

IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

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PRESENT

Mr. Justice Dr. Tanzil-ur-Rahman, Chief Justice.
Mr. Justice Ibadat Yar Khan
Mr. Justice Dr. Fida Muhammad Khan
Mr. Justice Abaid Ullah Khan

SHARIAT Petition No.5/I OF 1990

Mufti Iftikharuddin, --- Petitioner
Village & Post Office,
Teri, Teshil Banda Daud
Shah, District Karak.

VERSUS

Federal Government --- Respondent

S.S.M. NO.5/90

The Evacuee Trust Properties (Management and
Disposal) Act, 1975 (Act No.XIII of 1975).

For the petitioner	---	Nemo.
For the Federal Government	---	Mr. Iftikhar Hussain Chaudhry, and Hafiz S.A. Rahman, Advocates.
For the Evacuee Trust Property Board.	---	Ch. Fazal-i-Hussain, Senior Legal Adviser.
Date of hearing	---	25-3-1991 & 11-6-1991.
Date of decision	---	16-9-1991.

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JUDGMENT

IBADAT YAR KHAN, J.-This Shariat Petition was filed by Mufit Iftikharuddin on 15-3-1990. It was presented in Court for preliminary hearing on 8th April, 1990 and although the petitioner was called absent, the petition was admitted to regular hearing with the following observations:-

"The petitioner is not present. We have heard Hafiz S.A. Rahman, who appeared on behalf of the Evacuee Trust Property Board and find that the objection in respect of sections 8, 10 and 14 is prima-facie valid. We also took Suo-Moto notice of section 9. Let a notice issue to the Federal Government under Article 203D(1A) of the Constitution. A public notice shall also issue."

A public notice was issued and a notice was also issued to the Federal Government under Article 203-D of the Constitution.

2. At the time of final hearing of this petition on 16-6-1991 the petitioner remained absent but the Board was represented by Hafiz S.A. Rahman and Mr. Fazal Hussain, Advocates.

3. The petitioner has actually challenged sections 8, 10, 14 and 21 but the focal point in the case is conferment of unbridled and arbitrary powers on an individual and complete and total ouster of Courts from providing any relief to any aggrieved party who may be hit by and suffer at the hands of this individual.

4. Sections 8, 14 and 21 are as follows:-

Section 8.-(1) If a question arises whether an evacuee

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property is attached to a charitable, religious or educational trust or institution or not, it shall be decided, by the Chairman whose decision shall be final and shall not be called in question in any court.

(2) If the decision of the Chairman under sub-section (1) is that an evacuee property is evacuee trust property, he shall, by notification in the official Gazette, declare such property to be evacuee trust property.

(3) If a property is declared to be evacuee trust property under sub-section (2), the Chairman may pass an order cancelling the allotment or alienation, as the case may be, take possession and assume administrative control, management and maintenance thereof:

Provided that no declaration under sub-section (2) order under sub-section (3) shall be made or passed in respect of any property without giving the persons having interest in that property a reasonable opportunity of being heard.

Section 14. Save as otherwise provided in this Act, no civil court shall have jurisdiction in respect of any matter which the Federal Government or an officer appointed under this Act is empowered under this Act to determine, and no injunction, process or order shall be granted or issued by any court or other authority in respect of any action taken or to be taken in exercise of any power conferred by or under this Act.

Section 21.-(1) The Federal Government or any person authorised by it, the Chairman and every officer appointed under this Act shall, for the purposes of making any enquiry or hearing any appeal or revision under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 when trying a suit in respect of the following matters, namely:-

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of any documents;
- (c) requisitioning any public record from any court or office;
- (d) issuing commissions for examination of witnesses;



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- (e) appointing guardians or next friends of persons who are minors or unsound mind;
- (f) adding legal representative of deceased applicants or claimants, as parties;
- (g) restoration of cases dismissed for default;
- (h) substituting the names of the rightful claimants;
- (i) consolidation of cases;
- (j) any other matter which may be prescribed by rules under this Act.

(2) The Chairman and every officer appointed under this Act shall be deemed to be a court for the purposes of sections 480 and 482 of the Code of Criminal Procedure, 1898 and any proceedings before the Chairman or any such officer shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Pakistan Penal Code and for the purposes of sections 196, 199 and 200 thereof."

5. The objections may be elaborated thus:-

- (i) That no one should be a judge in his own cause;
- (ii) That whenever a right is conferred on any authority whether judicial or quasi-judicial, at least one right of appeal should be provided against the order of that authority;
- (iii) That in no case doors of the Courts should be closed by barring the jurisdiction of Courts.

6. These requirements go to the root of any judicial or quasi-judicial proceedings in any system and have been completely ignored in the present case.

