IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

PRESENT

MR.JUSTICE SHAHZADO SHAIKH
MR.JUSTICE DR.FIDA MUHAMMAD KHAN
MR. JUSTICE SHEIKH AHMAD FAROOQ

SHARIAT PETITION NO.4/I OF 2010

Qazi Muhammad Haroon, ... Petitioner
Advocate High Court, Balochistan.

Versus

Federal Government of Pakistan .....Respondent

Counsel for the Petitioner	.....	Nemo
Counsel for the State	.....	Nemo
Counsel for Federal Govt:	.....	Nemo
Date of Institution	.....	25.06.2010
Date of hearing	....	22.10.2012
Date of decision	....	22.10.2012

-:-

JUDGMENT

JUSTICE SHAHZADO SHAIKH, J.- In this petition, the petitioner Qazi Muhammad Haroon has challenged Article 17(2) and Article 163 of Qanoon-e-Shahadat Order 1984 for being not in line with the Islamic Injunctions, i.e., the Holy Quran and the Sunnah of the Holy Prophet (peace be upon him). According to the petitioner, under Article 17(2) of Qanoon-e-Shahadat, it has been provided that "The competence and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam but under Article 17(2) the number of witnesses regarding future obligation has been prescribed, which is as under: "In matters pertaining to financial or future obligation, if reduced to writing, the instrument shall be attested by two men, or one man and two women". According to the petitioner, Article 17(1) was sufficient and there was no need of this article, i.e. Article 17(2). According to him, the impugned Article has particularized the above referred Quranic verse regarding *Shahadat*, which is not in accordance with the commandments of *Shariah*.

2. Notice was sent to the petitioner which has not been returned served or un-served. However, the petitioner was informed telephonically also, but he is not present. He was also absent on 06.07.2010, 26.03.2012, 10.04.2012 and 07.05.2012, 20.06.2012. Notices were also issued to Secretary, Ministry of Law and Justice, Government of Pakistan, Attorney General for Pakistan, Mr. Shabbir Mehmood Malik, Standing Counsel-II for Attorney General, Mr. M. Nazir Abbasi, Standing Counsel for Federal Government, Barrister Feroze Jamal Shah Kakakhel as (Amicus curiae.), but no one appeared on

their behalf inspite of service neither anyone of them has filed their written comments/written reply in this petition.

3. We have given anxious consideration to the issue raised by petitioner Qazi Muhammad Haroon in Shariat Petition No.04/I of 2010. We have carefully considered the matter, and examined the material referred to above.

4. It is pertinent to mention here that the Qanoon-e-Shahadat Order 1984, in its present form, as the history shows, had been examined and brought in conformity with the Injunctions of Islam. It has replaced Evidence Act 1872. These issues have also been discussed in a judgment titled Rashida Patel Vs. State 1989 FSC-95.

Implications of above proposal in the petition have to be carefully examined in view of the multifarious human activities and consequent multitudinous situations. In fact Law has manifold dynamics, which should neither be constricted nor truncated.

Article 17 (1) and (2) of Qanoon-e-Shahadat Order 1984 is reproduced below:

> **17. Competence and number of witness:**
>
> (1) The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the Injunctions of Islam as laid down in the Holy Quran and Sunnah.
>
> (2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law,
>
> a. in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary and evidence shall be led accordingly; and
>
> b. in all other matters, the Court may accept, or act on, the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.

Translation of verse 2:282 is given below:

"O you who believe, when you transact a debt payable at a specified time, put it in writing, and let a scribe write it between you with fairness. A scribe should not refuse to write as Allah has educated him. He, therefore, should write. The one who owes something should get it written, but he must fear Allah, his Lord, and he should not omit anything from it. If the one who owes is feeble-minded or weak or cannot dictate himself, then his guardian should dictate with fairness. **Have two witnesses from among your men, and if two men are not there, then one man and two women from those witnesses whom you like,** so that if one of the two women errs, the other woman may remind her. The witnesses should not refuse when summoned. And do not be weary of writing it down, along with its due date, no matter whether the debt is small or large. That is more equitable in Allah's sight, and more supportive as evidence, and more likely to make you free of doubt. However, if it is spot transaction you are effecting between yourselves, there is no sin on you, should you not write it. Have witnesses when you transact a sale. Neither a scribe should be made to suffer, nor a witness. If you do (something harmful to them), it is certainly a sin on your part, and fear Allah. Allah educates you, and Allah is All-Knowing in respect of everything."

