

IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

PRESENT

MR. JUSTICE DR. AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MRS. JUSTICE ASHRAF JAHAN

SHARIAT REVIEW PETITION NO.02/I OF 2000

Cap. (R) Mukhtiar Ahmed Shaikh
124-Hina Garden,
Gulistan-e-Jauhar, Block-19,
Karachi-75290

Petitioner

Versus

Federation of Pakistan through Secretary Ministry of Law, Islamabad.

Respondent

Counsel for petitioner

In person

Counsel for Federal Gov.

Mr. M. Aslam Butt,
Deputy Attorney General

For Govt. of Punjab

Ch. Saleem Murtaza Mughal,
Assistant Advocate General

For Govt. of Sindh

Mr. Abdul Majeed,
Advocate

For Govt. of KPK

Mr. Mujahid Ali Khan,
Deputy Advocate General

For Govt. of Balochistan

Mr. Naseer Ahmed Bangulzai,
Additional Advocate General

Date of Institution as S.P.
converted into Review S.P.

26.01.1999
25.01.2001

Date of hearing

28 & 29.01.2014

Date of decision

04.02.2014

Date of Judgment

05.03.2014

JUDGMENT

ALLAMA DR. FIDA MUHAMMAD KHAN, Judge-

This Shariat Petition having been converted in Review Shariat Petition, filed by petitioner Capt.(R) Mukhtiar Ahmed, challenges section 3-A(2)(C), Section 4(1) with Proviso (A) and section 6 and 7 of Service Tribunal Act, 1973 (LXX of 1973), as amended from time to time, on the ground that these are against the Injunctions of Islam. The impugned sections read as mentioned herein under:-

“Section 3-(A)(2)(c).

3-A. The Powers and functions of a Tribunal may be exercised or performed by benches consisting of not less than two members of the Tribunal, including the Chairman, constituted by the Chairman.

(2) If the members of a bench differ in opinion as to the decision to be given on any point.

(c) If the members are equally divided and the Chairman of the Tribunal is himself a member of the Bench, the option of the Chairman shall prevail and the decision of the Tribunal shall be expressed in terms of the opinion of the Chairman.”

“Section 4(1) with proviso (a) and Sections 6 & 7.

“Section 4-(1): Any civil servant aggrieved by any final order, whether original or appellate, made by departmental

authority in respect of any of the terms and conditions of his service may, within thirty days of the communication of such order to him, [or within six months of the establishment of the appropriate Tribunal, whichever is later, prefer an appeal to the Tribunal]:

Provided that:

- (a) Where an appeal, review or representation to a departmental authority is provided under the (Civil Servants Act 1973) or any rules against any such order, no appeal shall lie to a Tribunal unless the aggrieved civil servant has preferred an appeal or application for review or representation to such departmental authority and a period of ninety days has elapsed from the date on which such appeal, application or representation was so preferred.”

“Section 6 and 7

“Abatement of suits and other proceedings. All suits, appeals or applications regarding any matter within the jurisdiction of a Tribunal pending in any court immediately before the commencement of this Act shall abate forth with:

Provided that any party to such a suit, appeal or application may, within ninety days of the [establishment of the appropriate Tribunal, prefer an appeal to it] in respect of any such matter which is in issue in such suit, appeal or application.

Limitation

The provisions of sections 5 and 12 of the Limitation Act, IX of 1908, shall apply to appeals under this Act.”

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2. We have heard the petitioner in person. He contended that in case the Members of the Service Tribunal are equally divided and the Chairman of the Tribunal himself is a Member of the Bench, the opinion of the Chairman should not prevail on the following grounds:-

- * All human beings are equal and the Chairman cannot be equated with two Judges of the same Bench; and
- * The Holy Prophet (صلى الله عليه وآله وسلم) had declared on the occasion of his last Address of Hujjatul Wida that "All people are equal, just like the teeth of a comb. There could be no claim of superiority of an Arab over a non-Arab or of a white over a black person. Only God-fearing people merit preference with God". Thus the Chairman is not entitled to any preferential treatment over the other numbers. However, as head of the set up, he may enjoy more pay, perks and privileges.

3. According to the petitioner though the Procedural Law is outside the ambit of jurisdiction conferred on this Court by the Constitution of Islamic Republic of Pakistan vide its Article 203-B(c), nevertheless, falls within the jurisdiction as, according to him, a procedure which extinguishes a substantive right can be examined by this Court and the impugned Sections being related to substantive right

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are well within the purview of jurisdiction of Federal Shariat Court. He

placed reliance on PLD-1989-84, PLJ-1989-FSC-82, NLR 1989 SD 820,

PLD-SC 360, PLJ 1986 SC 576 and 1986 PSC 1241.

4. In this connection, referring to the impugned section 4(1) and proviso (a), the petitioner further submitted that fixation of time limit for filing of appeal is against the Injunctions of Islam on the following grounds:-

- * Failure to file appeal within this period entails forfeiture of the right and in case he does not file appeal, he would lose his lawful right. This section and the proviso both negate the concept of Shariah;
- * Shariah does not contemplate any time frame to extinguish the rights of Allah nor of human beings. He added that Qaza Salat (صلوة) is permissible and one has all the time to perform this religious obligation during his life time. Likewise late payment of Zakat has also been permitted and this is equally true about fasting. Thus it is desired that Courts may take inspiration from this practice and decide claims/rights without adhering to any time frame.
- * The limitation of time hampers justice and is not in line with Islamic Injunctions.

