

IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

PRESENT:

MR. JUSTICE AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE
MR. JUSTICE MUHAMMAD JEHANGIR ARSHAD
MR. JUSTICE SHEIKH AHMAD FAROOQ
MR. JUSTICE SHAHZADO SHAIKH

SHARIAT PETITION NO.6/I OF 2006

1. Qasim Hassan Buki,
 2. Sadiq Hassan Buki,
 3. Ali Hassain Buki,
- All sons of Iqbal Ahmed Turabi,
residents of House No.34/II, Street No.N,
Phase-IV, DHA, Karachi.

---Petitioners

Versus

1. Federation of Pakistan, through Secretary,
Ministry of Law, Justice Human Rights and
Parliamentary Affairs, Islamabad.
2. Mr. Iqbal Ahmed Turabi S/O Ali Kousar
3. Mrs. Najma Turabi wife of Mr. Iqbal Ahmed Turabi,

---Respondents

For the petitioners	:	Nemo
For Federal Government	:	Nemo
For Province of Punjab	:	Ch. Saleem Murtaza Mughal, Assistant Advocate General
For Province of KPK	:	Nemo
For Province of Balochistan	:	Nemo
For Province of Sindh	:	Nemo

Date of Institution of Sh. Petition: 22.07.2006

Date of hearing : 08.07.2013

Date of Judgment : 08.07.2013

Justice Shahzad Shaikh, J.:- Petitioners Qasim Hassan Buki, Sadiq Hassan Buki and Ali Hassan Buki have filed Shariat Petition No.6/I/2006 under Article 203-D read with Articles 2-A, 4, 5, 9, 35 and 227 of the Constitution of Islamic Republic of Pakistan seeking declarations that (a) the rejection of plea bargain application is excess use of the power which is against the Injunction of Islam and principles of natural justice; and (b) the sentence of confinement awarded to respondent No.2 and respondent No.3 (wife of respondent No.1) is against the Islamic Injunctions.

2. The submissions of the petitioners as mentioned in their Shariat Petition are reproduced as follows:-

"1. That the petitioners are law abiding citizens of Pakistan and are studying and are sons of the respondent No.2 and 3 who have been convicted by the judgment dated 31.5.2002 passed by the learned Judge of the Accountability Court, Karachi, the petitioners parents filed an appeal against the judgment before the Hon'ble High Court of Sindh. That the petitioner challenged the impugned section 10, 11, 12 read with 25 of the NAB Ordinance 1999 alongwith the important point neither be agitated/challenged before the Hon'ble High Court nor in the Hon'ble Supreme Court of Pakistan. The judgment has become a law which can be reopened/challenged on the ground that the Hon'ble Supreme court of Pakistan held in Malik Asad Ali case that any point which could not be considered by the apex Court can be

challenged, therefore the 'petitioners' also challenged the vires of the impugned judgment dated 31.5.2002 only to the extent of point No.6 at page No.42 & 43 relating to deciding plea bargaining application of the petitioners parents i.e. respondent No.2 and 3 and also same punishment awarded to the accused Najma i.e. respondent No.3 who is a House wife, is against the injunction of Islam, Ayaat 27, 49, 40 Surah Al-Nisa; Ayaat 18, 182 Surah Al-Imran; Ayaat 115, 131 Surah Inaam; Ayat 29 Surah Al-Airaf; Ayat 44 Surah Younis; Ayaat 101, 117 Surah Hud, Ayat 90 Surah Numl; therefore this Hon'ble Federal Shariat Court may graciously to consider this petition inter alia on consideration of the following question of law, facts and grounds.

BRIEF FACTS OF THE CASE.

