rules of the Provinces were held to be repugnant to the Injunctions of Islam, as laid down in the Holy Quran and ^{the} Sunnah of the Holy Prophet *ﷺ*.

2. The impugned judgment was delivered on the petition filed by the respondent in the Federal Shariat Court challenging certain Rules of the Government Servants (Efficiency and Discipline) Rules, 1973 and the Fundamental Rules and Supplementary Rules on the basis of their repugnance to the Injunctions of Islam. The learned Federal Shariat Court after examining the main provisions of the Government Servants (Efficiency and Discipline) Rules, 1973, held that there was nothing repugnant to the Injunctions of Islam therein. However the petition was accepted with regard to rule 53 of the Fundamental Rules. The grievance of the respondent about Rule 53 was that according to this Rule if an enquiry is held against a Government Servant and he is suspended during the enquiry, he has not been held entitled to his full salary and benefits during the period of his suspension. It will be pertinent to reproduce Rule 53 of Fundamental Rules which reads as follows:-

"FR.53.- A Government servant under suspension is entitled to the following payments:-

(a) In the case of Commissioned Officer of the Indian Medical Department or a Warrant Officer who is liable to revert to Military duty, to the pay and allowances to which he would have been entitled had he been suspended while in military employment.

(b) In the case of Government servants other than those mentioned in clause (a) above, the subsistence grant at one-third of the pay

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Federal Shariat Court of Pakistan

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Federal Shariat Court

of the suspended Government servants; provided that the suspending authority may direct that the Government servant under suspension shall be granted in addition such compensatory allowances as the Governor General may sanction by general or special order for issue under this proviso".

3. The subsistence grant was thereafter increased from one third to one half of the salary as from the 1st of December 1969 vide O.M. No.F.12(52)-R3/70 dated the 14th February, 1970 (ESTACODE page 531 Edition 1989).

4. According to Sl. No. 106 a government servant under suspension is also entitled to Senior Post Allowance, House Rent Allowance, Local Compensatory Allowance and Conveyance Allowance. But the bill for the residential telephone has to be paid by the employee and the residential orderly and transport where supplied will be withdrawn (See ESTACODE Page 532 Edition 1989).

5. The major objection of the Federal Shariat Court on the above Rule is that a Government servant during his suspension remains in the service and before the conclusion of the inquiry no charge has been proved against him. If the Government does not want him to continue his normal functions during the enquiry he may be suspended, but he cannot be deprived of his salary during his suspension, because the contract of service remains valid during that period also. The Federal Shariat Court relied upon verse No. 1 of Surah Al-Maidah which reads as under:-

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ

O You who believe, fulfill your contracts".

It is held by the Federal Shariat Court that the

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Government has entered into a contract of service with the employee and a unilateral withholding of the salary is repugnant to the terms of the contract and to the verse quoted above.

7. Dr. Abdul Maalik Irfani who appeared to assist Hafiz S.A. Rahman, the learned counsel for the appellant and was permitted to assist the Court as juris-consult has submitted that the payment of half of the salary or half of the amount during the suspension period is a part of the contract itself. A government servant, while entering into the contract of service accepts all the rules of service prescribed by the government for its employees. It cannot be said, therefore, that the rule in question violates the terms of the contract.

8. We do not agree with the learned juris-consult. A contract allowing unilateral and arbitrary reduction of salary without any fault having been proved against the employee is itself repugnant to the Injunctions of Islam. A valid contract under Shariah must be clear, unambiguous and free from exploitation. An unbridled power in the hands of the employer to convert the salary into a "subsistence grant" amounts to an exploitation which is termed by the Holy Prophet ﷺ as "gharar".

Hazrat Ali رضي الله تعالى عنه says:

نهى رسول الله صلى الله عليه وسلم من بيع المضطر
وعن بيع الخرز

The Holy Prophet ﷺ has prohibited the sale under compulsion and the sale based on "gharar".

(Mishkat Sharif on the authority of Abu Dawood Vol. II Page 20 with Urdu translation published at Lahore).

