

P L D 2002 Supreme Court 800

[Shariat Review Jurisdiction]

Present: Sh. Riaz Ahmed, C.J., Munir A. Sheikh, Qazi Muhammad Farooq, Dr. Allama Khalid Mahmood and Dr. Rashid Ahmed Jullundhari, JJ

Civil Shariat Review Petition No. 1 of 2000

UNITED BANK LTD.----Petitioner

versus

Messrs FAROOQ BROTHERS and others---Respondents

(On review from the order, dated 23rd December, 1999 passed in C.Sh. Appeals Nos. 11 to 19 of 1992).

Civil Shariat Review Petition No. 1 of 2001

MUHAMMAD IQBAL ZAHID---Petitioner

versus

Messrs FAROOQ BROTHERS and others---Respondents

(On review from the order dated 14th of June, 2001 passed in C.M.A. No.1485 of 2001 in C.Sh. R.P. No.1 of 2000 in Shariat Appeals Nos. 11 to 19 of 1992).

Civil Shariat Review Petitions Nos. 1 of 2000 and 1 of 2001, decided on 24th June, 2002.

(a) Constitution of Pakistan (1973)---

----Art.203-F(3)(b)---Appointment of ad hoc members of the Shariat Appellate Bench of the Supreme Court---Question of such appointment cannot be raised collaterally---Appointees being recognized scholars and on the panel of Ulema and their appointment meeting the requirements of Art.203-F(3)(b) of the Constitution, objection against their appointment was repelled by the Supreme Court.

(b) Constitution of Pakistan (1973)--

----Arts. 203-F & 188---Review of the judgment of Shariat Appellate Bench of the Supreme Court wherein it was declared that Riba in all its forms and manifestations was prohibited by the Holy Qur'an and Sunnah and in consequence certain relevant laws were held to have ceased to have effect from 31-3-2000 and further suggesting measures in the judgment for transformation of the existing banking and economic system to the Islamic one---Validity---Case for review of the impugned judgment was made out as there were errors floating on the surface of record as highlighted (in the present order) and there was no force in the contention that the submissions made in support of the review petition amounted to a plea for rehearing the case---Issues involved in the cases required to be redetermined after thorough and elaborate research and comparative study of the financial systems which were prevalent in the contemporary Muslim countries of the world---Federal Shariat Court having not given a definite finding on all the issues involved, the determination whereof was essential to the resolution of the controversy in the cases, it would be in the fitness of things if the matter was remanded to the Federal Shariat Court which under the Constitution was

enjoined upon to give a definite finding on all the issues falling within its jurisdiction--Supreme Court set aside the impugned judgments and remitted the cases to the Federal Shariat Court for determination afresh in the light of the contentions of the parties noted in the present order and observations made therein which were germane to the controversy---Parties, besides the points raised before the Appellate Shariat Bench of the Supreme Court, would be at liberty to raise any other issue relevant to the cases and the Federal Shariat Court may also, on its own motion, take into consideration any other aspect which may arise or may be found relevant for determination of the issues involved herein.

Al-Qur'an: Verses 2:262-282; 3: 130; 12:108; 18:49-50; 25:73-75; 30:39; 34:46; 73:20; Tarjaman-ul-Qur'an by Maulana Abul Kalam Azad; Tafseer-ul-Qur'an by Sir Syed Ahmed Khan; Ma'arif-ul-Qur'an by Mufti Muhammad Shafi; Book XIV on Sale, Chap. VIII on Riba or Usury'; Hedaya, English Translation by Hamilton, Lahore, p.289 and Tafsir al Kabir by Imam Fakhru-d-Din Al-Razi (d.606 A.H.) ref.

Raja Muhammad Akram, Advocate Supreme Court and Ch. Akhtar Ali, Advocate-on-Record for Petitioner (in C.Sh.R.P. No. 1 of 2000).

Muhammad Ismail Qureshi, Sh. Khizar Hayat, Ch.Abdul Rehman, Advocates Supreme Court, Maroof Shah Sherazi, Advocate (Special permission) and Faiz-ur-Rehman, Advocate-on-Record (absent) for Petitioner (in C.Sh. R. P. No. 1 of 2001).

Makhdoom Ali Khan; Attorney-General for Pakistan, Syed Riazul Hasan Gilani, Senior Advocate Supreme Court, Raza Kazim, Advocate Supreme Court, Mohsin Raza, Advocate Supreme Court, Ali Kazim, Advocate Supreme Court, Amir Hani Muslim, Advocate Supreme Court Syed M. Ayub Bokhari, Advocate Supreme Court, Khurram Hashmi. Advocate Supreme Court (by Special Permission), Raja Abdul Ghafoor and Mehr Khan Malik, Advocates-on-Record for Respondents Nos. 8, 10, 19 and 34 (in C.Sh.R.P. No. 1 of 2000).