To support his contentions, he relied upon the following

Ahadith:-

“Prophet (PBUH) has been quoted in Muslim to have said
“You bring your disputes to me. It is possible that one of
you be more eloquent than the other, and I decide according
what I hear from him. But whom so ever I award a portion
from the right of his brother, he should not take it, because
what I gave him is but a portion of hell”. Ch 251 b 1968 It
implies, on the face of it that best of the judges can be led to
the wrong decision. But one has to be accountable for
omission/commission of usurping. He has to return the due
right so usurped on the day of judgment. Thus in matter of
rights Islam does not recognize the law of limitation. Islam
does not impose the time-frame for redress of grievance.
Even the judgment of Prophet (PBUH) does not help a
usurper. In the Service Tribunal Act, the state has worked
out the modality to extinguish the right of a person who
does not go according to time-schedule. The time-
scheduling is against the commandments of Islam.

He further submitted that there is another famous
tradition quoted in Bukhari, “Help your Muslim brother
whether he is ‘Zalim’ or ‘Mazlum’. It was asked that help
of ‘Mazlum’ is understandable but how ‘Zalim’ can be
helped. The Prophet (صلى الله عليه وآله وسلم), replied that help
him by stopping him from committing ‘Zulm’.” This time-

frame of filing of appeal if not adhered will extinguish his right. This is perpetuation of 'Zulm' and Prophet (صلى الله عليه وآله وسلم) has ordered its cessation. It fully justifies that the time-frame set in the Act be done away with. When one has to answer even at D-Day, he be given chance to mend and rectify the mistake, be it Government department/State or an individual.

The technicality of limitation debars decision on merit and thus it is squarely opposed to principle of justice and fair play.

5. We have also heard Muhammad Aslam Butt, Deputy Attorney General Pakistan, Ch. Saleem Murtaza Mughal, Assistant Advocate General, Punjab, Naseer Ahmad Bangalzai, Additional Advocate General, Balochistan Mr. Mujahid Ali Khan, Deputy Advocate General, KPK and Abdul Majeed, Advocate on behalf of Government of Sindh.

6. Comments submitted on behalf of Federation read as under:-

"The Service Tribunal Act derives its authority from the Constitution of Islamic Republic of Pakistan, 1973 and the

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Rules of 1974 were issued in accordance with the Service Tribunal Act.

Section 3(A)(2)(C) is required to be read with Section 3A(2)(a) "the point shall be decided according to the opinion of the majority." Section 3(A)(1) clearly describe that "The powers and functions of the Tribunal may be exercised or performed by benches consisting of not less than two Members of Tribunal, including the Chairman, constituted by the Government." Since, the Chairman of the Tribunal so appointed by the Government is always a sitting Judge or retired Judge of the High Courts and the points are decided according to the opinion of the majority and if the relief is allowed or refused by the Tribunal, as the case may be, it is available to the parties to move a CPSLA before the Supreme Court of Pakistan under Article 185 of the Constitution, therefore, there is nothing against Injunctions of Islam.

Admitted that in accordance with Section 4(1) and proviso (a):

"(1) any civil servant aggrieved by any order, whether original or appellate, made by a departmental authority in respect of any of the terms and conditions of his service may, within thirty days of the communication of such order to him, or within six months of the establishment of the appropriate Tribunal whichever is later, prefer an appeal to the Tribunal.

(a) Where an appeal, review or representation to a departmental authority is provided under the Civil Servants Ordinance, 1973, or any rule against any such order, no

appeal shall lie to a Tribunal unless the aggrieved civil servant has preferred an appeal or application for review of representation to such departmental authority and a period of ninety days has application or representation was so preferred.”

The limit of 30 days of the communication of such order or prefer an appeal before the Service Tribunal after waiting for 90 days if competent authority does not respond by that period. However, it may be added that in accordance with Rule 8 of the Service Tribunal (Procedure) Rules, 1974, which is reproduced as under:-

“8. Where an appeal is presented after the period of limitation prescribed in the Act, it shall be by an affidavit setting forth the cause of delay.”

Law of limitation is ancient law an existing in all the civilised societies before and now. This branch of law is a specialized subject. The law of limitation in spiritual and mundane affairs is very particular in civilized society of Muslims like prayers and law of pre-emption and other laws. It cannot be brushed aside by saying from here and there. Muslim Jurists have declared law of limitation as “Law of peace and repose”. The perspective opinion of a person should not prevail over the law of limitation as expanded by Muslim Jurists and Qazis from time to time for the last fourteen hundred years.

The procedure of hearing of appeals and decision thereupon is in buil on the aims and objects of the Service Tribunals Act, 1973 on the collective wisdom of supreme

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authority i.e. Parliament of this country. It cannot be tampered with by opinion of an individual for his own purposes under the garb of religion and that also Islam, which religion is final and eternal religion for all the mankind.

