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SHARIAT PETITION NO 8/I/2001

FAZAL AKBAR KHAN

Vs

SECRETARY OF LAW

1. Under article 203 D of the constitution, the petitioner Fazal Akbar has filed this Shariat petition through Jan Muhammad Advocate challenging section 26 of the limitation act 1908 and section 15 of the Easement act 1882 being contradictory to the Islamic injunctions as appeared in the Holy Quran and Sunnah of the Holy Prophet peace be upon him.

2. It is pertinent to refer here the provisions of the FSC procedural rules 1981 with regard to filing Shariat petitions in the Federal Shariat Court. Under sub section 2 of section 7 it has been mentioned that where a petitioner claims more than one law or provision thereof to be repugnant to the injunctions of Islam, separate petition in respect of each law is necessary. Secondly it is also the responsibility of the petitioner under f, g and h of the section 7 of the Procedural rule 1981, to mention

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to mention the grounds of repugnancy and state in support of such grounds, the relevant verses of the Holy Quran and traditions of the Holy Prophet peace be upon him and also present a list of books specifying the pages to be cited during arguments. In the mentioned case the petitioner has not fulfilled these requirements.

3. Under Section 26 of the Limitation Act 1908 and Section 15 of the Easement Act, where a person enjoys Easement rights over a property owned by a private individuals, it becomes absolute and infeasible if such right is enjoyed for a period of twenty years without interruption, while a property over which a right is claimed belongs to Government, the Easement right becomes absolute after the expiry of a period of sixty years. The contention of the petitioner is that while fixing limitation period, discrimination has been made between private and government properties, hence not followed the principle of Masawat (Equality) as ordained by Islam. According to him, the Limitation period fixed for private and Government properties with regard to Easement

rights must be at par., the difference made between them is not in line with the Islamic injunctions.

4. Regarding the legality of the limitation i, e fixing time limit to bring a suit in the court of law etc, the jurists have relied upon the

following traditions of the Holy prophet: من حاز شيئاً عشرين شهراً A thing

which remained in possession of a person for <sup>ten</sup> ~~three~~ years, he will become the owner of that thing. ( المردنية رقم ١٩٢ ) This Tradition has been reported

in Kanzul Ummal as follows من حاز شيئاً عشرين شهراً فهو من حقه A thing which

remained in possession of a person claiming adversely to the claimant for ten years, the right of the possession shall be superior to that of his

claimant opponent ( كنز العمال ج ٣ ص ٤٩٤ ) Another Tradition reported by Qazi

Abu Yousuf in Kitabul Khiraj is also referred in this regard عادى الأرض لله وللرسول ثم

بين بعد ثمان أعيا أرضاً ميتة وليس له معتبر حق Old and barren land is a property of  
بعد ثلاث سنين

the state and then of yours. Anyone who cultivates a piece of land, he will become its owner. But a person who takes in possession a piece of barren

land and by putting cornerstone did not cultivate the land for three years,

shall cease the right. (كتاب الخراج للابن قتيبة) It is pertinent to mention here that

there is no Quranic verse from which we may derive rules on this issue

and the authenticity of the Traditions quoted above has been questioned

by the august Supreme Court, however the Jurists have derived arguments

from these Traditions in terms of legality of the limitation. Apart from

this, the superior Courts have also endorsed the legality of the Limitation

in the light of Islamic injunctions. In Muhammad Ameen vs state this

Honorable Court held that the period of Limitation is not repugnant to the

injunctions of Quran and Sunnah of the Holy Prophet. This settles the

question of validity of Limitation period in other enactments.” (P.L.D

1981FSC75) In Shariat Petition No 3/I of 1992, Dr Mehmood ur Rehman

vs state, this court while examining section 3 of Limitation act observed

that ‘we are of the opinion that the provision of section 3 is not repugnant

to the injunctions of Islam. As it does not extinguish the right, it is only an

enabling provision of Law to prescribe certain period of Limitation to

bring a suit in a court of law.” Likewise in shariat Petition No11/I of

1987, Maqbool Ahmad Qurishi vs State, this court while examining Section 28 of the limitation Act had held that Fixing time limit in presentation or proving particular claim is not repugnant to the injunctions of Islam. (PLD1989 FSC 89) However when appeal filed before the supreme Court against our judgment on adverse possession, the august