(2:282)

The quality and competence essentially require to stand straight ('bil qist') as witnesses *(shuhadaa-a)*, discharging this sacred duty for Allah *(li-Allah)*. The above verse (2-282), inter alia, points towards a number of legal principles and rules, which can be derived from it, e.g.:

> *God consciousness-fear in all dealings with fairness, number and competence of witnesses, scribe, power of attorney, dealing with situations when some witnesses could not be available, future effect of transaction no matter small or large, along with its due date, witnesses for sale transaction, neither scribe nor witness should be made to suffer, preparing/writing a document, not to omit anything in documentation, importance of putting in writing, preservation of documentation, basis for appraisement of evidence in such cases, avoidance of conflict and its resolution in such cases, responsibility of scribe, responsibilities of executor/creditor/debtor, responsibilities of witnesses, who should not refuse when summoned, responsibility of guardian to dictate on behalf of feeble-minded/weak, two witnesses from own men, and if two men are not there, then one man and two women of liking, financial liability, document to be duly proved, etc., etc.*

The underlying emphasis on ensuring quality and competence of evidence, from the very beginning, cannot be missed in these broader pointers.

Law can neither remain static nor can it be limited by apparent lexicographics and in space and time. It is ever evolving. Stagnation of *ijtihad* putrefies the corpus of law. The Injunctions of the Quran and the Sunnah embody universal-timeless, immutable, broader laws, which need to be expanded and elaborated on the time line. Let us see how some of these aspects, highlighted in the above verse (2-282), are unfolded and expounded in their application and practice in the existing codified, juristic and jurisprudential corpus. In this regard, following case law may highlight some of the important underlying parameters, which will become more clear when re-examined in the light of verse 2-282:

It is not merely **number of witnesses**, but also their quality, and competence, and all pieces (of evidence) in circumstances, combine to constitute admissible, reliable and truth-revealing evidence:

The rule of evidence incorporated in Art. 17 is that in the cases which fall within the ambit of Sub-Article (2) of Art. 17 the Court may accept or act on the testimony of the number of witnesses mentioned therein or such other evidence as the circumstances of the case may warrant. In the light of this rule in addition to or in absence of direct evidence, the Court may also consider the direct and circumstantial evidence brought on record in proof of fact. [2005 SCMR 564]

In **appraisement of evidence** following is essentially pertinent:

Witnesses are weighed and not numbered. *[1991 MLD 2576]*

Purgation—Not relevant in cases of *Ta'zir. [1992 KLR (Cr.L.) 1]*

Solitary witness—No impediment to base conviction. [7992 *KLR (Cr.L.) 160)*

Sole testimony of a witness to be made foundation of guilt must be clean cogent and consistent. *[2001 SCMR 199]*

Mere quantity of evidence nowhere matters. Witnesses, as a rule are weighed and not counted. *[1990 P.Cr.L.J. 73)*

In case of conflict between the witnesses, quality will certainly give way to quantity. *[1991 MLD 2576]*

Where the execution of document is in issue, it is essential and mandatory upon the person relying upon the document to examine two of the attesting witnesses. *[PLD 2005 Lah. 654]*

Article 17 read with Art. 79 makes it clear that a document creating **financial liability** must be attested by two witnesses and proved likewise. *[PLD 1995 Lah 395]*

Document not duly proved cannot be read in evidence. *[1998 MLD* 1592]

Where **both** the attesting witnesses of document in question are alive and available but not produced, execution of document not proved. *[PLD 1996 S.C. 256]*

Only one witness examined, **document** would not be deemed to have been proved. *[PLD 1996 Lah 367]*

