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Shariat Petition No. 4/ L/2001

Syed Afzal Haider, Advocate has filed above titled Shariat Petition on behalf of the petitioner namely Sh. Aftab Ahmed, under Article 203-D of the Constitution of Islamic Republic of Pakistan to examine sub-section 3 of section 18 of Financial Institution (Recovery of Finances) Ordinance, 2001. in juxtaposition with the provisions contained in clause (a) of Sub-Article 2 of the Article 17 (read with Article 79) of the Qanun-e-Shahadat, Order 1984.

2. The leaned Counsel for the petitioner prayed that sub-section (3) of section 18 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (Ordinance No. XLVI of 2001) be examined and declared repugnant to the injunctions of Islam. It is pertinent to re-produce the impugned law for the purpose of its examination in the light of Islamic Injunctions:-

Section 18, Banking Documents. (1) No. Financial Institution shall obtain the signature of a customer on banking document which contains blanks in respect of important particulars including the date, the amount, the property or the period of time in question.

2). Finance agreements executed by or on behalf of a Finance Institution and a customer shall be duly attested in the manner laid down in Article 17 of the Qanun-e-Shahadat Order, 1984 (P.O 19 of 1984).

3). Nothing contained in sub-section (1) and (2) shall affect the validity of any document executed prior to the date of enforcement of this Ordinance.

The petitioner claims that sub-section 3 of Section 18 proceeds to exempt documents executed prior to the coming into force of Act XV of 1997 (as on 31 May 1997) and Ordinance XLVI of 2001 from the operation of Article 17 of P.O.X of 1984. According to him this concept is against the Islamic Injunctions. He claims that no legislation can exempt any category of documents from the operation of Islamic provision based upon Holy Quran. The said provision made operative by law is, therefore, in violation of Article 17/79 of Presidential Order X of 1984 and as such transgresses the Injunction of Islam as contained in verse 282 of Chapter of Al-Baqra of Holy Quran.

3. Sub-section (3) of section 18 of Ordinance prevents the retrospective application of the provision of Section 18 of the Ordinance in circumstances, i.e., the transactions past and closed even after the promulgation of the said Ordinance in order to avoid confusion and chaos.

4. The intent of the legislature becomes clear from proviso of Sub-section (3) of section 18 of Ordinance. This provision is clearly meant to avoid retrospective effect of that particular law.

5. Federal Shariat Court in its judgment in Shariat petition No. 19 /I/1998, where in section 2-A of West Pakistan Muslim personal (Shariat) Act (Amendment) Ordinance 1983 was Challenged as violative of Injunctions of Islam, held "Islamization of the legal framework is a gradual process, in the larger interest of the public, that takes place by reforming the prevailing laws and customs having the force of law.

The provision of Section 2-A does not validate the custom that is contrary to the Injunction of Islam and at the same time it provides a strategic way to avoid chaos in closed transactions."

6. Keeping in view the jurisdiction of this court, the main issue for discussion is whether Islam permits to reopen the past transactions or not?

7. The Holy Quran made a provision, for the ease and smooth operation of the corrections and improvements brought about in the laws, prospectively and not retrospectively, by exempting the 'closed and past transactions, without carrying any force of being a precedent.

This may be derived from the following verses and traditions of the Holy Prophet(SAWS).

﴿ الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ الَّذِي يَتَخَبَّطُهُ الشَّيْطَانُ مِنَ الْمَسِّ ذَلِكَ بِأَنَّهُمْ قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا فَمَنْ جَاءَهُ مَوْعِظَةٌ مِنْ رَبِّهِ فَانْتَهَى فَلَهُ مَا سَلَفَ وَأَمْرُهُ إِلَى اللَّهِ وَمَنْ عَادَ فَأُولَئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ ﴿۲۰﴾

Those who take riba (usury or interest) will not stand but as stands the one whom the demon has driven crazy by his touch. That is because they have said: Sale is but like riba.“, while Allah has permitted sale, and prohibited riba. So, whoever receives an advice from his Lord and desists (from indulging in riba), then what has passed is allowed for him, and his matter is up to Allah. As for the ones who revert back, those are the people of Fire. There they will remain forever.(2:275).