Accordingly, limitation prescribed in the Act does not hamper the justice, delay in filling appeal can be condoned by the Tribunal rather it protects the rights of the appellant qua the private respondents or the respondent Government, as the case may be, as it operates equally in favour of both the parties. The aggrieved Civil Servants can prefer an appeal redress of grievance before the Service Tribunal supported by an affidavit setting forth cause of delay. Therefore, there is nothing against Quran and Sunnah because Section 7 Limitation shall apply to all appeals. Accordingly, the benefit is available to every body without any discrimination

The Federal Service Tribunal is an administrative Court set up under Article 212 of the Constitution of Islamic Republic of Pakistan 1973 to exercise exclusive jurisdiction in respect of matters relating to the terms and conditions of civil servants. The Tribunal has been providing in-expensive justice to the civil servants, ever since its establishment in 1974. The appellants are entitled to argue their cases themselves without spending any penny

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or hiring services of any Advocate. Due to progressive contribution of the Tribunal towards giving justice to the aggrieved civil servants and speedy disposal of cases, the Parliament has incorporated amendment in the Service Tribunals Act, 1973 by amending Act XVII of 1997 dated 10.6.1997, due to which jurisdiction of the Tribunal has extended to employees of any authority, corporation, body or organization Federal Law or which is owned or controlled or in which the Federal Government has a controlling share or interest.

The cases are decided in accordance with the provision of Service Tribunals Act and the rules.

7. Comments on behalf of Government of Punjab are as follow:-

“It transpires from para No.1 of the application dated 09.01.2001 regarding the original Shariat Petition No.03/1/1999 to be converted into Review Shariat Petition No.2/1/2000 is not maintainable as the original Petition No.3/I/1999 has already been converted into Review Petition No.2/I/2000 on 23/10/2000 as referred by the petitioner in his petition dated 09/01/2001 and Law and instances mentioned in Para 2 of the application dated 09/01/2001 are not helpful to the petitioner as these are in a different context. Thus the Petition being not maintainable is liable to be dismissed.



The case law cited by the petitioner is in a different context. The law of limitation is a Procedural Law and the provisions of Limitation Act 9 of 1908 i.e.S-5 & 12 of the Limitation Act are applicable to the appeals filed under the Service Tribunal Act 1973 vide S-7 of the Service Tribunal Act 1973 and the time period for filing the appeal is provided under section 4(1)(a) of the Act LXX of 1973.

The provisions which provide the limitation for filing the appeal are Procedural in nature. If by any reasons the time period of limitation has elapsed then S-7 of the Act comes to rescue the person whose appeal is time barred. Such appellant is provided with a remedy for condonation of delay under section 5 of Limitation Act 1908 so if the aggrieved person explains the delay for filing the appeal and his application for Condonation of Delay is based upon cogent/plausible reasons and any other sufficient cause such application would be accepted and his appeal will be decided on merits but if otherwise there are no cogent ground for Condonation of Delay then the Tribunal by exercising the discretion judicially, and turns down such petition, only then the appeal will not be entertained if time barred. The provisions of Service Tribunal Act as regards limitation are quite in conformity with the injunctions of Islam. Every case has its own merits and demerits and every case is decided in accordance with law enacted thereto.

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The distinction between substantive law and procedural law have been determined by the Shariat Appellate Bench in a case reported as 1991 SCMR 2063 wherein the substantive law i.e. S-28 of Limitation Act 1908, which extinguished rights and barred the remedy, was declared repugnant to injunctions of Islam and the Procedural Law was never declared repugnant to injunctions of Islam. The Hon'ble Shariat Appellate Court (SC) held in 1991 SCMR 2063, relevant is at page 2072 and 2073 wherein it was held that Procedural Law does not fall in the ambit of article 203 G(b) of the Constitution of Islamic Republic of Pakistan 1973. Thus the August Court has no jurisdiction to decide as regard to Procedural law, (1991 SCMR 2063). So the petition is not maintainable and is liable to be dismissed.

S-3-A(2) (c) which reads as under is quite inconformity with the injunctions of Islam.

The powers and functions of a Tribunal may be exercised or performed by benches consisting of not less than two members of the Tribunal, including the Chairman, constituted by Chairman.

2) If the members of a bench differ in opinion as to the decision to be given on any point:-

a) The point shall be decided according to the opinion of the majority;

- b) If the members are equally divided and the Chairman of the Tribunal is not himself a member of the bench, the case shall be referred to the Chairman and the decision of the Tribunal shall be expressed in terms of the opinion of the Chairman; and
- c) If the members are equally divided and the Chairman of the Tribunal is himself a member of the Bench, the opinion of the Chairman shall prevail and the decision of the Tribunal shall be expressed in terms of the opinion of the Chairman.

In all sub clauses i.e. a, b & c of Sub Section 2 of S3-A contain the word opinion and the word opinion imports only subjective satisfaction of the members and Chairman of the Tribunal and the subjective satisfaction is always helpful for administration of justice. Thus Sub Section 2(c) of S3-A is not violative of injunctions of Islam.