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The term "gharar" means any transaction whereby the consideration

10. Although the word "Taṭfīf" used in the Holy verse literally means "giving short measure or short weight" yet, in the normal usage it covers all the situations where a person gives too little and asks too much. Maulana Mufti Muhammad Shafi, while explaining this verse, writes in his Ha'arif-ulquran:

مطففین تطفیف سے مشتق ہے جس کے معنی ناپ تول میں کمی کرنے کے ہیں۔ اور ایسا کرنے والے کو مطفیف کہا جاتا ہے۔ قرآن حکیم کے اس ارشاد سے ثابت ہوا کہ تطفیف کرنا حرام ہے۔ تطفیف صرف ناپ تول ہی میں نہیں؛ قرآن و حدیث میں ناپ تول میں کمی کرنے کو حرام بلکہ حقدار کو اس کے حق سے کم دینا؛ قرار دیا ہے کیونکہ عام طور سے معاملات کا لین دین کسی چیز میں ہو تطفیف میں داخل ہے؛ انہی دو طریقوں سے ہوتا ہے انہی کے ذریعہ یہ کہا جا سکتا ہے کہ حقدار کا حق ادا ہو گیا یا نہیں، لیکن یہ علوم ہوتا ہے نہ مقصود اس سے ہر ایک حقدار کا حق پورا پورا دینا ہے اس میں کمی کرنا حرام ہے، تو ختم دوا کہ یہ صرف ناپ تول کے ساتھ مخصوص نہیں بلکہ ہر وہ چیز جس سے کسی کا حق پورا کرنا یا نہ کرنا جانچا جاتا ہے اس کا یہ ہی حکم ہے خواہ ناپ تول سے ہو یا عدد شماری سے یا کسی اور طریقے سے ہر ایک میں حقدار کے حق سے کم دینا بحکم تطفیف حرام ہے۔

موظا امام مالک میں ہے کہ حدیث عمر بن خطابؓ نے ایک شخص کو دیکھا کہ وہ نماز کے رکوع سجدے وغیرہ پورے نہیں کرتا جلدی جلدی نماز ختم کر ڈالتا ہے تو اس کو فرمایا لقد طفت یعنی تونے اللہ کے حق میں تطفیف کر دی، فاروق اعظم کے اس قول کو نقل کر کے حضرت امام مالک نے فرمایا لکل شیء وفاء و تطفیف یعنی پورا حق نبٹنا یا کم کرنا ہر چیز میں ہے یہاں تک کہ نماز، وضو طہارت میں بھی اور اسی طرح دوسرے حقوق اللہ اور عبادات میں کمی کوتاہی کرنے والا تطفیف کا مجرم ہے اس طرح حقوق العباد میں جو شخص مقررہ حق سے کم کرتا ہے وہ بھی تطفیف کے حکم میں ہے۔ مزدور ملازم نے جتنے وقت کی خدمت کا معاوضہ کیا ہے اس میں سے وقت چرانا اور کم کرنا بھی اس میں داخل ہے۔

زمعارف القرآن جلد ۸، ص ۶۹۳ و ۶۹۴ مطبوعہ کراچی (۱۹۸۱ء)

In the instant case a government servant under suspension, is not allowed to go on leave, nor is he allowed to leave the station of service, nor is he given an opportunity to service anywhere else which means that he has been detained for the government like any other ^{servant} but at the same time he is denied his full salary and other benefits. This unjust treatment itself certainly falls under the "Taṭfīf" prohibited by the Holy Prophet in the verse quoted above and is, therefore

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repugnant to the Injunctions of Islam.

11. The learned Federal Shariat Court has allowed the Government to deprive a suspended government servant from other facilities provided to him, like residential orderly, telephone call, but we do not find any reason to differentiate between the salary and the benefits he is entitled to under the contract of service. Once it is accepted that he is a Government servant, he must be allowed all the benefits he deserves under the contract of service like any other government servant. Therefore, we do not agree with the Federal Shariat Court in this respect and we hold that Rule 53 of the Fundamental Rules and the rule mentioned in Sl. No. 105 and all the parallel rules of the Provinces are repugnant to the Injunctions of Islam as laid down in the Holy Quran and the Sunnah of the Holy Prophet ^ﷺ to the extent ^A that they deprive government servants of their full salary and other benefits during the period of their suspension. A suspended government servant should be allowed full amount of his salary ^{all} and other benefits and facilities provided to him under the contract of service. Necessary amendment in the rules shall be carried out before 30th of June, 1993, on which date this judgment shall take effect. The rules declared in this judgment as repugnant to the Injunctions of Islam shall cease to have effect on 30th June, 1993. With this

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modification in the order of the Federal Shariat Court
these appeals are hereby dismissed.



- Sd/- Nasim Hasan Shah, J.
- Sd/- Ajmal Mian, J.
- Sd/- Sajjad Ali Shah, J.
- Sd/- Piri Muhammad Hasan Shah,
- Sd/- Nazim M. Fazi Usmani,

Certified to be a true copy

[Signature]
Superintendent
Shariat Court of Pakistan

Rawalpindi,
February 15, 1993.

APPROVED FOR REPORTING

[Signature]

M. Anis
13.3.93