

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

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PRESENT

Mr. Justice Aftab Hussain	Chairman
Mr. Justice Zahoorul Haq	Member
Mr. Justice Ch. Muhammad Siddiq	Member
Mr. Justice Malik Ghulam Ali	Member
Mr. Justice Pir Muhammad Karam Shah	Member
Mr. Justice Muhammad Taqi Usmani	Member

SHARIAT PETITION NO.6/R OF 1980

Mirza Muhammad Amin etc. ... Petitioners

Vs

Government of Pakistan ... Respondent

For the Petitioners Mr. M. Kaukab Iqbal, Advocate.

For the Respondent Syed Riazul Hassan Gillani assisted by Mr. M. Saleem, advocate.

Dates of hearing 4.10.81, 6.10.81 & 2.12.81

JUDGMENT.

AFTAB HUSSAIN, CHAIRMAN. This petition under Article 203-D of the Constitution has been filed to challenge the vires of the so called Military Law, Rules, Instructions, Regulations etc. which provide for disbursement of money of the Awards, Death Gratuity, Provident Fund etc. payable on the death of an Air force employee to the members of the family of such employee otherwise than in accordance with the Sharia Law of Inheritance.

2. In order to understand the petitioner's case it is necessary to refer to the facts which induced the petitioner to file this petition. Flt./Lt. Taloot Mirza of the Pakistan Air force who was on deputation in Libya died in an air accident in that country on the 18th September, 1977 leaving behind him a widow, father (petitioner No.1), mother (petitioner No.2) and a son (petitioner No.3). It is claimed that the

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Government of Pakistan through the Ministry of Defence informed Petitioner No.1 and 2 that a Committee of Adjustment had been set up by the Pakistan Air force (PAF) for distribution of the assets of the deceased, but later on it transpired that in view of the Joint Service Instructions all the assets were decided to be given to the widow of the deceased.

3. These instructions are Instruction No.26/60 as amended by Instruction 39/60 and Instruction No.3/69.

Instruction No.26/60 is as follows:-

"No.26/60. Payment of Monetary Allowances attached to various posthumous operational awards - Definition of the Term "Legal Heirs".

The Government of Pakistan have had under consideration for sometime past, the question as to who should be a 'Legal heir' for the purposes of payment of monetary allowances attached to various operational awards, when granted posthumously. It has now been decided that the following shall be considered 'Legal heirs' in the order shown below:-

- (a) Widow
- (b) Mother
- (c) Father
- (d) Son
- (e) Daughter"

4. This Instruction was amended by Joint Service Instruction No.39/60 dated the 14th of October, 1960. The amended Instruction changed the order of 'Legal heirs' so as to be read as follows:

- 1. Widow
- 2. Son
- 3. Daughter
- 4. Mother and
- 5. Father

The order was thus rationalised by giving precedence to son and daughter over parents.

5. The question of disbursement of Death Gratuity and grant of a special Family Pension is governed by Joint Service Instruction No.3/69 which is as follows:-

"Death Gratuity and Division of Special Family Pension - Officers.

In partial modification of the existing rules on the subject it has been decided that the death gratuity and

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special family pension will be paid to the eligible heirs of the deceased officers of the Armed Forces in the manner prescribed below:-

(a) Nomination by Officers:

Officers shall declare in their lifetime the names, with relationship, of their dependents indicating the proportion in which the pension/death gratuity may be divided amongst their eligible heirs including wife(wives)

(b) Death Gratuity:

If there is no nomination the death gratuity will be paid to widow(s) and this will not be divisible amongst the widow(s) and other eligible heirs. Where there are more than one widow according to the service records, this will be divided equally amongst the widows.

(c) 1. Special Family Pension:

The first claim to special family pension is that of the widow(s) of the deceased officer. Special Family Pension could, however, be divided amongst widow(s) and other eligible heirs, i.e. dependent parents, brothers and sisters, at the discretion of the Competent Authority".