A brief facts of the reference are that the Chairman NAB had received creditable information that rampant erosion of national funds and huge embezzlement were prevalent in the Pakistan State Oil Limited. On the said information, he had authorized the investigation agencies viz F.I.A Karachi to unearth persons who were involved in the malpractices. Subsequently it was found that accused Iqbal Ahmed Turabi being a holding of public office (from March 1987 to July, 1998) in furtherance of common intention, criminal conspiracy and abetment of co-accused Mrs. Najma Iqbal acquired immoveable/movable properties and pecuniary resources in his name and in the name of above co-accused were disproportionate to the known sources of their income for which they could not reasonably

account and thereby they committed an offence of corruption and corrupt practices as defined under section 9(a) (iv)(v) of the NAB Ordinance 1999. Thus the Chairman NAB made reference No.39/2001 amounting to near about of Rs.25,00,000/- and submitted the same before the Accountability Court at Karachi.

QUESTION OF LAW.

1. Whether the learned judge of the Accountability Court not mentioned the amount in the entire judgment as per reference?
2. Whether the learned judge of the Accountability Court overlooked the reference amount made by the Chairman NAB under the law?
3. Whether this Hon'ble court has jurisdiction to entertain this Shariat Petition under the Islamic Injunction?
4. Whether the learned judge of the Accountability Court was empowered to increase the amount, from the reference amount?
5. Whether Hon'ble Apex Court held in the case of Malik Asad Ali "that any point which could not be agitated/challenged either, the Court has power to re-examine the same?"
6. Whether the Hon'ble Accountability Trial Court on the point of plea bargaining pleaded by the petitioner has been refused which amounted as treatment of discriminations towards the petitioners?
7. Whether a house wife of an accused is deemed to be treated a criminal in view of teaching any instructions of Holy Quran and Sunnah?
8. Whether a house wife and mother of "Non-Mehsin" children of her family without having active role in

the offence committed by her husband is liable to be kept in jail in view of the teaching of Holy Quran and Sunnah?

9. *Whether the punishment of imprisonment awarded to a housewife accused without her direct involvement in the offence alleged against her is tantamount to distortion of her family which is protected by under article 35 of the Constitution of Islamic Republic of Pakistan?*

10. *Whether the "benami" transaction executed in favour of a housewife by an accused is amounted to attribution of criminal abetment on the part of wife under the principles of "Adal" and Ahsan enshrined in Shariah Law.*

11. *Whether the aspects confinement of accused who overlooked/omitted while passing the impugned judgment dated 31.5.2002 specially point No.6 at page 42 and 42, which neither challenged before the Hon'ble Superior Judiciary nor touched at any stage up to the level of the Hon'ble Supreme Court of Pakistan is liable to be set aside in view of section 25 of the NAB Ordinance 1999?*

FACTS AND GROUNDS.

1. *That the Chairman NAB made reference No.39/2001, wherein the petitioners parents i.e. respondent No.2 and 3 and 3 other were accused the reference was submitted before the learned Accountability Court, Karachi whereby the petitioners parents i.e. respondent No.1 and 2 were awarded punishment under section 9(2) (v) read with section 10 of NAB Ordinance 1999 for ten years R.I alongwith 95 Millions fines per accused. Being aggrieved by the aforesaid judgment dated 31.5.2002 passed by the learned Trial Court was*

assailed in form, of appeal No.46/2002 before the Hon'ble High Court of Sindh, Karachi wherein modifications in fines imposed on the petitioners were reduced to 25 millions each. Again being dissatisfied with the order of learned High Court was challenged before the Supreme Court of Pakistan wherein vide judgment dated 13.7.2004 passed in Cr.P.L.A. No.379/2003, the sentence upheld by the Hon'ble Sindh High Court was maintained by the same which was subsequently reduced from 5 years to 3 years R.I. to the respondent No.2. Hence the judgment and sentence maintained upto the Apex Court has taken the finality of law.