S.4(1) and Proviso-A provides period of limitation for filing appeal and if appeal is barred by time then the aggrieved person has been given right to file application for Condonation of Delay under section 5 of Limitation Act 1908 vide S-7 of the Service Tribunal Act 1973.

S4 (1)(a) read with S-5 Limitation Act 1908 is a Procedural Law and does not extinguish any right of a party but these provisions are provided in aid to administration of justice.

As held by Shariat Appellate Bench of Supreme Court in 1991 SCMR 2063, The Federal Shariat Court has no jurisdiction under Article 203G(b) of the Constitution of Islamic Republic of Pakistan 1973, to pass any order, meaning thereby that the Hon'ble Shariat Court has no jurisdiction to strike down any Procedural Law.

The instances mentioned in para 5-7 herein are correct but in a different context. The Procedural Law of Limitation is quite inconformity with the Injunctions of Islam. Such provisions of Procedural Law of Limitation are enabling provisions for administration of justice and fair play.

S-7 of the Service Tribunal Act 1973 also provides protection to a litigant/appellant whose appeal has become barred by time. These provisions of Limitation Act 1908 are also procedural in nature and these help for administration of justice so S-7 of the Service Tribunal Act 1973 is not against injunctions of Islam.”

8. Comments of Government of KPK are summed up as under:-

The provision of Service Tribunal Act limiting the time for filing appeal is not against the injunction of law and Islam. Reference is made to 1991-SCMR, 2063.

Principle of estoppel through Conduct is accepted by

Islam. Leaving matters undecided for indefinite period is against the public policy and State interest. Reference is made to PLD 1986 SC-360.

The provision of 3-A(2-C) of Service Tribunal Act are not opposed to provision of Islam. The appointment of Chairman among the Judges is in compliance with the provision of Islam. Islamic provision enjoins upon Islamic society to appoint Amir and follow him when he make orders not opposed to Quran and Sunnah. It also demands people obedience of those in authority almighty Allah Verse 99 of Chapter-IV lays down as under:-

“O you who believe, obey Allah, and obey Messenger and those of you in authority.”

How a dispute can be resolved if there is difference of opinion between the members of bench. The principle of equality has wrongly been stretched. Islam accepts preference of those pious over the others while making appointment for public offices.

Provision of Section-4(1) and Section-6 are not against the provisions of Islam.

As stated above, provisions of Section-7 are not opposed to Islam, Qazi is not stopped to do complete justice, by condoning delay if reasons for delay are given.

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No provision of Service Tribunal is opposed to the provision of Islam.

9. Comments of Government of Balochistan are as follow:-

“The application dated 09-01-2001 is not maintainable as the original Petition No. 3/1/1999 has already been converted into Review petition No.2/1/2000 on 23/10/2000 as referred by the petitioner in his petition dated 09/01/2001 and Law and instances mentioned in Para 2 of the application dated 09/01/2001 are not helpful to the petitioner as these are in a different context”.

Thus the petition No.2/1/2000 is not maintainable and is liable to be dismissed.

The case law cited in this para by the petitioner is in a different context. The law of limitation is a Procedural Law and the proviso of Limitation Act 9 of 1908 i.e. S-5 & 12 the Limitation Act are applicable to the appeals filed under the Service Tribunal Act 1973 vide S-7 of the Service Tribunal Act 1973 and the time period for filing the appeal is provided U/S 4(1)(a) of the Act LXX of 1973 which reads as Under:-

“S-4(1)(a) Any civil servant aggrieved by any order, whether original or appellate, made by departmental authority in respect of any of the terms and conditions of his service may, within 30 days of the communication of such order to him (or with six months of the establishment of the appropriate Tribunal, whichever is later, prefer an appeal to the Tribunal)

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(a) Where an appeal, review or representation to a departmental authority is provided under the Civil Servants Act, 1973 (LXXI of 1973), or any rules against any such order, no appeal lies to a Tribunal unless the aggrieved civil servant has preferred an appeal or application for review or representation to such departmental authority and a period of ninety days has elapsed from the date on which such appeal, application or representation was not preferred.

The proviso which provide the limitation for filing the appeal are procedural in nature. If by any reason the time period of limitation has elapsed then S-7 of the Act comes to rescue the person whose appeal is time barred. Such appellant is provided with a remedy for condition of delay U/S 5 of Limitation Act 1908 so that if the aggrieved person explains the delay for filing the appeal and his application for Condonation of Delay is based upon cogent/plausible reasons and any other sufficient cause such application would be accepted and his appeal will be decided on merits but if otherwise i.e. there are no cogent grounds for Condonation of Delay then the Tribunal by exercising the discretion judicially and turns down such petition and appeal will not be entertained if time barred. The provisions of Service Tribunal Act as regard limitation are quite inconformity with the Injunctions of Islam. Every case has its own merits and demerits and every case is decided in accordance with law enacted thereto.