Requirement of production of **two attesting witnesses** *is sine quo non to* prove the document. *[PLD 2008 Lah. 51]*

Name of the scribe not mentioned on the deed. First marginal witness produced deposing that such deed was not prepared in his presence and he never appeared before any authority for its execution. Second marginal witness not produced. Execution of document held not proved. *[PLD 2008 Lah. 511]*

Execution of **document** denied, party relying must prove the document—scribe as good a witness as anybody else. *[2008 SCMR 1639]*

Sale deed **registered** and purchaser in possession of the disputed land on the basis thereof, non-examination of its attesting witnesses would not be fatal. *[2002 SCMR 1391]*

Power of attorney:

Document conferring authority on the agent to deal with financial matters and making him responsible for future obligations squarely fall within the category of instruments which are **required to be attested by two men or one man or two women** in terms of Art. 17(2)(a), document required to be proved as per methodology of Art. 79. *[PLD 2003 S.C. 31]*

Even the document is registered, attestation of instruments by two witnesses is mandatory. *[PLD 2003 S.C. 31)*

Respondent claiming execution of sale deed on the basis of general power of attorney, duty bound to prove the execution of the contents of general power of attorney by producing two witnesses in view of Arts. 17 and 79. *[2004 MLD 620]*

Scribe:

There is no bar in law that the statement of scribe can never be considered as being that of a person witnessing the execution, but this is subject to basic condition the scribe should also have signed the document as an attesting witness. However, a scribe cannot equate or partake as a marginal witness and his statement only remains to be in the nature of a corroborative piece of evidence. *[PLD 2007 Lah. 254)*

Scribe cannot be substituted for marginal witness thereof. *[PLD 2008 Lah. 51]*

Agreement to sell:

Agreement to sell involving **future obligations** if reduced to writing and executed after 1984 is required to be attested by two male or one male *or* two female witnesses and to be proved in accordance with the provisions of Art. 79 of Qanun-e-Shahadat. *[2002 SCMR 1089]*

Agreement to sell should not be used in evidence unless at least two attesting witnesses are examined. *[PLD 1996 Lah 367]*

Production of **two female witnesses** jointly, only necessary in case of financial matters or future obligations and not in criminal cases. *[PLD 2001 S.C. (AJ&K) 1]*

Registered deed executed by *Pardanashin* lady. Sole statement of vendee on oath regarding sale by lady with her free will and for valuable consideration who being beneficiary of transaction cannot be considered sufficient to prove willingness of lady and genuineness of registered sale deed. Legal character of document must be established through independent evidence. *[PLD 2008 S.C. 140]*

At this point, it may also be pertinent to touch briefly upon the point of one man and two women witnesses required for recording a futuristic financial document which may entail civil litigation. This proviso, although apparently has case-specific

stipulations also, which may however be extended by systemic analogy to akin classes and categories of cases, but it is not a general prescription for all kinds of litigation, including criminal.

