**IN THE FEDERAL SHARIAT COURT**
(Original Jurisdiction)

**PRESENT**

**MR. JUSTICE RIAZ AHMAD KHAN, CHIEF JUSTICE**
**MR. JUSTICE DR. ALLAMA FIDA MUHAMMAD KHAN**
**MR.JUSTICE SHEIKH NAJAM UL HASAN**
**MR.JUSTICE ZAHOOR AHMED SHAHWANI**

**SHARIAT PETITION NO. 04/L OF 2001**

Shaikh Aftab Ahmad son of Shaikh Ata Ullah,
R/o 6-Ahmad Block, Garden Town, Lahore

.... Petitioner

Versus

Govt. of Pakistan through Secretary,
Ministry of Law and Parliamentary Affairs, Islamabad.

..... Respondent

| | | |
|---|---|---|
| Counsel for the Federation | ... | Raja Ahsan Mehmood Satti, Standing Counsel |
| Date of Institution | ... | 26.09.2001 |
| Date of hearing | ... | 09.03.2015 |
| Date of decision | ... | 09.03.2015 |

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**JUDGMENT**

**DR. ALLAMA FIDA MUHAMMAD KHAN, Judge.-**

Shaikh Aftab Ahmad has filed this petition, under Article 203-D of the Constitution of Islamic Republic of Pakistan, wherein he has prayed that sub-Section (3) of Section 18 of "The Financial Institutions (Recovery of Finances) Ordinance No.XLVI of 2001" (hereinafter referred to as the "said Ordinance" be examined and declared repugnant to the Injunctions of Islam. The impugned section (as underlined) alongwith the other two connected relevant Sections reads as follows:-

> "**Banking Documents.** (1) No. financial institution shall obtain the signature of a customer on banking document which contains blanks in respect of important particulars including the date, the amount, the property of the period of time in question.
>
> (2) Finance agreements executed by or on behalf of a financial institution and a customer shall be duly attested in the manner laid down in Article 17 of the Qanun-e-Shahadat Order, 1984 (P.O.19 of 1984).
>
> (3) Nothing contained in sub-Sections (1) and (2) shall affect the validity of any document executed prior to the date of enforcement of this Ordinance." (underlined by us).

2. This Shariat Petition filed in 2001, was admitted for regular hearing on 02.04.2007 and fixed thereafter on several dates but adjourned on account of absence of petitioner side. On the last date of hearing the

court directed that Juris-consults be appointed to assist the Court and thereafter the Court shall proceed with the matter on merits even if the petitioner or his counsel were not present. Accordingly we are disposing of this petition on merits as the petitioner is still absent. After hearing the two Juris-consults namely Professor Muhammad Munir and Dr. Mohyuddin Hashmi and Raja Ahsan Mehmood Satti, Standing Counsel for Federal Government, the petition was dismissed. The following paras contain reasons for our judgment.

3. Learned counsel for the petitioner has submitted in his petition that "No legislation can exempt any category of documents from the operation of Islamic provisions based upon Holy Quran". In this connection he has relied upon Verse 282 of Surah Al Baqarah and Articles 17/79 of the Qanoon-e-Shahadat Order, 1984 (hereinafter referred to as the said Order).

4. Article 17 of the said Order reads as mentioned hereinunder:

> "**Competence and number of witnesses.---(1)** The competence of a person to testify and the number of witness 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."

Article 79 of the said Order reads as follows:

"**Proof of execution of document required by law to be attested...** if a document is required by law to be attested it shall not be used as evidence until two attesting witnesses at least have been called for the purposes of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence.

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the Registration Act, 1908 (XVI of 1908) unless its execution by the person by whom it purports to have been executed is specifically denied."