7. The Chairman of the Board, who sits at the apex of the triangle in the set up of the Board, has been invested with arbitrary and extensive powers and no right of appeal is provided against his decision. We have read the whole Act and examined it from cover to cover and noticed that not only the orders passed

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by the Chairman have been granted complete immunity, but good care has been taken to provide them sanctity by barring the jurisdiction of the Court.


8. The Chairman is not only administrative and executive head of the Board but has been further invested with purely judicial powers. On the administrative side he is the head of the Board with vast powers described in section 4 of the Act. On the judicial side he is the Original and Appellate/Revisional "Court" exercising unlimited jurisdiction. His powers under section 4 of the Act include "to supervise and control all evacuee trust property; to maintain and even dispose of evacuee trust property; to buy new properties by utilising surplus income or by taking loan after obtaining approval of the Government; to mortgage or lease any evacuee trust property with the prior approval of the Federal Government; to extinguish a trust or to wind up an institution which in his opinion the object of which has wholly or partly ceased to exist; to order sealing of any evacuee trust property in an appropriate case pending payment of the Board's dues; to undertake development programmes for increasing the productivity of agricultural land forming part of the Trust Pool and for enhancing the commercial value of an evacuee trust property; to invest money for social welfare of charitable purpose; to set up any industrial or commercial undertaking; to exercise official administrative control over offices attached to or under it; to appoint such staff

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on such terms and conditions as may be approved by the Federal Government; to prepare a scheme or schemes for promoting the objects of the Act."

9. With the powers stated above and with the involvement and dedication which an individual in this position is expected to employ in performance of these duties how can it be expected that this single individual would be able to keep his balance in disposing of disputes between the third parties and the Board. Can such an individual be expected to have a detached view while scrutinising highly sensitive and disputed questions of law and fact. May be that this individual is a super man and he can control and contain his zeal but that is not enough. Justice should not only be done, but appear to have been done. Mere adjudication of a dispute is not enough. The litigant should, while entering the court premises, have a feeling that his case is being appraised by a person, who enjoys the title of "shadow of God on earth" and once the case is concluded both the parties should come out with a feeling that justice has been done. In the present case the very fact that the Chairman would sit on the woolsack and the adversary in the docks is enough to shake and shatter the confidence of the adversary in his impartiality. The Quranic injunction is clear on the point that whenever there is a dispute between two parties and they fail to resolve it mutually, they should refer the dispute for adjudication to the Qazi/Judge.



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" يا ايها الذين آمنوا اطيعوا الله واطيعوا الرسول واولى الامر منكم فان تنازعت في شئ فردوه الى الله والرسول ان كنتم تؤمنون بالله و اليوم الاخر ذلك خير واحسن تاويلًا . (النساء: ٥٩)

ترجمہ : مومنو! خدا اور اس کے رسول کی فرمانبرداری کرو اور جو تم میں سے صاحب حکومت ہیں ان کی بھی - اور اگر کسی بات میں تم میں اختلاف واقع ہو تو اگر خدا اور روز آخرت پر ایمان رکھتے ہو تو اس میں خدا اور اس کے رسول (کے حکم) کی طرف رجوع کرو یہ بہت اچھی بات ہے اس کا مال بھی اچھا ہے -

10. Clothed with all the civil and criminal powers this high functinary has been authorised to play dual role of a party as well as of a Judge. Whether the property is an Evacuee Trust Property or not is a complex quetion. Its determination woud depend on careful interpretation of Trust Deeds and other documents of title and the law applicable to these transactions.

" مدینہ منورہ میں مسجد کے ساتھ حضرت عباس کا گھر تھا ، حضرت عمر رضی اللہ عنہ نے جب مسجد نبوی میں توسیع کا ارادہ کیا تو ان سے فرمایا کہ یہ گھر مجھے فروخت کر دو ، حضرت عباس رضی اللہ عنہ نے اسے فروخت کرنے سے انکار کیا تو حضرت عمر رضی اللہ عنہ نے کہا کہ مجھے یہ گھر ہبہ کر دو ، انہوں نے اس سے بھی انکار کیا ، اس پر حضرت عمر رضی اللہ عنہ نے کہا کہ اپنے اور میرے درمیان کوئی حکم مقرر کر لو ، اس پر انہوں نے ابی بن کعب رضی اللہ عنہ کو حکم مقرر کیا - " (فقہ حضرت عمر، صفحہ ۶۱۰)

The above incident would show that even a powerful and "Adil"

Caliph, like Hazrat Umar, did not force his decision on Hazrat Abbas

but himself suggested that the dispute should be adjudicated by a

third party. It may be mentioned here that Hazrat Kab was a highly

respected and elderly gentleman enjoying the title of "سید المسلمین"

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11. The Chairman, with one stroke of his pen would be cancelling an allotment or annulling the transfer of the property acquired through purchase or otherwise, thus depriving people of their vested rights acquired through proper sale transaction or even by allotment in their favour passed by the competent authority under laws of land. There can nothing be more offensive to the concept of clean justice than to confer such powers on an individual and then granting immunity to such orders. Not only that the aggrieved party has no right of appeal against this order even remedy by way of a suit has been taken away from him (section 21). The normal courts have been barred from granting any injunctions or issuing any process or to examine the validity of the order when a rightful owner with secure title fully protected either by an instrument of sale or an allotment order in his favour is being hounded out by the Chowkidars of the Chairman.