The distinction between substantive law and procedural law have been determined by the Shariat Appellate Bench in a case reported as 1991 SCMR 2063 wherein the substantive law i.e. S-28 of Limitation Act 1908, which extinguished rights and barred the remedy, was declared repugnant to Injunctions of Islam and Procedural Law as never declared repugnant to Injunction of Islam. The Hon'ble Shariat Appellate Court (SC) held in 1991 SCMR 2063, relevant is at page 2072 and 2073 wherein it was held that Procedural law does not fall in the ambit of article 203 G(b) of the Constitution of Islamic Republic of Pakistan 1973. Thus the August Court has no jurisdiction to decide as regard to procedural law. (1991 SCMR 2063). So the petition is not maintainable and is liable to be dismissed.

S.3-A(2)(c) is quite inconformity with the Injunctions of Islam S.3-A reads as under:-

“The Powers and functions of a Tribunal may be exercised or performed by benches consisting of not less than two members of the Tribunal, including the Chairman, constituted by the Chairman.

If the members of a bench differ in opinion as to the decision to be given on any point.

- a) The point shall be decided to the opinion of the majority;
- b) If the members are equally divided and the Chairman of the Tribunal is not himself a member of the bench, the case shall be referred to the Chairman and the decision



of the Tribunal shall be expressed in terms of the opinion of the Chairman, and

- c) If the members are equally divided and the Chairman of the Tribunal is himself a member of the Bench, the option of the Chairman shall prevail and the decision of the Tribunal shall be expressed in terms of the opinion of the Chairman.

In all sub clauses i.e. a, b and c of Sub Section 2 of S-3-A contain the word opinion and the word opinion imports only subjective satisfactions of the members and Chairman of the Tribunal and the subjective satisfaction is always helpful for administration of justice, thus Sub Section 2(c) of S.3-A is not violative of injunctions of Islam.

Reply to Para No.3 is that S.4(1) and Proviso-A provides period of limitation for filing appeals and if appeal is barred by time then the aggrieved person has been given right to file application for Condonation of delay U/S of Limitation Act 1908 vide S-7 of the Service Tribunal Act 1973.

S4 (1) read with S-5 of Limitation Act 1908 is a Procedural Law and does not extinguish any right of a party but these provisions are provided in aid to administration of justice.

The Procedural Laws have been held by Shariat Appellate Bench Supreme Court in 1991 SCMR 2063 that the Federal Shariat Court has no jurisdiction under Article 203G(b) of the Constitution of Islamic Republic of Pakistan 1973, to pass any order, meaning thereby that the Hon'ble

Shariat Court has no jurisdiction to strike down any Procedural law.

5 to 7 (4.5.6 & 7) Reply to these paras is that instances mentioned herein are correct but in a different context. The Procedural Law of Limitation is quite inconformity with the Injunctions of Islam. Such provisions of Procedural Law of Limitation are enabling provisions for administration of justice and fair play.

S-7 of the Service Tribunal Act 1973 is a Procedural Law thus is not against the Injunction of Islam. S-7 of the Service Tribunal Act 1973 also provides protection to a litigant/appellant whose appeal has become barred by time. These provisions of Limitation Act 1908 are also procedural in nature and these help for administration of justice so S-7 of the Service Tribunal Act 1973 is not against the Injunctions of Islam”.

10. Comments on behalf of Government of Sindh read as follow:-

“The original Shariat petition No.03/I/1999 was allowed on verbal request, to be converted into Review Shariat Petition No.2/I/2000.

The application dated 09/01/2001, is again filed with a prayer to convert the Shariat Petition into Shariat Review Petition. The application dated 09/01/2001 is not maintainable as the original Petition No.03/1/1999 has already been converted into Review Petition No.2/1/2000 on 23/10/2000 as referred by the petitioner in his petition dated 09/01/2001 and Law and instances

mentioned in Para 2 of the application dated 09/01/2001 are not helpful to the petitioner as these are in a different context.

Thus the Petition No.2/1/2000 is not maintainable thus is liable to be dismissed.

The case law cited in this para by the petitioner is in a different context. The law of limitation is a Procedural Law and the provisions of Limitation Act 9 of 1908 i.e. S-5 & 12 of the Limitation Act are applicable to the appeals filed under the Service Tribunal Act 1973 vide S-7 of the Service Tribunal Act 1973 and the time period for filing the appeal is provided U/s 4(1)(a) of the Act LXX of 1973 which reads as under:-

“S-4(1)(a) Any civil servant aggrieved by any order, whether original or appellate, made by a departmental authority in respect of any of the terms and conditions of his service may, within thirty days of the communication of such order to him [or within six months of the establishment of the appropriate Tribunal, whichever is later, prefer an appeal to the Tribunal.]

(a) Where an appeal, review or representations to a departmental authority is provided under the Civil Servants act, 1973 (LXXI of 1973), or any rules against any such order, no appeal that lie to a Tribunal unless the aggrieved civil servant has preferred an appeal or application for review for representation to such departmental authority and a period of ninety days has elapsed from the date on which such appeal, application or representation was not preferred.