2. *That the Hon'ble Supreme Court of Pakistan held that the question relating to the appointment of Chief Justice of Pakistan was not determined by this Court in Al-Jehad Trust case (Supra) and was left open as is evident from the following paragraph in the short order announced by the Court on the conclusion of arguments in the case, which was subscribed by all the learned members of the Bench. It is submitted that the aspect of the matter omitted/overlooked by any judicial forum in any case can be re-entertained/re-opened after taking the finality of the same. Hence, the petitioners rely on very judgment passed by the Hon'ble Apex Court assailed the part of judgment which pertain to the discriminatory treatment meted out by the learned Trial Court to the parents of the petitioners which is contrary to the norms of administration of justice as well as in derogation of Holy Quran and Sunnah.*

3. *That we being the children of our convicted parents especially our convicted mother seek the gracious indulgence of this Hon'ble Court under article 203-D read with Article 35 wherein protection of family etc has been guaranteed by the Constitution and in reported case 1999 PCRLJ page 638 which makes entitled the petitioners to bring the notice of any violation of law by any person or any act or proceedings which infringes his fundamental rights or cause him any unnecessary harassment, the Court has power to pass appropriate orders. We the petitioners being children of convicted and confined parents in the above referred case seek the protection of our family by the forum of this august Shariat Court which can competently strike down/set aside any law or provision of law under Article 203-D read with Article 227 of the Constitution of Islamic Republic of Pakistan being contrary to the direction and will of the Holy Quran and Sunnah.*
4. *That the learned Judge did not considered the application dated 10.5.2012 submitted by the petitioners' parents i.e respondent No.2 and 3 and other three accused jointly under section 25 of the NAB Ordinance. It is submitted that the learned Judge rejected the same on the ground that the accused No. 1, 2, 4 and 5 value of the properties movable and immoveable is more than the amount offered by them. It is submitted that the petitioners' parents i.e. respondent No. 2 and 3 jointly filed an application under section 25 of NAB Ordinance for plea bargaining provided under the law and offered the entire amount made by the Chairman NAB under his reference No.39/2001. It is submitted that* ✓

the learned Judge has no power to increase the amount from the reference which is against the provision of the Constitution, principle of law and as well as against the spirit of Islamic Injunction.

5. *That the petitioners parents due to confinement overlooked the important point in the judgment at page 42 and 43 and their advocates not touch the said point before the Hon'ble High Court and as well as in the Hon'ble Supreme Court of Pakistan, therefore the said point which could not be touched/agitated can be re-open by this Hon'ble Court on the ground of Islamic Injunction and principle laid down by the Apex Court. Reported .1998 SC page 161.*

PRAYER.

It is therefore, respectfully prayed that this Hon'ble Federal Shariat Court may graciously be pleased to:-

(a) declare that only to extent the judgment dated 31.5.2002 at the point No.6 at page 42 and 43 wherein the learned Judge rejected the plea bargaining application of the accused i.e. respondent No.2 and 3 on the ground that accused have more than property of the offered amount. As the offered amount was not less than from the reference amount made by the Chairman NAB after thoroughly inquiry. Thus the rejection of plea bargaining application is excess the power which is against the injunction of Islam and Principle of natural justice.

(b) Declare that the sentences of confinement awarded to respondent No.3 who is wife of respondent No.1 is against the Islamic Injunction and the respondent No.2 confinement is un-Islamic.

(c) *Any other relief/reliefs under the circumstances of the case may also be granted in the larger interest of justice and equity."*

3. This petition came up for preliminary hearing before the Court on 24.01.2007 but it was adjourned on the written request sent by the learned Counsel for the petitioners. It was again fixed for preliminary hearing before the Court on 03.04.2007 but no one put in appearance and it was adjourned to 23.04.2007. On 23.04.2007 the petition was dismissed for non-prosecution due to absence of the petitioners. Vide order dated 06.07.2010, the Hon'ble Full Bench of this Court restored the petition to its original number by recalling its earlier order holding:

"Under Rule 15 of the Federal Shariat Court (Procedure) Rules, 1981 a petition fixed for hearing may not be rejected only on the ground of absence of the petitioner, his counsel or juris-consult. The second clause of this Rule stipulates further that no petition made under Article 203-D shall abate by reason of death of the petitioner. This petition was dismissed solely on the ground of non prosecution. The Court was seized of a substantial question of law and it should have been considered on merits."