M.A. Farani, Advocate Supreme Court for Respondent No. 17.

Hashmat Ali Habib, Advocate Supreme Court and Engineer Muhammad Saleemullah for Jamiat Ulema-e-Pakistan.

Dates of hearing: 6th, 7th, 13th, 14th and 17th to 22nd June, 2002.

ORDER

SH. RIAZ AHMED, C. J.--The United Bank Ltd. has filed Civil Shariat Review Petition No. I of 2000 under Article 188 of the Constitution of the Islamic Republic of Pakistan seeking review of the judgment, dated 23rd December, 1999 passed by the Shariat Appellate Bench of this Court in Shariat Appeals Nos.11 to 19 of 1992 whereby the judgment, dated 14th November, 1991 of the Federal Shariat Court was affirmed and it was declared that Riba in all its forms and manifestations was prohibited by the Holy Qur'an and Sunnah. In consequence the Shariat Appellate Bench of this Court declared as under:

"(10) The following laws being repugnant to the Injunctions of Islam shall cease to have effect from 31st March, 2000:

1. The Interest Act, 1839.
2. The West Pakistan Money-Lenders' Ordinance, 1960.
3. The West Pakistan Money-Lenders' Rules, 1965.

4. The Punjab Money-Lenders' Ordinance, 1960.
5. The Sindh Money-Lenders' Ordinance, 1960.
6. The N.-W. F. P. Money-Lenders' Ordinance, 1960.
7. The Balochistan Money-Lenders' Ordinance, 1960.
8. Section 9 of the Banking Companies Ordinance, 1962.

(11) The other laws or the provisions of the laws to the extent that those have been declared to be repugnant to the Injunctions of Islam shall cease to have effect from 30th June, 2001.

Following measures were suggested in the judgment under review for transformation of the existing banking and economic system to the Islamic one:--

(1) Strict austerity measures to drastically curtail the Government expenditure should be adopted and implemented and deficit financing should be controlled as therein lies the solution to economic revival.

(2) An Act to regulate the Federal Consolidated Fund and Public Account, Provincial Consolidated Fund and Public Account requires to be enacted by the Parliament and the Provincial Assemblies respectively. This law will have to take care of borrowing powers, purpose and the scope of monitoring process including all ancillary matters.

(3) Laws providing for necessary prudential measures ensuring transparency be enacted. These laws may include laws like Freedom of Information Act, the Privacy Act and Ethics Regulations of United States, Financial Services Act of Britain.

(4) Establishment of Institution like Serious Fraud Office to control white collar and economic crimes.

(5) Establishment of credit rating agencies in the public sector.

(6) Establishment of evaluators for scrutiny of feasibility reports.

(7) Establishment of special departments within the State Bank--

(a) Shari'ah Board for scrutiny and evaluation of Board's procedures and products and for providing guidance for successfully managing the Islamic economics.

(b) A Board for arranging exchange of information, financial institutions about feasibility of projects, evaluation thereof and credit rating of institutions, corporations and other entities.

(c) A Board for providing technical assistance to the financial institutions/banks with regard to the anomalies emerging in the practical operation of the financial institutions or difficulties arising during operation of financial products, transactions or arrangements between the financial institutions and the consumers/clients. This may also take the shape of Islamic Financial Service Institution. Such institutions will also work to the field of shares and investment certificates, underwriting promotion and market making to help in activation of primary and secondary markets. The rise of such institutions, whose functions include the promotion of financial instruments and to work as their catalysts in the financial market, would be of great help and support to Islamic Banking. Among the factors which would help the creation and spreading of such institutions is the extension of tax incentives to their operation as well as to Islamic banks to benefit from their services.

The establishment of aforementioned Infrastructure is considered necessary by the economists for operation of the Islamic banking system with success."

Since the transformation of the existing system could not take place instantly, the Shariat Appellate Bench directed as under:--

"Keeping all these aspects in view, we have decided to appoint different dates for different phases of the transformation. We, therefore, direct that:--

(1) The Federal Government shall, within one month from the announcement of this judgment, constitute in the State Bank of Pakistan a high level Commission fully empowered to carry out, control and supervise the process of transformation of the existing financial system to the one conforming to Shari'ah. It shall comprise Shari'ah scholars, committed economists, bankers and chartered accountants.