Maulana Mawdoodi commented on this verse as: This allowance applies only to the legal aspect of the interest which had been taken before the revelation of this verse about prohibition and does not mean that the income from that interest had also been made lawful.

(٢) وَلَا تَنْكِحُوا مَا نَكَحَ آبَاؤُكُمْ مِنَ النِّسَاءِ إِلَّا مَا قَدْ سَلَفَ إِنَّهُ كَانَ فَاحِشَةً
وَمَقْتًا وَسَاءَ سَبِيلًا ﴿٢٢﴾

Do not marry those women whom your fathers had married except what has passed. It is indeed shameful and detestable, and it is an evil practice. (4:22)

Maulana Mawdoodi commented on this verse as: While forbidding the wrong ways of 'ignorance', the Holy Qur'an usually ends the instruction with such words as: "though what has happened in the past is excepted." It has two meanings in view. First, that no action will be taken in regard to those wrong things that one did in ignorance, provided that one mended ones ways and gave them up after the receipt of a particular Commandment. Second, that those words meant to give reassurance that the new instructions had no retrospective effect. For instance, if a person had married his step-mother before it was declared to be unlawful, according to these words, the offspring of all such previous marriages did not automatically become illegitimate by this newly declared prohibition so as to deprive them of their share of inheritance. Likewise if some from of trade had been made unlawful, it did not mean that all the previous transactions in that form

had become null and void, and that one would have to return all the wealth earned in that way or that it had become completely unlawful.

(٢) حُرِّمَتْ عَلَيْكُمْ أُمَّهَاتُكُمْ وَبَنَاتُكُمْ وَأَخَوَاتُكُمْ وَعُمَّاتُكُمْ وَخَالَاتُكُمْ وَبَنَاتُ الْأَخِ وَبَنَاتُ الْأُخْتِ وَأُمَّهَاتُكُمُ اللَّاتِي أَرْضَعْتَكُمْ وَأَخَوَاتُكُمُ مِنَ الرَّضَاعَةِ وَأُمَّهَاتُ نِسَائِكُمْ وَرَبَائِبُكُمُ اللَّاتِي فِي حُجُورِكُمْ مِنْ نِسَائِكُمُ اللَّاتِي دَخَلْتُمْ بِهِنَّ فَإِنْ لَمْ تَكُونُوا دَخَلْتُمْ بِهِنَّ فَلَا جُنَاحَ عَلَيْكُمْ وَحَلَائِلُ أَبْنَائِكُمُ الَّذِينَ مِنْ أَصْلَابِكُمْ وَأَنْ تَجْبَعُوا يُنَى الْأَخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ إِنَّ اللَّهَ كَانَ غَفُورًا رَحِيمًا ﴿٢٣﴾

Prohibited for you are your mothers, your daughters, your sisters, your paternal aunts, your maternal aunts, daughters of brother, daughters of sister, your mothers who suckled you, your sisters through suckling, mothers of your wives and your step-daughters under your care who are born of your women with whom you have had intercourse, though if you have not had intercourse with them, there is no sin on you, and the wives of your sons from your loins, and that you combine two sisters (in wedlock), except what has passed. Surely, Allah is Most-Forgiving, Very-Merciful..(4:23)

(٣) يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَقْتُلُوا الصَّيْدَ وَأَنْتُمْ حُرُمٌ وَمَنْ قَتَلَهُ مِنْكُمْ مُتَعَدًّا فَجْرَاءٌ مِثْلُ مَا قَتَلَ مِنَ النَّعْمِ يَحْكُمُ بِهِ ذَوَا عَدْلٍ مِنْكُمْ هَدْيًا بَالِغَ الْكَعْبَةِ أَوْ كَفَّارَةٌ طَعَامُ مَسْكِينٍ أَوْ عَدْلٌ ذَلِكَ صِيَامًا لِيَذُوقَ وَبَالَ أَمْرِ عَفَا اللَّهُ عَمَّا سَلَفَ وَمَنْ عَادَ فَيَنْتَقِمُ اللَّهُ مِنْهُ وَاللَّهُ عَزِيزٌ ذُو انْتِقَامٍ ﴿٩٥﴾