The provisions which provide the limitation for filing the appeal are Procedural in nature. If by any reason the time period of limitation has elapsed then S-7 of the Act comes to rescue the person, whose appeal is time barred. Such appellant is provided with a remedy for Condonation

of delay U/s 5 of Limitation Act 1908 so the aggrieved person if explains the delay for filing the appeal and his application for Condonation of delay is based upon cogent/plausible and any other sufficient cause such application would be accepted and his appeal will be decided on merits but if otherwise i.e. there are no cogent ground for Condonation of Delay then Tribunal by exercising the discretion judicially, and turns down such petition and appeal will not be entertained if it is time bared. The provisions of Service Tribunal Act as regards limitation are quite inconformity with the Injunctions of Islam. Every case has its own merits and demerits and every case is decided in accordance with law enacted thereto.

The distinction between substantive law and procedural law have been determined by the Shariat Appellate Bench in a case reported as 1991 SCMR 2063 wherein the substantive law i.e. S-28 of Limitation Act 1908, which extinguished rights and barred the remedy, was declared repugnant to Injunctions of Islam and the Procedural Law was never declared repugnant to Injunctions of Islam. The Hon'ble Shariat Appellate Court (SC) held in 1991 SCMR 2003, relevant is at page 2072 and 2073 wherein it was held that Procedural law does not fall in the ambit of article 203-D of the Constitution of Islamic Republic of Pakistan 1973. Thus the August Court has no jurisdiction to decide as regard to procedural Law (1991

SCMR 2063). So the petition is not maintainable and is liable to be dismissed. As regards the contents of para 2 of the petition is that section 3-A(2)(c) is quite inconformity with the injunctions of Islam, S3-A reads as under:-

“The powers and functions of a Tribunal may be exercised or performed by benches consisting of not less than two members of the Tribunal, including the Chairman, constituted by the Chairman.”

2) If the members of a bench differ in opinion as to decision to be given on any point:-

- a) The point shall be decided according to the opinion of the authority.
- b) If the members are equally divided and the Chairman of the Tribunal is not himself a member of the bench, the case shall be referred to the Chairman and the decision of the Tribunal shall be expressed in terms of the opinion of the Chairman; and
- c) If the members are equally divided and the Chairman of the Tribunal is him self a member of the Bench, the opinion of the Chairman shall prevail and the decision of the Tribunal shall be expressed in terms of the opinion of the Chairman.

In all sub clauses i.e. a, b & c of Sub Section 2 of S.3 A contain the word Opinion and the word opinion imports only subjective satisfaction of the members and Chairman of the tribunal and the subjective satisfaction is always helpful for administration of justice. Thus Sub Section 2 (c) of S3-A is not violative of Injunction of Islam.

S.4 (1) and proviso-A Provides period of limitation for filing appeal and if appeal is barred by time than the aggrieved person has been given the right to file application for Condonation of delay U/s 5 of Limitation Act 1908 vide S-7 of the Service Tribunal Act 1973.

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S.4(1) (a) read with S-5 Limitation Act 1908 is a Procedural Law and does not extinguish any right of a party but these provisions are provided in aid to administration of justice.

The procedural Laws have been held by Shariat Appellate Bench Supreme Court in 1991 SCMR 2063 that The Federal Shariat court has no jurisdiction under Article 203G (b) of the Constitution of Islamic Republic of Pakistan 1973, to pass any order, meaning thereby that the Hon'ble Shariat Court has no jurisdiction to strike down any Procedural law.

As regards the contents of paras 5 to 7 (4,5,6&7) Reply to these paras, is that instances mentioned herein are correct but in a different context. The procedural Law of Limitation is quite inconformity with the injunctions of Islam. Such provisions of Procedural Law of limitation are enabling provisions for administration of justice and fair play.

S-7 of the Service Tribunal Act 1973 is a Procedural Law thus is not against the Injunction of Islam. Reply to para No.9 is that S-7 of the Service Tribunal Act, 1973 also provides protection to a litigant/appellant whose appeal has become barred by time. These provisions of Limitation Act 1908 are also procedural in nature and these are to help the administration of justice. So S-7 of the Service Tribunal Act 1973 is not against injunctions of Islam.

11. We have thoroughly considered the contentions of the petitioner and have also taken into consideration the submissions of all the learned counsel representing The Federal Government and all the four respective Provinces and have duly perused the comments filed by the Federation and the four Provinces.

12. Regarding the impugned section 3-A(2)(c) of Service Tribunal Act, 1973, we agree with the petitioner that the Chairman Service Tribunal cannot enjoy any preferential authority in deciding a judicial matter. The Verses and Ahadith are correctly relied upon by him. Moreover, it seems beneficial to refer here to the concept of equality among human beings as enshrined in the Holy Quran and Sunnah of the Holy Prophet (صلی اللہ علیہ وآلہ وسلم). The Holy Quran says:

يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاكُمْ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ

(O mankind: We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other.

Verily the most honoured of you in the sight of God is (he who is) the

most righteous of you. And God has full knowledge and is well acquainted (with all things). (49:13).

"يَا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا
وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا"

(O mankind! reverence your Guardian-Lord, who created you from a single person, created of like nature, his mate, and from them twain scattered (like seeds) countless men and women. (4:1).