5. Verse 282 of Surah Al-Baqarah reads as under:-

"O you who have attained to faith! When you contract a debt for a fixed term, write it down. And let a writer write down between you justly. And the writer should not refuse to write it as Allah has taught him. So let him write and let him on whom is the obligation to dictate, and let him observe his duty to Allah, his Lord and do not diminish anything from it. But if he, on whom is the obligation is of poor understanding or weak or unable to dictate himself, let his guardian dictate justly. And call two witnesses from among your men. But if two men are not available then a man and two women which

you choose with liking to be witnesses, so that if one woman forgets then the other should remind her. Let not the witnesses refuse when they are called upon. And be not averse to writing down whether it be small or great with its terms. That is more equitable in the sight of Allah and more sure method for testimony and the best way to avoid doubt between you. But if there is a transaction which you deal from hand to hand amongst yourselves, there is no sin on you if you do not write it. And have witnesses when you sell to one another. And let no harm be done to the scribe or to the witness. But if you do that, it would be your wickedness. Fear Allah for what Allah teaches you. And Allah knows everything."

6. Comments were called from Ministry of Finance Division and Ministry of Law, Justice and Parliamentary Affairs.

7. We have heard learned Standing Counsel for Federation. He fully supported the stands taken by the Ministries and adopted the same comments.

8. We have given our anxious consideration to the points raised by both sides and have perused the comments. We have minutely gone through the relevant law as well. Before we proceed further to discuss the merits of instant Shariat Petition, it may be relevant to mention here that, since independence of Pakistan, the Evidence Act 1872 remained in vogue

till 20th October, 1984 when the Qanoon-e-Shahadat Order, 1984 (hereinafter referred to as the "said Order") was promulgated. The said Order revised, amended and consolidated the law of evidence and brought it in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet ( S.A.W). In this connection, however, it is notable that the said Order was made applicable with immediate effect and it did not invalidate any transaction made previously under the former Evidence Act. Instead, Article 17(2) of the said Order provided exception to some specific laws. It opens with the following words:-

> "Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law".

The said Ordinance of 2001 is admittedly a special law and as such the exception provided in Article 17(2) is equally applicable to the documents exempted from attestation as required under section 18(2) of the said Ordinance. It is worth mentioning that the rule of evidence incorporated in Article 17 of the said Order also does not debar the Court to accept or act on the testimony of one man or one woman or such other reliable

evidence as the circumstances of the case may warrant. In other words it grants tacit approval to the fact that the court may also consider the circumstantial evidence brought on record in proof of a fact. The aforementioned exception provided in the said Order establishes the fact that any document creating financial liability or future obligation or, for that matter, even pertaining to financial transactions will not be void or legally invalid even if it was not reduced to writing provided that the parties/persons concerned were in full agreement about the terms and conditions of their deal. Section 18(2) of the said Ordinance, after its promulgation would, however, be necessarily applicable as a requisite proof for all financial transactions, if the concerned parties dispute and bring the matter to the court for judicial decision. It is also worth consideration that prior to the impugned section in the said Ordinance (of 2001) and after the promulgation of Qanoon-e-Shahadat Order, 1984, there must have been thousands of financial matters creating future liabilities in-between the parties, persons and companies and in case retrospective effect was given to section 18(1) and 18(2) of the said Ordinance, that would have certainly created a legal chaos. It could have

opened a flood gate of litigation and caused the Courts over burdened with endless disputes impossible to be judiciously resolved.

9. The background that gave rise to the legislation of the impugned section was the fact that earlier there had been active debate amongst the legal circles with regard to the applicability of the requirements of Article 17 of the said Order, to certain classes of documents used in banking and financial transactions. Such debate urgently needed to be legally resolved and, by virtue of the provisions of Section 18 of the Ordinance of 2001, the controversies have been amicably settled. The provisions of Section 18(3) of the said Ordinance, 2001 have been framed in the larger public interest to protect the interest of the banking companies and financial institutions (who are the custodian of the funds belonging to general public) and to avoid the abuse of process of law by the defaulters.