In order to facilitate proper consideration of the original legal provision in its textual language, the verse 2-282 from the holy Quran is reproduced below:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنتُم بِدَيْنٍ إِلَىٰ أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ ۚ وَلْيَكْتُب بَّيْنَكُمْ كَاتِبٌ بِالْعَدْلِ ۚ وَلَا يَأْبَ كَاتِبٌ أَن يَكْتُبَ كَمَا عَلَّمَهُ اللَّـهُ ۚ فَلْيَكْتُبْ وَلْيُمْلِلِ الَّذِي عَلَيْهِ الْحَقُّ وَلْيَتَّقِ اللَّـهَ رَبَّهُ وَلَا يَبْخَسْ مِنْهُ شَيْئًا ۚ فَإِن كَانَ الَّذِي عَلَيْهِ الْحَقُّ سَفِيهًا أَوْ ضَعِيفًا أَوْ لَا يَسْتَطِيعُ أَن يُمِلَّ هُوَ فَلْيُمْلِلْ وَلِيُّهُ بِالْعَدْلِ ۚ وَاسْتَشْهِدُوا **شَهِيدَيْنِ** مِن رِّجَالِكُمْ ۖ فَإِن لَّمْ يَكُونَا **رَجُلَيْنِ** فَرَجُلٌ **وَامْرَأَتَانِ** مِمَّن تَرْضَوْنَ مِنَ الشُّهَدَاءِ **أَن تَضِلَّ إِحْدَاهُمَا فَتُذَكِّرَ إِحْدَاهُمَا الْأُخْرَىٰ** ۚ وَلَا يَأْبَ الشُّهَدَاءُ إِذَا مَا دُعُوا ۚ وَلَا تَسْأَمُوا أَن تَكْتُبُوهُ صَغِيرًا أَوْ كَبِيرًا إِلَىٰ أَجَلِهِ ۚ ذَٰلِكُمْ أَقْسَطُ عِندَ اللَّـهِ وَأَقْوَمُ لِلشَّهَادَةِ وَأَدْنَىٰ أَلَّا تَرْتَابُوا ۖ إِلَّا أَن تَكُونَ تِجَارَةً حَاضِرَةً تُدِيرُونَهَا بَيْنَكُمْ فَلَيْسَ عَلَيْكُمْ جُنَاحٌ أَلَّا تَكْتُبُوهَا ۗ وَأَشْهِدُوا إِذَا تَبَايَعْتُمْ ۚ وَلَا يُضَارَّ كَاتِبٌ وَلَا شَهِيدٌ ۚ وَإِن تَفْعَلُوا فَإِنَّهُ فُسُوقٌ بِكُمْ ۗ وَاتَّقُوا اللَّـهَ ۖ وَيُعَلِّمُكُمُ اللَّـهُ ۗ وَاللَّـهُ بِكُلِّ شَيْءٍ عَلِيمٌ (٢٨٢)

"Two witnesses from your own men" (شَهِيدَيْنِ مِن رِّجَالِكُمْ) highlights yet another principle that in such cases of financial stake of futuristic effect, longer duration or perpetual nature, preferable choice of witnesses has been advised to be from one's own community or relations. Similarly for female witnesses, not only the word '*imra-ataan*', instead of '*an-nissa*', has been used (امْرَأَتَانِ مِمَّن تَرْضَوْنَ), which emphasizes affinity, bond, or relationship of these two *ladies* of one's own fold, like two men witnesses of one's own community. But in case of female witnesses, the relationship has been further preferred by using the phrase '*mimman tardhoan*', i.e., whom you preferably choose. In this linguistic frame, it may

better convey the connotation in translation and interpretation of the term *'imra-ataan'*, as *two of your own ladies,* rather than just *any two female witnesses*. It is a common experience in litigation, in any society, that it is mostly the kin who stand by their respective litigant parties. This can guard against witnesses losing interest with time and/or even becoming hostile.

But at the same time it may be noted that it does not *exclude* evidence of other men and women, not necessarily related to the parties. It does not exclude chance witnesses and circumstantial or corroborative evidence. Evidence of one woman in many classes of litigation is admissible, and particularly solitary statement of victim, duly corroborated, is also competent.

The verse 2-282 lays down another important principle that "*if two men are **not there,** then one man and two women from those witnesses whom you like*," It *does not say* that if two men are 'not there' then *four women*, which means that one man has to be there. Litigation has never been easy and likeable activity during any period of human history. Therefore, in the above verse (2-282) also, an emphasis has been placed on attendance, when summoned, as an ordainment from God, so that witnesses should not avoid it by usual aversion to it. Women as a special relaxation have been given exemption, as far as possible. Even in modern days, particularly in underdeveloped world, litigation is not easy and not suitable at all for women. If one man is there he may bear most of its burden.

It may not be normally desirable to compel a female witness to compulsorily appear for hearing before a court, during natural and biological periods of her stress. She may not be available for about a year when in a family way, and even after that for considerable time. She can also not be

over stressed during period of suckling a child. This may violate child rights also. During spell of mothering infant(s), it would be least desirable to bother her by the summons to attend court as witness. All this means that, choosing women to be witnesses would not only be least desirable for *women themselves, in these circumstances, but also in all probability* be disadvantageous for the person who has to make a choice for her to be her witness, as his case will suffer because of her oft non-availability, and even for longer periods.