The petition again came up for preliminary hearing on 18.10.2010 but no one appeared before the Court from the petitioners' side and the case was adjourned because the notice was not properly served. On 05.06.2013 also the petitioners were absent and pre-admission Notice was ordered to be sent to the Federation of Pakistan. ✓

4. The Shariat Petition is again fixed today at the stage of pre-admission Notice but no one either from the petitioners' side or on behalf of the Federation of Pakistan turned up. The Research Advisor of this Court submitted research note in compliance with the Court's order dated 05.06.2013, which is reproduced as follows:

"This Shariat Petition is filed to challenge Section 10, 11 and 12 of the National Accountability Bureau Ordinance, 1999, for being repugnant to Islamic injunctions, by three brothers and the sons of the respondents No.2 and 3 of the corruption case decided by the Accountability Court, Karachi where the above mentioned two respondents were convicted by the Accountability Court and the appeal was filed before the Sindh High Court against this judgment. The High Court pleased to reduce the amount of fine as well as the period of confinement. The august Supreme Court upheld/maintained the judgment of the High Court when appeal filed before it against the judgment of High Court. As a last resort, section 10, 11 and 12 of National Accountability Ordinance 1999 were challenged before this Court for being repugnant to injunctions of Islam. It was also contended that the rejection of plea bargaining under section 25 of the said Ordinance is based on discrimination, hence repugnant to injunctions of Islam. It is also contended that "where the aspect of any matter or issue is overlooked in any judicial forum, in any case, that can be reopened for discussion even after taking finality of the case. According to the petitioners, when the judgment of Supreme Court attained finality, it becomes a law and any law can be challenged before this Court for being repugnant to the injunctions of Islam. According

to petitioner, the trial Court treated their parents discriminately and awarded the woman the punishment of imprisonment, which according to them, is not allowed in Islam.

When we go through this petition, it becomes evident that it is mainly based on personal grievances and has been filed in a quest to get relief from this Court against the order of trial Court. They filed appeal before the Sindh High Court and august Supreme Court of Pakistan and succeeded in getting some relief in terms of reduction in fine and period of confinement. The petitioners have not mentioned the grounds as why and on which grounds, Section 10, 11 and 12 of the impugned law are repugnant to the injunctions of Islam nor produced the Quranic verses and traditions of the Holy Prophet (Peace be upon Him) to which these provisions are in conflict. The petitioners have referred some Suras of the Holy Quran at page 2 of the main petition which are not sufficient in terms of requirements under FSC procedure rules 1981.

This Petition was filed in this Court on 22.07.2006 and placed before the Court on 24.01.2007 for preliminary hearing. The petitioners moved an application for adjournment on the grounds of illness. The previous record shows that since then, neither the petitioners nor their Counsel has ever appeared before the Court nor sent any application for adjournment. On 23.04.2007, this petition was dismissed for non-prosecution but later on it was restored automatically because under the procedure rule of this court, a Shariat Petition once filed, cannot be dismissed for non prosecution or on a death of the petitioner. This petition was restored on 6.7.2010 but the petitioners seem to be least interested in pursuing this Shariat

Petition simply because the period of confinement of their parents may have completed with the lapse of specified period of confinement."

5. Perusal of the petition shows that the petitioners have not explained as to how the impugned sections of National Accountability Bureau Ordinance, 1999 are repugnant to the Injunctions of Holy Quran and the Sunnah of the Holy Prophet (Peace be upon Him). Although the petitioners have referred to some verses of the Holy Quran yet they have not elaborated the verses to show any relevance to their contentions. Even they did not bother to submit the text of verses of Holy Quran quoted by them in their petition. The contents of the petition show that the petitioners approached this Court through the instant Shariat Petition in order to get relief in personam because the father (respondent No.2) and mother (respondent No.3) of the petitioners were convicted by the learned Judge, Accountability Court, Karachi. The appeal filed against the said judgment was disposed of by the Hon'ble High Court of Sindh by reducing the sentence of imprisonment and fine. The Hon'ble Supreme Court of Pakistan maintained the judgment of Sindh High Court. The petitioners or their Counsel have not been appearing before this Court since filing of the instant Shariat Petition in spite of service of Notices upon them. It shows that the petitioners have no interest in pursuing the Shariat Petition.