O you who believe, do not kill game when you are in Ihram (state of consecration for Hajj or Umrah). If someone from among you kills it deliberately, then compensation (will be required) from cattle equal to what one has killed, according to the judgment of two just men from among you, as an offering due to reach the Ka'bah, or an expiation, that is, to feed the poor, or its equal in fasts, so that he may taste the punishment of what he did. Allah has forgiven what has passed, but whoever does it again, Allah shall subject him to retribution. Allah is Mighty, Lord of Retribution.(5:95)

(ه) قُلْ لِلَّذِينَ كَفَرُوا إِنْ يَنْتَهُوا يُغْفَرْ لَهُمْ مَا قَدْ سَلَفَ وَإِنْ يَعُودُوا فَقَدْ مَضَتْ سُنتُهُ

الْأُولَىٰ ۝

Say to those who disbelieve that if they desist (from infidelity), they shall be forgiven for what has passed (of their sins), and if they repeat, then, the precedent of the earlier people is already established (that the infidels are punished)(8:38).


(5) حَدَّثَنَا حَجَّاجُ بْنُ أَبِي يَعْقُوبَ حَدَّثَنَا مُوسَى بْنُ دَاوُدَ حَدَّثَنَا مُحَمَّدُ بْنُ مُسْلِمٍ عَنْ عَمْرِو بْنِ دِينَارٍ عَنْ أَبِي الشَّعَثَاءِ عَنْ ابْنِ عَبَّاسٍ قَالَ قَالَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ كُلُّ قَسْمٍ قُسِمَ فِي الْجَاهِلِيَّةِ فَهُوَ عَلَى مَا قُسِمَ لَهُ وَكُلُّ قَسْمٍ أُدْرِكُهُ الْإِسْلَامُ فَهُوَ عَلَى قَسْمِ الْإِسْلَامِ (سنن ابوداؤد: جلد دوم: حدیث نمبر 1140 حدیث مرفوع)

حجاج بن ابی یعقوب، موسی بن داؤد، محمد بن مسلم، عمرو بن دینار، ابی شعثاء، حضرت ابن عباس سے روایت ہے کہ رسول اللہ صلی اللہ علیہ وآلہ وسلم نے فرمایا جو تقسیم زمانہ جاہلیت میں ہو چکی وہ زمانہ اسلام میں علی حالہ قائم رہے گی اور جو تقسیم اسلام کے زمانہ تک نہیں ہوئی اب وہ اسلام آ جانے کے بعد اسلامی اصولوں کے مطابق تقسیم ہوگی۔

(6) حَدَّثَنَا مُحَمَّدُ بْنُ زُمْجٍ أَنْبَأَنَا عَبْدُ اللَّهِ بْنُ لَهَيْعَةَ عَنْ عَقِيلِ بْنِ أَبِي مَرْثٍ أَنَّهُ سَمِعَ نَافِعًا يُخْبِرُ عَنْ عَبْدِ اللَّهِ بْنِ عَمْرٍو أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ مَا كَانَ مِنْ مِيرَاثٍ قُسِمَ فِي الْجَاهِلِيَّةِ فَهُوَ عَلَى قِسْمَةِ الْجَاهِلِيَّةِ وَمَا كَانَ مِنْ مِيرَاثٍ أُدْرِكُهُ الْإِسْلَامُ فَهُوَ عَلَى قِسْمَةِ الْإِسْلَامِ (سنن ابن ماجہ: جلد دوم: حدیث نمبر 2749 حدیث مرفوع ص 38 جلد 4)

محمد بن رمح، عبد اللہ بن لہیعہ، عقیل، نافع، عبد اللہ بن عمر، حضرت عبد اللہ بن عمر سے روایت ہے کہ اللہ کے رسول صلی اللہ علیہ وآلہ وسلم نے ارشاد فرمایا جو میراث دور جاہلیت میں تقسیم ہو چکی تو وہ تقسیم جاہلیت برقرار رہے گی اور قانون اسلام آنے کے بعد ہر میراث اسلامی اصولوں کے مطابق تقسیم ہوگی۔ (اب قانون اسلام کے مطابق از سر نو اس کی تقسیم نہ ہوگی کیونکہ اس میں بہت حرج ہے)

8. In the light of above, this particular provision of law requires examination in the light of Islamic injunctions as appeared in the holy Quran and Sunnah of the Holy Prophet to being it in conformity with the injunctions of Islam.


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