Supreme court declared the concept of adverse possession contradictory to the Islamic injunctions and Section 28 of the said act was declared repugnant to the Islamic injunctions. (SCMR 1991—2063)

5. As for as the legality of the Easement right is concerned, it is

appeared in the Holy Quran that وبالوالدين إحساناً وبذي القربى واليتامى والمساكين والجارى القريب

وإلى القريب واليتامى والمساكين والجارى القريب (And unto parents show kindness and also unto kindred and

orphan and the needy and near neighbor and distant neighbor and the companions by your side and the way farer and those whom your right hands own. Verily Allah loveth not one who is vainglorious boaster.(4-36)

A renowned commentator of the Holy Quran, Allama Qurtubi while commenting on this verse writes; This Quranic verse ordains that the

people must respect and cooperate each other in temporal matters and day to day affairs. If anyone is in need to use the land owned by other for the fulfillment of his requirements, the owner of that land should not restrict

that person (أحكام القوارض) Imam Malik has narrated another Tradition which is as under " 179 "

is as under " لا يمنع احدكم حاجته ان يعرض حديقته في حديقته " No one can prevent his neighbor from

using the wall adjacent to him (الموطأ في القضاة) The sayings of Hazrat Umar in terms of Easement rights is well known and has always been

given pivotal importance in this respect, who said to one Muhammad bin Muslima that " والله لا يمرن دوني لعن الله لعن الله " By God I will arrange to pass this canal

through your land even not hesitate to pass it through your body (الموطأ ص 643).

The detail of above cited quotation is that Dahak wanted to

construct a canal for irrigation purposes and Pass it through the Land owned by one

Muhammad bin Muslima who despite of repeated request refused to do

so. Ultimately Dahak approached Hazrat Umar and complained against

Muhammad bin Muslima. Hazrat Umar himself

asked Muhammad bin Muslima to extend required facilities to Dahak, on

refusal to do so Hazrat Umar ordered to construct canal and said "by God

(Body)

I will pass it even through your stomach". This signifies the importance of

Easement rights in Islam.

6. It is expedient to clarify here that with the lapse of specified

period, the right of an individual does not cease <sup>ان للفق لا يزول</sup> but keeping in <sub>بتأد ٣ الزمان</sub>

view the Masalih of the people and to avoid false litigation, the judges

have been ordered not to entertain any petition filed after the lapse of

certain period. As far as the issue under consideration is concerned, it is

appeared in Majallatul Ahkamul Adlia that: <sup>آورد عوی خاص دایستے کا یوں یا پالی کے با برہما و کا یا کسی</sup>

ملوکہ زمین کی حق سرابی کا، تو نیندہ سالہ گزرنے کے بعد یہ دعوی قابل سماعت نہیں رہتا۔ اور آورد عوی و حق زمین کی حق سرابی کا ہو، تو متوفی کو چھتیس سال تک دعوی کرنے کا حق حاصل رہے گا۔ آورد عوی سرکاری زمین، خاص دایستے، نزر کا آب یا حق سرابی کا ہو، تو دس سال کے بعد قابل سماعت نہیں رہے گا۔ آورد میں سال تک چھوڑ دیا گیا اور دعوی نہیں

(مخلة الاقام العبد) کیا گیا تو اس کے بعد دعوی نہیں سنا جا سکتا  
ردعیہ 1662

The Jurists have mentioned three categories of land and have fixed

different time limit for each category to bring a suit before the court of

law. For the land owned by the individuals, (ارضی ملوکہ) they have fixed 15

years and after the lapse of this specified period, a case filed before the

court of law shall not be heard. For Waqf property (ارضى متوقف)

the jurists have fixed 36 years, within this period the administrator of

Waqf or Mutawali can bring a case before the court of law. The third one

is the land owned by the government (ارضى أمير دولة). If a person enjoys

Easement rights over the government property for a period of 10 years, he

will continue to enjoy this right (لحق القرار) however if the question of

ownership of the government property arise, the administrator of the

government property shall have a right to approach the court of law till

the lapse of 36 years. (شرح محمد) (القعد الراجي) (داد لته ص 333) (رد نم 1662)

in bringing a suit before the court of law, shall be considered positively.