6. The deceased was entitled to the:-

- i) Group Insurance.
- ii) Amount if any, under the Gallantry Award of Najmatul Askaria awarded by the Libyan Government.
- iii) Flying Insurance awarded by the Government of Pakistan.
- iv) Death Gratuity.
- v) DSO Provident Fund.
- vi) Family Pension.
- vii) 8250/- Libyan Dinars out of which 4000/- Libyan Dinars have already been paid by the Libyan Government to the widow of the deceased.

Group Insurance amount of Rs 20,000/- has been paid to the widow and she has also been awarded Pension at the rate of Rs 1500/- per month. The amount of 8250/- Libyan Dinars awarded by the Libyan Government is being claimed by the widow and according to the Government the same is payable to her and her children according to the usage of PAF.

7. During the arguments the learned counsel for the petitioners pleaded want of knowledge about whether the Gallantry Award of Najmatul Askaria entitled the deceased to any Cash award. The Respondent denied this. There is no dispute that the Flying Insurance was not paid since at the time of death the deceased was not flying a Pakistani Aircraft. It was conceded on behalf of the Government that the Provident Fund was not payable according to Joint Service Instructions referred to above but was to be disbursed to all the legal heirs according to Islamic Personal Law. It was however urged that the Family Pension, Death Gratuity were not the assets of the deceased and as such the Law of Inheritance could not apply to them.

8. Regarding the Libyan Dinars it was stated that these were payable by the Libyan Government by virtue of Article 3(b) of the Deputation Contract entered between the Government of Pakistan and the Government of Libya in regard to the employment of the deceased by the latter. It was payable as an Insurance compensation for the death of the deceased and did not form part of his estate. Moreover this being an amount of insurance as provided in Serial No.20 of the Schedule attached to that Contract, this Court has no jurisdiction to adjudicate about it. Similar objection about jurisdiction was taken in respect of Group Insurance. It was also urged that the matter involved in this case pertains to inheritance which is dealt with by Personal Law - again a subject over which this court's jurisdiction is barred.

9. Group Insurance is governed by the Central Employees Benevolent Fund and Group Insurance Act, 1969, section 18 of which provides for compulsory deduction of Premia from the salary of the employee. Undoubtedly it is an insurance which is not included in the definition of 'Law' in Article 203 B to which our jurisdiction

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extends. The objection against the jurisdiction prevails to this extent.

10. The other question is about the nature of award of Libyan Dinars, whether it is insurance money or compensation simpliciter for death caused by accident. According to the Protocol Agreement between the Government of Libya and the Government of Pakistan (Article III(b) the Libyan Government made itself liable to pay to the deputationist or his family compensation falling due as a result of death/disability of the deceased during the period of deputation as per rates shown in the Annexure annexed thereto. In the Arabic version of this protocol the word تعويض (Taawiz) denotes the nature of the amount payable to the deputationist's family in case of death of the deputationist. Taawiz means compensation. If this had been insurance money the word تأمين (Taameen) should have been used. In the english version the word compensation is used in Article III(b) but the annexure in its para 20 deals with Insurance payable by the Libyan Government in case of death or partial disability. The amount payable to a married person is LD.8250. It was on the basis of the use of this word "Insurance" that an argument was raised by Mr.Riazul Hassan Gillani that the matter was beyond the jurisdiction of this Court.

11. We have gone through the entire protocol but we find that the amount specified in para 20 of the annexure is relatable to only Article III(b) but the terminology used in the Arabic version of the protocol is different from that of the English version. In the English version the word "compensation" has been used in Article III(b); the word "Insurance" is used only in the Annexure. But in the Arabic version at both places (i.e. Article III(b) as well as Annexure) the word "تعويض" (Taawiz) has been used which is translated as compensation only and not insurance. In these circumstances particularly when the main clause

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in the English version of Article III(b) uses the word "compensation" for this money, it cannot be considered to be insurance money within the meaning of Article 203-B(c) which defines law as inter alia excluding "Insurance Practice and Procedure or Fiscal Law". We do not, therefore, agree with the arguments of the learned counsel on this point. However, we find that none of the Joint Service Instructions 39 or No.3 deal with the disbursement of this amount since neither it is an amount of award nor family pension nor even death gratuity. We do not know whether there is any other law governing this compensation. In the circumstances, it will be futile to issue a declaration against the Joint Service Instructions being ultra vires in any manner. It will be for the Civil Court to decide the question about the entitlement of the petitioners or any of them in regard to this money.