13. The Holy Prophet (صلى الله عليه وآله وسلم) has also emphasised the equality among the human beings. The Holy Prophet (صلى الله عليه وآله وسلم) in his sermon at the time of Hajj-al-Wada declared:

"ياايها الناس ألا إن ربكم واحد ان آباكم واحد الآ لا فضل لعربي على عجمي
ولا لعجمي على عربي ولا لاحمر على اسود ولا لاسود على احمر الا بالتقوى-

(O people! Your Allah is one and your father is one. No Arab has any superiority over a non-Arab nor a non-Arab over an Arab nor a black over a red nor a red over a black except in piety. (Al-Musnad, Ahmad

Ibn Hunbal, Volume V, page 111, printed Beirut).

14. In fact it was Islam which strongly advocated the concept of equality among mankind irrespective of their colour, creed, gender or any other consideration. We believe in the superiority of a pious person as mentioned in the Holy Quran and Ahadith, but that is in the rank one holds with Allah Almighty in the Hereafter and not in this world as the yardstick for judging the piety of a person is only with Him because He sees the intention and all actions of a person in totality. As far as life in this world is concerned, all are considered equal and entitled to equal protection of law and the Chairman is no exception. Such a rule/law is even alien to the Chief Justice of a High Court, Federal Shariat Court and even Supreme Court where they enjoy equal judicial powers with all other members of a Bench. As such the impugned provision--i.e. Section 3-A(2)(C) of Service Tribunal Act, 1973 which grants double weight to the opinion of the Chairman and let the same to decide the fate of a judicial matter solely on its strength is held as repugnant to the Injunctions of Islam. To this extent we allow the instant Shariat Review Petition.

JK

15. However, as far as submissions of the petitioner regarding limitation are concerned, they are mis-conceived and against the dictum laid by the verdicts of Superior Courts and consistently maintained by them. The question of limitation was considered by this Court in a Judgment titled as "Maqbool Ahmed Qureshi Versus Government of Pakistan" wherein a similar question pertaining to Limitation Act had been challenged on the ground that it deprived a person of his right of property which had remained in adverse possession of another. In this connection the Court held as follows:-

"The law of limitation of time wherever applied does not always mean to usurp or help usurp a right. It rather operates on the principle that if a claimant does not press his claim in the time specified by law, through an authority appointed for the purpose by law, it will be presumed that either the claimant waived his right or was not serious and rather indolent so as to have acquiesced. The concept of law is only this that the authority created or appointed for helping a claimant in such a situation will not help if the claimant knowing the position of law did not ask for it within the prescribed period.

It is quite clear from all that is said above that in cases of adverse possession of land even ownership could be extinguished and the adverse possessor can be given the same rights and also preferences over the previous owner. Similarly, if a person takes possession of certain 'Mawat' land but does not develop it within three years he loses his right of possession.

It has been narrated by Abu Musa Asha'ri that Mu'aviyya bin Abu Sufian told that do you know that the Holy Prophet (PBUH) fixed the date for hearing when the parties came before him with their litigation and whereas one of them came on the fixed date and the other did not come the Holy Prophet (PBUH) decided the case in favour of the person who came and against the person who did not come"

"عن ابي موسى الاشعري بن معاوية بن ابي سفيان قال له اما علمت ان رسول الله صلى الله عليه وسلم كان اذا احتصم عنده الرجلان فاتعد الموعد فجاء احدهم ولم يات الآخر قضى رسول الله صلى الله عليه وسلم للذي جاء على الذي يحيئى-"

(Mahmood Ahmad Ghazi, Adabul Qazi, page 258, Print Islamic University, Islamabad).

The dicta given above was also followed by the Companions after the Holy Prophet. Hazrat Umar had directed Abu Musa Asha'ri in the time of his Caliphate that he should fix a date for hearing of the case. The Qadhi should also allow an opportunity to the party who wants to produce evidence in support of his plea but if he does not

produce the same within the specified period, the case should be decided against him. (Adab-ul-Qadhi – Urdu – Islamic Research Institute, pp. 128, 248, 258, 352). Similar is the view given in Al-Ahkamus Sultaniyya, Urdu Translation, page 128, Print Lahore. Even Majallah contains a Chapter on limitation (فى مرور الزمان) sections 1660 to 1675 supporting the principle of limitation in various cases.

Ibne Hajar Asqalant, in his book “Al-Diraya-Fi-Takhreeje-Ahadith-il-Hidaya”, Vol. II, p.244 quotes Hazrat Umar as saying that if a grantee of a land does not cultivate it for three years and another enters upon thereafter to do so; the latter gets a better title to it than the earlier grantee. The same view is by Yahya Ibne Adam in his book (Kitabul Khiraj, page 103).

The precedents given above clearly establish the principle that a time limit can be placed both in respect of extinguishment of right and for the purpose of proving a claim. In fact it will be seen that Islam does not permit usurpation of one's right and rather protects and preserve. However, Islam also recognizes that an owner or a holder of a right has the authority and discretion either to transfer the same by sale, gift etc. or acquiesce and ignore if someone takes that away without his express authority or consent. Thus if the facts of a case show that the owner or the holder having knowledge of the fact of time limit did not claim or challenge, it will be presumed that he waived his right.