Litigation is usually undesirably protractable in nature. With time its details fade away. When the evidence is actually recorded and witnesses are cross-examined, even the experienced counsel need to revisit and recall the whole case and re-consult his clients on many aspects and details. For two male witnesses, it is easier to consult and refresh each other on required aspects and details. But for a woman, it is relatively more difficult and undesirable to converse, consult and revise, again and again, often unpalatable and objectionable descriptions, etc. When two women are there they can more conveniently help each *recall* and *revisit* all details, fading with time, which is a very common experience in lingering nature of litigations. (أَن تَضِلَّ إِحْدَاهُمَا فَتُذَكِّرَ إِحْدَاهُمَا الْأُخْرَىٰ : *if one of the two women errs, the other woman may remind her.*) In present, and in fact in all prevailing, conditions in court, during different periods of history, in different societies, it is extremely difficult for a lone woman to face irritating and imposing male-majority environs of courts, waiting endlessly without any answer not only to thirst and hunger, but even to biological and natural calls.

Keeping two male witnesses does not mean that each one of these two men stands as '*half* (1/2) witness.' There is no concept of *fractionalization* of a witness in any legal evidentiary system. Similarly instituting two ladies,

if one of the two men is 'not there', does not *fractionalize* them as witnesses to be ½ of the ½ (=1/4) of the unit of a witness. There is no such splitting or dissection of a person of a witness.

5. As far as Article 163 of Qanoon-e-Shahadat is concerned, this article is regarding ***acceptance*** or ***denial*** of claims on Oath. It has been provided under this article that: "When the plaintiff takes Oath in support of his claim, the Court shall, on the application of the plaintiff, call upon the defendant to deny the claim on Oath."

6. The contention of the petitioner is that it is the responsibility of the Plaintiff to prove his claim through evidence while the defendant has to take Oath. The petitioner has relied on the following Tradition, as a legal maxim:

الْبَيِّنَةَ عَلَى الْمُدَّعِي وَالْيَمِينَ عَلَى مَن أنكر

"To prove the claim is the responsibility of the Plaintiff and the defendant has to take oath"

(احمد بن الحسين بن علي البيهقي، السنن الكبري ،كتاب الدعوي والبينات ، باب البينة علي المدعي واليمين علي المدعي عليه ، جلد 10 ص 252)

This simply means that it is the responsibility of the claimant to establish his claim on the basis of undeniable 'proof', but such a 'proof' (*haq*) cannot be set aside merely on 'oath', e.g., the scientific law and fact providing the 'proof' of the Sun cannot merely be denied on oath.

Application or petition, in some cases, may require an oath to 'admit' the same for process. Proceedings for disposal and decision will require the

whole set of appraisement and evaluation of all relevant evidence. The denial of the defendant may not necessarily close the matter solely on the strength of the oath, It is not merely the mechanics but the mind which makes a judgment and takes a decision.

7. Article 163 of Qanoon-e-Shahadat had been challenged before this Court in Shariat Petition No.8/L of 1996 (Muhammad Rafi Vs. Federation of Pakistan) which was dismissed in limine being without force and merit.

In view of the above examination of the impugned Article 17(2) and Article 163 of Qanoon-e-Shahadat Order, 1984, it reveals that these pieces of law are not contradictory to Islamic injunctions:

We have come to conclusion that it would not be appropriate to allow this Shariat Petition No.04/I of 2010 as we find no merit in it which is accordingly dismissed.

JUSTICE SHAHZADO SHAIKH

JUSTICE DR.FIDA MUHAMMAD KHAN

JUSTICE SHEIKH AHMAD FAROOQ

Islamabad the 22nd October, 2012

*MUJEEB-UR-REHMAN/**

Fit for reporting.

JUSTICE SHAHZADO SHAIKH