12. The last objection about jurisdiction is also without force. Inheritance is undoubtedly a subject of Personal Law. It is also true that 'personal' law is excluded from the definition of law in Article 203 B of the Constitution. But the jurisdiction of this Court is barred only to the extent of declaring Personal Law as being repugnant to the Holy Quran and the Sunnah. The embargo on jurisdiction does not extend to implementation by us of a matter of personal law and to the declaration by us of a law or custom or usage having the force of law as being repugnant to the provisions of Muslim Personal Law in the Holy Quran and the Sunnah of the holy Prophet. While this Court is debarred from giving any opinion as to the repugnance of 'Personal Law' with Sharia, there is no bar to sustaining and preserving it by declaring other, laws as repugnant to it. The subject of inheritance in Personal Law is specifically dealt with by the Quran and it is the duty of this Court to sustain and support that Law by striking Laws not otherwise excluded from its jurisdiction on ground of repugnancy from the law as laid down in the Quran

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13. In view of the concession about the Provident Fund being the heritable asset of the deceased it is not necessary to give any declaration. The declaration by this Court on this subject is also unnecessary in view of the law laid down by the Supreme Court in Mst. Amtul Habib Vs. Mst. Parveen and Others, PLD 1974 S.C.185(191) that Provident Fund not paid during lifetime of the employee is his heritable asset despite nomination by the employee made under the Provident Fund Act. This authority shall govern the disbursement of the Provident Fund of the deceased.

14. Now remains the question of only Death Gratuity and Family Pension. In this connection the learned counsel for the petitioners referred to the Muhammadan Jurisprudence of A. Rahim, 1963 Edition, page 346 in regard to the definition of Heritable Property of a Muhammadan. It is as follows:

"The transmissible rights include all rights to property, usufruct, rights connected with property, many dependent rights, such as debts and choses-in-action rights to compensation, etc. and the transmissible obligations are, generally speaking those which are capable of being satisfied out of the deceased's estate....."

It may be explained that choses-in-action is a right of bringing an action in a Court of Law to recover a debt or money, damages on a cause of action excontractu or from a tort or omission of a duty (Black's Law Dictionary) as distinguished from an action for a personal right which abates on the death of the plaintiff.

15. In other books of fiqh the subject is dealt with in more details. Sheikh Hasanain Muhammad Mahluf writes in his famous book "Al-Mawaris fil Shariatil Islamiyya Page 10."

"The transmissible rights of the heirs of a deceased person include moveable and immoveable properties, the debts of the deceased due from others the diyat due on qatl-e-khata (culpable homicide not amounting to murder), diyat due by virtue of agreement of amnesty in Qatle Amad (culpable homicide amounting to murder) by which Qissas

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(retribution) is converted into money as a result of pardon granted by the heirs of the person murdered. It also includes all fiscal rights like the right of possession (by the mortgagee) of the mortgaged property till the payment of mortgage debt, the right of keeping possession of the property sold by the deceased from among his properties till the payments of its price by the purchaser. It further includes incorporeal rights and easement the right to water, including right of irrigation or of flowing the water and right of way. All these properties and rights are heritable. The transmissible property of a deceased person according to some jurists means all kinds of absolute property left by the deceased irrespective of whether any other person had some right (of enjoyment) in that property before the death of the deceased or even after."

16. Imam Zailai writes in his famous book "Tabyinul Haqaiq, Sharh Kanzuddaqaiq, Volume VI at page 229".

"The transmissible property of a deceased means all the properties which the deceased leaves behind him and no one else has any right directly to it. It also include all the money and properties in which others have right indirectly and not directly as in mortgage, (i.e. mortgagers' right in the property mortgaged if the deceased is the mortgagee and mortgagee's right in property if the deceased is a mortgager) or the criminal liability of his slave (liability to discharge or pay the fine etc. incurred by the criminal action of his slave) or the right of purchaser of the property vesting in him before the payment by heir of the purchase price....."