6. The petitioners contended in their petition that any aspect of the matter omitted/overlooked by any judicial forum in

any case can be re-entertained/re-opened even after attaining finality by the concerned judgment. It was also contended that when the judgment of Supreme Court attained finality, it becomes a law and any law can be challenged before this Court for being repugnant to the injunctions of Islam. According to petitioners, the trial Court treated their parents with discrimination and awarded the woman the punishment of imprisonment, which according to them, is not allowed in Islam.

In this regard, Article 203-D of the Constitution of Islamic Republic of Pakistan is very clear, which is reproduced as follows:-

203-D. Powers, jurisdiction and functions of the Court.---(1) The Court may, either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam.

(1-A) Where the Court takes up the examination of any law or provision of law under clause (1) and such law or provision of law appears to it to be repugnant to the Injunctions of Islam, the Court shall cause to be given to the Federal Government in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or to the Provincial Government in the case of a law with respect to a matter not enumerated in either of those Lists, a notice specifying the particular provisions that appear to it to

be so repugnant, and afford to such Government adequate opportunity to have its point of view placed before the Court.

(2) If the Court decides that any law or provision of law is repugnant to the Injunctions of Islam, it shall set out in its decision:-

(a) the reasons for its holding that opinion; and

(b) the extent to which such law or provision is so repugnant; and specify the day on which the decision shall take effect.

Provided that no such decision shall be deemed to take effect before the expiration of the period within which an appeal therefrom may be preferred to the Supreme Court or, where an appeal has been so preferred, before the disposal of such appeal.

(3) If any law or provision of law is held by the Court to be repugnant to the Injunctions of Islam:-

(a) the President in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or the Governor in the case of a law with respect to a matter not enumerated in either of those Lists, shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam; and

(b) such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect.

7. From the above it is clear that Article 203-D of the Constitution pertains to the jurisdiction of this Court to examine

and decide the question whether or not any *law or provision of law* is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet (Peace be upon Him) whereas in the instant Shariat Petition, the petitioners challenged the *judgment* of the Hon'ble Supreme Court, which according to them, has already taken finality. A *judgment* does not fall within the definition of *law or provision of law*. In this regard relevant part of the "Article 203B Definitions" is reproduced below:

"(c) "law" includes any **custom** or **usage** having the force of law but *does not include* the **Constitution, Muslim Personal Law,...**"

It is quite clear from the above that definition of law does not include a *judgment*.

8. Although the petitioners have referred to some verses of the Holy Quran yet they have neither reproduced the specific text nor elaborated the verses to show any relevance to their contentions. However, in this context, the following is very pertinent:

"word *law* in Articles 4, 8 and 260(3), Constitution of Pakistan (1973) relates to *positive law, not inclusive of texts of Shariat* except as made applicable by positive law. Evidence Act, 1872 though has been replaced with Qanun-e-Shahadat, 1984, Qur'anic verses, however cannot be made basis for determining guilt or otherwise of accused.

(Asalat v. State 1978 P Cr. L J 18.)

9. It may also be relevant to examine definition of the term '*Judgment*' (according to Black's Law Dictionary):

1. A court's final determination of the rights and obligations of the parties in a case. The term *judgment* includes an equitable decree and any

order from which an appeal lies. (Fed. R. Civ. P. 54. — Abbr. J.)

2. (English law): An opinion delivered by a member of the appellate committee of the House of Lords; a Law Lord's judicial opinion.

From the above, it is quite clear that the term '*judgment*' does not fall within the lexical or legal definition of the term '*law*'.

10. According to the petitioners, the trial Court treated their parents with discrimination and awarded the woman the punishment of imprisonment, which according to them, is not allowed in Islam. It is evident from the record that the parents of the petitioners were convicted by a Court of law. Against the said conviction they went into appeal upto the apex Court. The stance of the petitioners that they had not agitated some important points before the Hon'ble High Court of Sindh and the Hon'ble Supreme Court of Pakistan is not relevant to invoke jurisdiction of this Court against the order/judgment of the learned trial Court or the Honourable High Court or the Honourable Supreme Court.