10. The scheme of legislation in Islam, based on Quranic Injunctions, is very simple, logical and practical. There are dozens of personal, fiscal and ritual laws mentioned in the Holy Quran and Sunnah of the Holy Prophet ( صلى الله عليه وسلم). The principle adopted there is consistently maintained prospective in nature so that compliance with the

Injunctions is facilitated and hardships are removed as, obviously, undoing of what had already happened in the past was next to impossible. For example the evil practices of indulging in interest-based financial transaction/bargaining etc. or marrying a step mother or combining of two sisters in wedlock at the same time or killing of game in "Ihram", were prohibited with immediate effect and stopped forthwith. It is, however, seriously notable here that the said injunctions which prohibited various evils and stopped unjust practices/transactions forthwith were followed, respectively, by the words فَلَهُ مَا سَلَفَ ..... ("What has passed is allowed for him"2:275), ....إِلَّا مَا قَدْ سَلَفَ.....("Except what has passed."4:22), .....إِلَّا مَا قَدْ سَلَفَ.....("Except what has passed."(4:23), .....عَفَا اللَّهُ عَمَّا سَلَفَ.....("Allah has forgiven what has passed." 5:95). Obviously these verses expressly provides that the past and closed transactions were left untouched and, rather, waived off, even from the "*Akhirath*" point of view as well. In this connection the following Ahadith are also worth consideration:-

1) حَدَّثَنَا حَجَّاجٌ بْنُ أَبِي يَعْقُوبَ حَدَّثَنَا مُوسَى بْنُ دَاوُدَ حَدَّثَنَا مُحَمَّدُ بْنُ مُسْلِمٍ عَنْ عَمْرِو بْنِ دِينَارٍ عَنْ أَبِي الشَّعْثَاءِ عَنْ ابْنِ عَبَّاسٍ قَالَ قَالَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ كُلُّ قَسْمٍ قُسِمَ فِي الْجَاهِلِيَّةِ فَهُوَ عَلَى مَا قُسِمَ لَهُ وَكُلُّ قَسْمٍ أَدْرَكَهُ الْإِسْلَامُ فَهُوَ عَلَى قَسْمِ الْإِسْلَامِ (سنن ابوداؤد:جلد دوم:حدیث نمبر 1147 حدیث مرفوع)

Narrated Abdullah ibn Abbas: The Prophet (صلی اللہ علیہ وسلم) said: An estate which was divided in pre-Islamic period may follow the division in force then, but any estate in Islamic times must follow the division laid down by Islam.

2) حدثنا محمد بن رمح أنبأنا عبد الله بن لهيعة عن عقيل أنه سمع نافعا يخبر عن عبد الله بن عمر أن رسول الله صلى الله عليه وسلم قال ماكان من ميراث قسم في الجاهلية فهو على قسمة الجاهلية وماكان من ميراث أدركه الإسلام فهو على قسمة الإسلام ( سنن ابن ماجه : جلد دوم : حدیث نمبر 2749حدیث مرفوع ص 38 )

**Narrated on the authority of:** 'Abdullah bin 'Umar(R.A) that the Messenger of Allah (SAWS) said: "Whatever division of inheritance was made during the Ignorance period, stands according to the division of the Ignorance period, and whatever division of inheritance was made during Islam, it stands according to the division of Islam.

11. Before parting with the judgment we may point out that this Court performs its functions under the jurisdiction conferred by Article 203A of the Constitution of Islamic Republic of Pakistan. Under the provisions Article 203D, this Court delivers judgments on Shariat Petitions, in respect of repugnancy or otherwise of any law or provision of law as defined in Article 203-B(c), but it is pertinent to mention that the judgment in respect of repugnancy of any law or provision of law is always prospective i.e. from some date fixed in future, whereafter the law

so declared repugnant ceases to have effect on that date onward unless the judgment is challenged in appeal before Hon'ble Shariah Appellate Bench. Thus the principle of effectiveness of a law to be brought in conformity with Injunctions of Islam from a prospective date has been maintained in the Constitution as well.

12. In view of the above, we have come to the irresistable conclusion that the past and closed matters in financial transactions made prior to coming into force of the said Ordinance, have been rightly protected in the impugned section. This petition found misconceived was therefore, dismissed accordingly.

13. These are the reasons of our short Order dated 09.03.2015.

(JUSTICE DR. FIDA MUHAMMAD KHAN)
Judge

(JUSTICE RIAZ AHMED KHAN)
Chief Justice

(JUSTICE NAJAM UL HASAN SHEIKH)
Judge

(JUSTICE ZAHOOR AHMED SHAHWANI)
Judge

Fit for reporting
16.4.2015

Islamabad the 16th April, 2015
*Mujeeb ur Rehman/**