17. Allama Ibn-e-Abidin sums it up in his famous book "Raddul Mukhtar Vol V page 537:

"Every right which accrues in the life time of the deceased person will continue after his death."

This summing up is the crux of the matter. What is heritable is only that right which a person enjoys or had a right to enjoy during his lifetime till his death. This may include corporeal property, incorporeal property whether partial or absolute, right to easement, debt including mortgage debt with right to remain in possession of property mortgaged, right to Diyat and other compensation, right to recover debt or property by action (choses-in-action), right to

possession of property sold till the payment by the purchaser of the purchase money and all other rights which are not strictly personal in the sense that they might abate with the death of the right holder.

18. The only question is whether a Family Pension provided in the rules for the family of the deceased employee or Death Gratuity similarly payable is part of the assets of the deceased. If so any provision of law providing for payment of moneys falling under such categories in a manner not strictly in accordance with the Sharia Law of Inheritance will have to be declared repugnant to the Quran and Sunnah. If, however, these are held to be gifts of the Governments even though in lieu of service rendered by the deceased but to which he could not claim a right, they cannot be held to be heritable.

19. Special family pension and death gratuity both are dealt with in joint services instruction No.3/69. According to the rule the first claim to the family pension is that of the widow but the Competent Authority has a discretion to divide it amongst the widow and other eligible heirs described therein. According to rule 85 of the pension regulations the pension is admissible if the death was due to wounds, injuries or disease directly attributable to the conditions of Military Service. It is clearly a gift or a concession given by the government in order to maintain the widow or the members of the family of the deceased who on account of dependence upon him for their living would be hard hit by his death. It is not the right of the deceased. It is not, therefore heritable.

20. Gratuity is defined in Black's Law Dictionary. It means.

" Something given freely or without recompense; a gift. Something

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voluntarily given in return for a favour of especially a service, hence, a bounty, a tip, a bribe."

In the new Oxford Dictionary Vol.1, it is stated to mean:-

"Money present, in addition to payment due, given in recognition of services, tip; bounty given to soldiers on discharge, retirement etc."

According to AIR 1932 Pattna 311 and AIR 1961 Punjab 433, gratuity is a gift. In PLD 1979 Lahore 34, however gratuity being the property of the deceased at the time of death was held to be heritable; but this principle will not apply to Death Gratuity payable to Members of the Defence Services, which has a special significance.

21. Death Gratuity according to the Joint Services Instruction 3/69 is payable to the nominee of the deceased and if there is no nomination, to the widow. Death Gratuity is not gratuity which would be payable to the employee in case of retirement but as clarified in Memo 223/WB/R/65 dated 18.9.65 issued by the Ministry of Defence of the Government of Pakistan is the gratuity admissible to widows of officers.....who are killed in action or die of wounds received in action. This was extended inter alia to Officers of the three forces who, otherwise than ^{if} though their own serious negligence or misconduct, are killed or die of injuries sustained while on flying duty, or while being carried on duty in aircraft under proper authority "vide Memo JCS/JSA/A/1501/1/121/PCII/500/D15/71 dated 8.4.1971 issued by the Ministry of Defence. Being payable on account

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of and after death it is not property of the deceased but is a gift or bounty of the State to his widow. Consequently it is also not heritable. This was conceded by the learned counsel for the Petitioner too.

The petition is dismissed.

Affah Khan
CHAIRMAN

Zaboorul Haq
MEMBER - I

M. Siddiq
MEMBER - III

Jeet
MEMBER - IV

Jeet
MEMBER - V

Jeet
MEMBER - VI

*Mirza Adham Khan Amin
Announced
Affah Khan
13/3/82
Zaboorul Haq
M. Siddiq
Jeet*

Islamabad, the 1st Feb.
February, 1982.
AZN

FIT FOR REPORTING

Affah Khan
CHAIRMAN

Jeet

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ



Phone : 62091
62092
62093

No. S.A.2/1982-SCJ.
SUPREME COURT OF PAKISTAN

Rawalpindi, the

8th Dated: April, 1986.

From

The Registrar,
Supreme Court of Pakistan.

To

The Registrar,
Federal Shariat Court of Pakistan,
Islamabad.