AK

Thus emphasis in respect of such a matter is on the conduct of the person who seeks to press his claim. If the facts show that he knew the situation and he neglected or chose not to press it within the prescribed period, the machinery of law will refuse to help him. In fact he had already been forewarned by law that if he does not press his claim within the prescribed time he has to blame himself as the machinery of State is prohibited from helping him. The Islamic jurisprudence also embodies the principle known as "Tamadi".(PLD 1989 FSC, page 89)

The question of limitation again came under consideration by the Honourable Supreme Court in a Judgment reported as SCMR 1991 page 2075. The Hon'ble Shariat Appellate Bench Supreme Court held as follows:-

اب میں اصل مسئلے کی طرف آتا ہوں۔ واقعہ یہ ہے کہ اگر بات صرف اتنی ہوتی کہ مقدمات کی سماعت نیلئے قانون کی طرف سے کوئی مدت مقرر کر دی گئی ، جس کا مطلب یہ ہے کہ اس مدت کے بعد عدالتیں کسی مقدمے کو سننے سے انکار کر دیں گی ، لیکن اس انکار کا اثر فریقین کے اصلی حقوق (Substantive Rights) پر کچھ اثر نہیں پڑے گا ، تو محض یہ ایک ضابطے (PROCEDURE) کی بات ہونے کی وجہ سے اس عدالت کے دائرہ اختیار میں بھی نہیں تھی ، اور خود شرعی اعتبار سے بھی اس پر کوئی بڑا اعتراض مشکل تھا ، کیونکہ عدالتیں اس شخص کی مدد کر سکتی ہیں جو مناسب وقت پر چارہ کار حاصل کرنے کیلئے ان سے رجوع کرے ، اگر لوگوں کو یہ چھٹی دے دی جائے کہ وہ سیکڑوں سال پرانے تنازعات کو جب چاہیں زندہ کر کے عدالت میں پہنچ جایا کریں ، تو اس سے لامحدود مقدمہ بازی کا دروازہ کھل جائے گا اور عدالتوں کیلئے نہ صرف یہ کہ ایسے پرانے جھگڑوں کو نمٹانا تقریباً ممکن ہوگا بلکہ اس سے فوری اور

حقیقی تنازعات کے تصفیے میں بھی سخت رکاوٹ پڑے گی ، اسی لیے مختلف اسلامی حکومتوں میں بھی مقدمات کی سماعت کیلئے مختلف مدتیں مقرر کی دجاتی رہی ہیں۔ علامہ شامی ؒ نے شمس الامہ سرخسی کے حوالے سے لکھا ہے کہ اگر کوئی شخص تینتیس سال تک مقدمہ دائر نہ کرے تو اس مدت کے بعد اس کا دعوی قابل سماعت نہیں رہے گا۔ (ردالمختار ، ص 422 جلد 5 مطبوعہ کراچی) شمس علامہ سرخسی خلافت عباسیہ کے زمانے کے ہیں لہذا اس سے معلوم ہوتا ہے کہ خلافت عباسیہ کے زمانے میں بھی میعاد سماعت کا تصور موجود تھا (ایس سی ایم آر 1991، صفحہ 2074 تا 2075)

16. We may add that as is clear from the above, the substantive right cannot be usurped nor get extinguished by limitation fixed for filing the appeal but in fact the claimant would not be able to knock at the door of a Court otherwise such a practice, if allowed without any limitation, will definitely open a flood gate of old matters piled up during the past years—may be for centuries - when evidence of the same would have been destroyed or lost and no record or evidence could be available for the Courts to decide the same. Moreover, the case belonging to rights of human beings to be adjudicated by other human being (i.e. Judges) and availability of the required evidence to them cannot be equated with the rights of Allah (i.e. Ibadaat), as in the later case the Omni Present and Omni - Potent Allah (SWT) has granted the concession and He does not need

any external evidence. In the former case, however, the rulers/judges always stand in need for the evidence which may not remain available indefinitely. The Ahadith relied upon by the petitioner do not discuss, nor even remotely refer to, the point of limitation raised by the petitioner. Both the Ahadith rather pertain to the responsibility of the litigants to observe due care and caution and never resort to contest undue frivolous matters for which they will be accountable if they succeed in getting favourable judgments even from the Prophet (صلى الله عليه وآله وسلم) Hence this petition to the extent of the point of limitation is mis-conceived.

17. In view of the above, this petition to the extent of section 4(1) with proviso (A) and sections 6 and 7 of Service Tribunal Act, 1973 on point of limitation being misconceived is dismissed accordingly. However, we allow this petition to the extent of Section 3-A(2)(c) of Service Tribunal Act, 1973. We direct the respondent Federation of Pakistan, through Secretary Law to take necessary steps to amend the said section so as to bring it in conformity with the Injunctions of Islam.


The necessary action shall be taken for this purpose by 30th June, 2014


AS

whereafter the said section shall become void and have no legal effect to the extent stated above.

18. These are the reasons for our short Order dated 04.02.2014.


JUSTICE ALLAMA DR. FIDA MUHAMMAD KHAN


JUSTICE DR. AGHA RAFIQ AHMED KHAN
Chief Justice


JUSTICE ASHRAF JAHAN

Islamabad the 5th March, 2014
Mujeeb ur Rehman/*

File for reporting

