

IN THE FEDERAL SHARIAT COURT
(ORIGINAL JURISDICTION)

PRESENT

| | |
|-------------------------------------|---------------|
| Mr. Justice Aftab Hussain | Chief Justice |
| Mr. Justice Ali Hussain Qazilbash | Judge |
| Mr. Justice Zahoorul Haq | Judge |
| Mr. Justice Ch. Muhammad Siddiq | Judge |
| Mr. Justice Malik Ghulam Ali | Judge |
| Mr. Justice Pir Muhammad Karam Shah | Judge |
| Mr. Justice Muhammad Taqi Usmani | Judge |

SHARIAT PETITION NO.3/P OF 1981

| | | |
|------------------------|------------------------------------|------------|
| Mohammad Sadiq KHAN | ... | Petitioner |
| | Vs | |
| Federation of Pakistan | ... | Respondent |
| For the Petitioner | Mr. Ghulam Mustafa, advocate. | |
| For the respondent | Mr. Riazul Hasan Gilani, advocate. | |
| Date of hearing | ... | 17-4-1982 |

JUDGMENT

AFTAB HUSSAIN, CHIEF JUSTICE: Petition No.3/P of 1981 challenges the vires of Section 58(d) of the Transfer of Property Act which is as follows:

"Usufructuary mortgage - Where the mortgager delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to mortgagee, and authorizes him to retain such possession until payment of the mortgage - money and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee".

2. The objection is that allowing mortgagee to remain in possession of the mortgaged property and to receive its rents and profits after the principal amount is paid up and allowing him to appropriate the additional rents and profits in lieu of interest amounts to permitting Riba which is prohibited by the holy Quran.

3. A preliminary objection was raised by Mr. Riazul Hasan Gilani, learned counsel for the Federal Government

that the petition questions the legality of a fiscal law to which the jurisdiction of this Court does not extend. We have heard the learned counsel on this issue, and propose to uphold that objection.

4. Article 203-B(c) is as follows:-

(c) "law" includes any custom or usage having the force of law but does not include the Constitution, Muslim personal law, any law relating to the procedure of any court or tribunal or, until the expiration of three years from the commencement of this Chapter, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure."

'Law' thus does not include:

- (1) The Constitution,
- (2) Muslim Personal Law, or
- (3) any law relating to the procedure of any Court or tribunal
and until expiration of three years from commencement of Chapter 3-A of the Constitution,
- (4) any fiscal law,
- or (5) any law relating to the levy and collection of taxes and fees,
- or (6) any law relating to the banking or insurance practice and procedure.

Since Article 203-D confers upon this Court the jurisdiction to correct only a law so as to remove its repugnance with Shariah, the impact of the definition is that any law dealing with matters excepted from its definition would be beyond the pale of the jurisdiction of this Court.

5. The expression 'fiscal law' is not defined in the Constitution. The intention of the Constitution maker can therefore be gathered from a reference to its dictionary meanings, as well as context including what precedes or follows it.

6. The preponderating sense in which the word 'fiscal' as an adjective to statutes is used is in regard to 'money, taxes, public treasury'. Thus in "Law Terms and Phrases Judicially interpreted by Sardar Mohammad Iqbal Khan Mokal" 'fiscal law' is defined as:

"Statutes that relate to the collection of taxes from people by the Government, e.g., the Stamp Act, the Court Fees Act, etc."

In the Reader's Digest Great Encyclopaedic Dictionary the word 'fisc' is said to mean:

"Public treasury of ancient Rome; Roman emperor's privy purse, Public Treasury into which estates lapse by escheat."

This is the sense in which, as will be seen later, the word fiscal has been used since its origin in the Roman Law. But it is difficult to concede that sense in Article 203-B in so far as the Laws about taxes or fees are laws dealing with public revenues and are specifically excluded from the jurisdiction of this Court which means that the expression fiscal law is either a totally different category of law or a category which includes some other matters also. This point was conceded by the learned counsel for the petitioner in this case.

7. It appears that the word fiscal was originally used as stated above in the sense of something pertaining to public revenues but now it has been given an extended connotation.

8. The word 'fisc' in Corpus Juris Secundum, Vol.36, Page 825 is explained as an anglicised form of the latin fiscus and defined as meaning 'treasury of a kingdom or a state, money chest'.