Subject:- Shariat Appeal No. 2 of 1982.
Mirza Muhammad Amin and others. Appellants.

Versus.

Government of Pakistan, through
Secretary, Ministry of Defence
Rawalpindi.

.... Respondent.

(On appeal from the judgment and order dated the 13th March, 1982, of Shariat Petition No. 6-R of 1980, (Mirza Muhammad Amin etc. Vs. Government of Pakistan).

Sir,

I am directed to request that original record of the Federal Shariat Court in the above-cited case may kindly be forwarded to this Registry at an early date.

Please acknowledge receipt of this letter.

Your obedient servant,

Manzoor d/6
Deputy Registrar,
for Registrar.

u

No.S.P.6/R of 1980-FSC
FEDERAL SHARIAT COURT?
146-Margalla Road, F-6/3,
ISLAMABAD.
* * * * *

Registered Parcel

Dated; 2.6.1986.

From : Mr. S.M. Tayyab,
Deputy Registrar

To : The Registrar,
Supreme Court of Pakistan,
Rawalpindi.

Subject:- SHARIAT APPEAL NO.2 OF 1982.
(Mirza Muhammad Amin and others
Versus.
Government of Pakistan, through
Secretary, Ministry of Defence,
Rawalpindi.)

On appeal from the judgment and order dated the 13th March, 1982, of Federal Shariat Court, in Shariat Petition No.6-R of 1980, (Mirza Muhammad Amin etc Vs. Government of Pakistan).

Sir,

I am directed to refer to your letter No.S.A.2/1982-SCJ dated 8.4.1986 and to enclose herewith the Original record (Along with Judgment) of this Court in the above cited petition, containing number of pages 110 as desired. Kindly acknowledge receipt of this letter alongwith its enclosure.

Your obedient servant,

S.M. Tayyab
(S.M. TAYYAB)
Deputy Registrar.

Recd
15-6-86

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ



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No. Shariat Appeal No. 2/82-SCJ.
SUPREME COURT OF PAKISTAN

Rawalpindi, Dated 27/2/91 Feb; 91.

From

The Registrar,
Supreme Court of Pakistan.

To

The Registrar,
Federal Shariat Court of Pakistan,
Islamabad.

SUBJECT: - SHARIAT APPEAL NO. 2 OF 1982.
(Mirza Muhammad Amir and others Vs.
Government of Pakistan through Secy.
Ministry of Defence).

-:-

(On appeal from the judgment and order
of the Federal Shariat Court of Pakistan
dated 13.3.1982 in Sh. Petition No. 6/R/81).

-:-


Sir,

I am directed to forward herewith under rule 9,
order 10, Supreme Court Rules, 1980 a certified copy of
the final order of this Court dated 6.2.1991 for information
and necessary action.

2- I am also to return herewith the original record
received under the cover of your letter No. Sh.P.6/R of 1980-
F.S.C. dated 2.6.1986.

Receipt of this letter alongwith its enclosures
may kindly be acknowledged.

Your obedient servant,


ASSISTANT REGISTRAR(I),
for REGISTRAR.

Encls: 1) Copy of order.
2) Original record.

JAC(SP)
An
27/2/91

IN THE SUPREME COURT:
(Appellate Jurisdiction)

SHARIAT APPEAL NO. 2 OF 1982.
(Mirza Muhammad Amin and others Vs.
Government of Pakistan through Secy.
Ministry of Defence).

-:-

(On appeal from the judgment and order
of the Federal Shariat Court of Pakistan
dated 13.3.82 in Sh.Petition No.6/R/81).

-:-

O R D E R:

Mr.M.Kaukab Iqbal, Advocate for the
appellants.
Mr.Ejaz Ahmed Khan, Deputy Attorney
General and Ch.Akhtar Ali, AOR for
respondent No.1.

Request for withdrawal, the same
having become infructuous due to the
decision of the same subject-matter in
another case. Order accordingly.

Dated;
6.2.1991.

Sd/-Muhammad Afzal Zullah,
Chief Justice.



Certified to be True Copy

[Signature]
Superintendent 13.2.91
Supreme Court of Pakistan