These issues have been discussed by Ibn Abideen shami also; he further

writes that Imam or a man in authority is empowered to fix time limit in

connection with filing petitions before the court of law and disallow a

Judge to hear a case after the lapse of such period. (حاشیه ابن عابدین ص 382)

in the Encyclopedia of Fiqh that the Judges are bound to obey the orders

of sultan or Ameer in respect of Limitation period fixed by him. It has



been further mentioned that the Shariah view point pertaining to

Limitation is based on two things, the first one is حکومتی and the second one is نوی سلطان. The time limit of 36 years as fixed in connection with

Waqf properties and inheritance is based on the Ijthehad of the Jurists and

Imam or a man in authority is not empowered to bring any change in this

specified period. As far as the نوی سلطان is concerned, the Hanafi Jurists are

unanimously agreed on the point that the time limit of 15 years as fixed in

connection with hearing certain cases is based on directives issued by

Sultan. <sup>کویت</sup> موسو مقیمہ / لفظ تقادم

7. It is also pertinent to mention here the viewpoint of Ulema

regarding a situation where about any matter; there is no explicit

provision available in the Holy Quran or Sunna of the Holy prophet. In

this respect, Allama Rashid writes: In such situation, in which text of the

Holy Quran and Sunna is not available, the man in authority would be

responsible to look into the matter according to the public interest because

the Ulul Amr is the trustee of the people. He is bound to decide the matter

with consultation. If they agreed upon a thing and decided the issue

unanimously, it is obligatory to act upon what they have decided. (Al

Manar vol 3 p-147) In this respect, a Tradition reported by Baihaqi is

appeared in Adabul Qazi wherein the practice of Hazrat Umar has been

quoted that: If Quranic injunctions and Sunnah of the Holy Prophet were

silent about any new born issue, he used to see whether this matter has

been decided by Hazrat Abu Bakr or not? In case of any Judgment, he

used to act in the light of that judgment, otherwise the issue was settled in

the light consultations with high ups, scholars and jurists of the country

سنن البيهقي  
كتاب اداب القاض  
ص 114

). Likewise Abdullah Ibn Masood had directed to settle any issue in the

light of judgments delivered by the pious and righteous people of the

Umma (من نزلت الخلف بانفاق) اصل العلو  
ج 8 ص 23

8. Legislation in Islam is based on public welfare (Maslaha).

The legal maxim in this respect is that تمر الامام على العبيد منوط بالمصلحة

(The ruling of a ruler over his subject is based on their welfare.) (Mejella

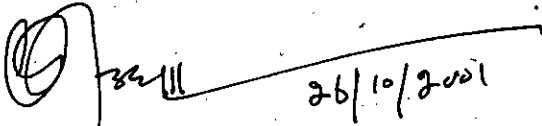
article 558) This principle defines the limit within which the rulers can

exercise his powers by formulating laws to <sup>maintain</sup> /~~to~~ justice and protect the rights of the people. In support, the following verse of the holy Quran is referred: <sup>لَا يَجِدُكُمْ إِلَّا عَدُوًّا كَاتِبًا</sup> "For everyone of you we have ordained a divine law and an open road." ( المائدة: 48 ) The divine law outlines the area within which the life of a Muslim may develop. Within this area, the lawgiver has conceded to us an open road (Minhaj) for temporal legislation which cover the contingencies deliberately left untouched by the Nuss of Quran and Sunna of the Holy Prophet.

9. The upshot is that wherever basic guidance is not available in the Holy Quran, Sunnah or the convention of the righteous caliphs, it would be taken to mean that God has left us free to legislate on those points according to our best lights. Where previously enacted laws are present or the judgment of the pious and righteous <sup>صالحين</sup> (سلف) is there, we are bound to adopt them, otherwise the legislative body of the country which consist of Ahl Hil wal Aqd, is empowered to formulate laws without restriction

provided that such legislation is not in contravention of the letter and spirit of the Shariah.

10. In the light of above discussion, it is thus concluded that the impugned provision of Easement Act cannot be declared repugnant to the injunctions of Islam. The state is empowered to minimize the existing period of sixty years keeping in view the Masalih of the people; likewise it can be enhanced if the situation so demands. The criterion of Maslaha changes in the changing circumstances. A law is just in a time and in a context is unjust in another time and another context.

  
( FAZAL ELAHI QAZI )  
S.R.A

26/10/2021