9. The meaning of the word 'fiscal' is as follows:

"Financial, pertaining to finance; relating to accounts or the management of revenue; of or pertaining to the treasury or public finances of a government. The term imports some relation to financial operations, and has been held synonymous with "financial" see Financial 36 Corpus Juris Secundum, Page 765, note 24."

10. In the Black's Law Dictionary also the words 'fisc and fiscal' are expressed as follows:

"Fisc. A treasury of a kingdom, nation, a state, or other governmental body. An Anglicised form of the Latin "fiscus" (which see)."

"Fiscal. In general, having to do with financial matters; i.e. money, taxes, public or private revenues, etc. Belonging to the fisc, or public treasury. Relating to accounts or the management of revenue. Of or pertaining

to the public finances of a Government or private finances of business."

11. The word 'fisc' is similarly explained in Oxford English Dictionary. According to it the word fiscal means not only "of or pertaining to the fisc or treasury of a state or prince; or pertaining to the public revenue", but also "of or pertaining to financial matters in general". Similar wider meanings are given in other dictionaries also.

12. The learned counsel for the Petitioner urged that the word 'fiscal law' in Article 203-B should be interpreted in its preponderating sense of laws pertaining to public revenue or public treasury. When his attention was drawn to Black's Law Dictionary and Oxford Dictionary he submitted that the extended meaning of 'fiscal' that is, "of something pertaining to financial matters generally" cannot be applied to Article 203-B.

13. He also argued that if the word fiscal is interpreted as meaning financial matters generally, all the laws which not only pertain to borrowing and lending but also to sale and purchase, for example the Contract Act, as well as ^{the sale} of Goods Act will also have to be included in the category of laws which are outside the jurisdiction of this Court.

14. It is difficult to give such a narrow interpretation as suggested by the learned counsel to the expression 'fiscal law' in view of the language in which the word law is defined. The laws relating to the levy and collection of taxes and fees which are laws about public revenue, are treated as a category separate from fiscal law. Thus the intention of the law makers is clear that fiscal law is something different from the laws of taxes or fees. This was conceded by the learned counsel for the petitioner also. In this view of the matter it is not possible to confine fiscal law to matters pertaining to public revenue only but it will

have to be given an extended meaning so as to include private financial matters.

15. The other objection that it may have to be interpreted as including laws of sale and purchase of property and goods is not relevant. At present what is relevant is whether the word fiscal law includes law allowing interest. That it does include such laws will be clear from the consideration of the meaning of financial matters, since as seen in Corpus Juris Secundum Vol. 36 Page 825, the Oxford English Dictionary and the Black's Law Dictionary, the word fiscal imports, same relation to private financial operations. The word finance according to the Oxford English Dictionary means "settlement with a creditor; payment of debt;.....-parting of money at interest....." According to Corpus Juris Secundum, Vol.36, one of the meanings of word finance is "borrowing of money at interest". Clearly therefore a law concerning interest is a fiscal law.

16. The primary aim of excluding fiscal laws from the jurisdiction of this Court appears to be to give protection to all laws concerning interest. It would have been opposed to the principle of equality if the Government had given this protection to its own Bank, or Insurance Companies and taken it away from privately owned Banks or Insurance Companies. It is for this reason that no distinction is made between one type of Banks or Insurance Companies and another. On the same principle it appears that the laws relating to interest whether applicable to government or to companies or to private persons have been given protection for three years. We are, therefore, of the view that the provision challenged by the petitioner in this

case is not within our jurisdiction. Same view was taken by the Shariat Bench of the Lahore High Court in Shariat Petition No.71/L of 1979, Mian Zahoor Ahmad Vs. The Central Government, decided on 18.3.1980.

The petition is dismissed.

Afflatun

CHIEF JUSTICE

subject to my appended observations I agree that this petition may be dismissed. Zahoorulhaq.

ASGHAR ALI

JUDGE - I

JUDGE - II

M. Jodha

JUDGE - III

Q. J. Iqbal
JUDGE - IV

K. J. Iqbal

JUDGE - V

JUDGE - VI

Islamabad, the
AZN

The petition is dismissed by a majority of five to one.

FIT FOR REPORTING

Afflatun

*Announced
25/10/82*

Afflatun