11. Jurisdiction of a court means the competent jurisdiction of the court, i.e. its power to decide a case or a question. In this connection the following from the US court system may elucidate this point of jurisdiction:

"RULES OF JURISDICTION IN A SENSE SPEAK FROM A POSITION OUTSIDE THE COURT SYSTEM AND PRESCRIBE THE AUTHORITY OF THE COURTS WITHIN THE SYSTEM. *THEY ARE TO A LARGE EXTENT CONSTITUTIONAL RULES. THE PROVISIONS OF THE U.S. CONSTITUTION SPECIFY THE OUTER LIMITS OF THE SUBJECT-MATTER JURISDICTION OF THE FEDERAL COURTS AND AUTHORIZE CONGRESS, WITHIN THOSE*

LIMITS, TO ESTABLISH BY STATUTE THE ORGANIZATION AND JURISDICTION OF THE FEDERAL COURTS. THUS, ARTICLE III OF THE CONSTITUTION DEFINES THE JUDICIAL POWER OF THE UNITED STATES TO INCLUDE CASES ARISING UNDER FEDERAL LAW AND CASES BETWEEN PARTIES OF DIVERSE STATE CITIZENSHIP, AS WELL AS OTHER CATEGORIES. THE U.S. CONSTITUTION, PARTICULARLY THE DUE PROCESS CLAUSE, ALSO ESTABLISHES LIMITS ON THE JURISDICTION OF THE STATE COURTS. THESE DUE PROCESS LIMITATIONS TRADITIONALLY OPERATE IN TWO AREAS: JURISDICTION OF THE SUBJECT MATTER AND JURISDICTION OVER PERSONS. WITHIN EACH STATE, THE COURT SYSTEM IS ESTABLISHED BY STATE CONSTITUTIONAL PROVISIONS OR BY A COMBINATION OF SUCH PROVISIONS AND IMPLEMENTING LEGISLATION, WHICH TOGETHER DEFINE THE AUTHORITY OF THE VARIOUS COURTS WITHIN THE SYSTEM." FLEMING JAMES JR., GEOFFREY C. HAZARD JR. & JOHN LEUBSDORF. Civil Procedure § 2.1, AT 55 (5TH ED. 2001).

(Black's Law Dictionary)

From the above citation, the important points on the question of jurisdiction, emerge as follows:

Rules of Jurisdiction... are to a large extent constitutional rules.

The provisions of the U.S. Constitution specify...by statute the organization and jurisdiction...

Article III of: The Constitution defines the judicial power of the United States to include cases arising under federal law and cases between parties of diverse state citizenship, as well as other categories...

The U.S. Constitution,... due process limitations traditionally operate in two areas:

Jurisdiction of the subject matter, And

Jurisdiction over persons.

...The court system is established by state constitutional provisions or by a combination of such provisions and implementing legislation, which together define the authority of the various...

12. In line with the international best constitutional practices, in Pakistan also jurisdiction of Federal Shariat Court of Pakistan is laid down in the Constitution, as elaborated above. ✓

Therefore, an individual or a party cannot extend any jurisdiction to this Court, suitable to his prayer.

13. The petitioners did not appear before this Court even on a single date of hearing. They just filed the Shariat Petition and then nobody had bothered to come forward to assist the Court, if they had a different argument to pursue. The absence of the petitioners shows that they have no interest and no argument in this Shariat Petition.

14. The petitioners have failed to give any convincing reason about the impugned sections of NAB Ordinance being repugnant to the Injunctions of the Holy Quran and the Sunnah of Holy Prophet (Peace be upon Him).

15. Even otherwise the petition is not maintainable before this Court, in view of the legal position explained above.

16. In view of what has been discussed above, we find no merits in this instant Shariat Petition, which is dismissed accordingly.

[Redacted]
Justice Shahzado Shaikh

Justice Agha Rafiq Ahmed Khan
Chief Justice

[Redacted]
Justice Muhammad Jehangir Arshad

[Redacted]
Justice Sheikh Ahmad Farooq

Dated, Islamabad the
8th July, 2013
M. Imran Bhatti/*

Fit for reporting.

[Redacted]
Justice Shahzado Shaikh