12. Section 9 has also been noticed as un-Islamic in the suo-moto notice. The section is in the following terms:-

"No evacuee trust property shall be liable to be proceeded against for any claim in any manner whatsoever in execution of any decree or order or by any other process of court or other authority."

13. If the owner of the property had incurred any liability and a competent Court has decreed the claim, the claim must be satisfied by execution of the decree. To defeat the claim and nullify the decree against the real owner of the property would be nothing else but usurpation of rights of the decree holder.

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" ولا تاكلوا اموالكم بينكم بالباطل وتدلوا بها الى الحكام لتاكلوا فريقا من اموال

الناس بالاثم وانتم تعلمون " (البقرة ٢ : ١٨٨)

ترجمہ: اور ایک دوسرے کا مال ناحق نہ کھاو اور نہ اس کو (رشوة) حاکموں کے

پاس پہنچاؤ تاکہ لوگوں کے مال کا کچھ حصہ ناچاہئے طور پر نہ کھا جاو اور (اسے)

تم جانتے بھی ہو "

14. It is difficult to imagine how decrees of creditors can be defeated and their execution rendered nul and void. Surely the property exposed to the execution of a decree neither belongs to the Government n or to the Board. If a competent court has, after examining the claim of the plaintiff, passed a decree, the decree must be honoured and executed. Section 9 takes away the powers from court and on the face of it, it cannot be sustained.

15. Sections 8, 14, 21 and 9 have been discussed above.

Section 10 has also been challenged, which is in the following

terms:-

"10.--(1) An immovable evacuee trust property,-

- (a) if situated in a rural area and utilised bona fide under any Act prior to June, 1964, for allotment against the satisfaction of verified claims; and
- (b) if situated in an urban area and utilised bona fide under any Act for transfer against the satisfaction of verified claims in respect of which Permanent Transfer Deeds were issued prior to June, 1968,

shall be deemed to have been validly transferred by sale to the Chief Settlement Commissioner, and the sale proceeds thereof shall be re-imbursed to the Board and shall form part of the Trust Pool.

(2) If a question arises whether a transaction referred

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to in sub-section (1) is bona fide or not, it shall be decided by the Chairman whose decision shall be final and shall not be called in question in any Court.

(3) If it is decided that a transaction referred to in sub-section (1) is not bona fide, the Chairman may pass an order cancelling the allotment or transfer of such property:

Provided that no decision under sub-section (2) or order under sub-section (3) shall be taken or passed in respect of any property without giving the person affected a reasonable opportunity fo being heard."

16. The objection raised against this section is that transfers have been discriminated. The dead line for transfers in rural areas is June, 1964 and for urban area is June, 1968. What is the wisdom behind it is not clear. Nor Hafiz S. A. Rahman, who represented the Board tried to explain why this distinction between rural and urban areas has been made. Another point, which is agitating our mind after reading section 10, is that the Ordinance XVI of 1974 for the Control and Management was passed sometimes in 1974, which has been repealed by section 33 of Act XIII of 1975. The impact of section 10 seems to be that the vested rights of the parties are usurped with retrospective effect. In other words the transactions entered into and transfers concluded in favour of vandees or transferees before coming into force of the Act i.e. 1st July, 1974, are being unilaterly thrown away and cancelled. This cannot be countenanced and by Sharia. Concluded contracts and transfer/rights acquired under them cannot be defeated, as is attempted to be done in section 10 of the Act. The objection that it is repugnant to the concept of Islamic Justice must be sustained.

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17. The upshot of the discussion is that sections 8, 9, 10, 14 and 21 are repugnant to the Quran and Sunnah and cannot be retained. They would cease to have effect from 30th December, 1991.

Ibadat Yar Khan
(IBADAT YAR KHAN)
Judge

Tanzilur Rahman
(DR. TANZIL-UR-RAHMAN)
Chief Justice

Fida Muhammad Khan
(DR. FIDA MUHAMMAD KHAN)
Judge

Announced in open Court in presence of Mr. Mohammed A. Khan, Advocate for Gov. Trust Property

Abaid Ullah Khan
(ABAID ULLAH KHAN)
Judge

Ibadat Yar Khan
16-9-91

Fit for reporting.

Ibadat Yar Khan
(Ibadat Yar Khan)
Judge