(2) Within two months from the date of its constitution, the Commission shall chalk out the strategy to evaluate, scrutinize and implement the reports of the Commission for Islamization of the Economy as well as the report of Raja Zafarul Haq Commission after circulating it among the leading banks, religious scholars, economists and the State Bank and Finance Division, inviting their comments and further suggestions. The strategic plan so finalized shall be sent to the Ministries of Law, Finance and Commerce, all the banks and financial institutions to take steps to implement it.

(3) Within one month from the announcement of this judgment, the Ministry of Law and Parliamentary Affairs shall form a task force, comprising its officials and two Shari'ah scholars from the Council of Islamic Ideology or from the Commission of the Islamization of Economy, to:

(a) Draft a new law for the prohibition of Riba and other laws as proposed in the guidelines above;

(b) to review the existing financial and other laws to bring them into conformity with the requirements of the new financial system;

(c) to draft new laws to give legal cover to the new financial instruments.

The recommendations of the task force shall be vetted and finalized by the 'Commission for Transformation' proposed to be set up in the SBP after which the Federal Government shall promulgate the recommended laws.

(4) Within six months from the announcement of this judgment, all the banks and financial institutions shall prepare their model agreements and documents for all their major operations and shall present them to the Commission for transformation in the SBP for its approval after examining them.

(5) All the joint stock companies, mutual funds and the firms asking in aggregate finance above Rs.5 million a year shall be required by law to subject themselves to independent rating by neutral rating agencies.

(6) All the Banks and financial institutions shall, thereafter, arrange for training programmes and seminars to educate the staff and the clients about the new arrangements of financing, their necessary requirements and their effects.

(7) The Ministry of Finance shall, within one month from the announcement of this judgment, form a task force of its experts to find out means to convert the domestic borrowings into project related financing and to establish a mutual fund that may finance the Government on that basis. The units of the mutual fund may be purchased

by the public and they will be tradable in the secondary market on the basis of net asset value. The certificates of the existing bonds of the existing Government savings schemes based on interest shall be converted into the units of the proposed mutual fund.

(8) The domestic inter-Government borrowings as well as the borrowings of the Federal Government. from State Bank of Pakistan shall be designed on interest-free basis.

(9) Serious efforts shall be started by the Federal Government to relieve the nation from the burden of foreign debts as soon as possible, and to renegotiate the existing loans. Serious efforts shall also be made to structure the future borrowings, if necessary on the basis of Islamic modes of financing.

2. In the year 2001 two miscellaneous applications (Nos. 1480 and 1485 of 2001) were filed in the above review petition with a composite prayer for suspension of the operation of the judgment and extension of time for its implementation. After hearing the Federal Government and the parties concerned this court extended the period for implementation of the judgment till 30th June, 2002.

3. Civil Shariat Review Petition No. 1 of 2001 has been tiled by Muhammad Iqbal Zahid and others seeking review of the order, dated 14th June, 2001 with the prayer that the said order may be reviewed and recalled and the Federal Government may be directed to promulgate the Ordinance on Riba. which is stated to have been framed to bring all laws in conformity with the Islamic Injunctions.

4. At the commencement of hearing of these review petitions, objection to the constitutionality of the appointment of two of us (Dr. Allama Khalid Mahmood and Dr. Rashid Ahmed Jullundhri, ad hoc members of the Shariat Appellate Bench) was raised. It was urged that their inclusion in the Shariat Appellate Bench was unconstitutional and illegal. Without further going into this question, we may observe that the question of appointment of ad hoc members of the Bench cannot be raised collaterally. Furthermore, both the learned ad hoc members being recognized scholars, are on the panel of Ulema and their appointment meets the requirements of Article 203F(3)(b) of the Constitution. The objection is repelled.

5. In course of hearing of these review petitions, we have had the advantage of hearing M/s. Raja Muhammad Akram, Senior Advocate Supreme Court, learned counsel for the United Bank Ltd., Mr. Makhdoom Ali Khan, learned Attorney-General for Pakistan, Messrs Raza Kazim and Dr. Syed Riazul Hasan Gilani on behalf of the Federation, M/s. Muhammad Ismail Qureshi, Senior Advocate Supreme Court and Sh. Khizar Hayat, Advocate Supreme Court on behalf of the petitioner in Civil Shariat Review Petition No. 1 of 2001, Mr. M.A. Farani on behalf of respondent No. 17, Engineer Muhammad Saleemullah and Mr. Hashmat Ali Habib, Advocate Supreme Court on behalf of Jamiat Ulema-e-Pakistan.

6. Raja Muhammad Akram, Senior Advocate Supreme Court, learned counsel for the petitioner (UBL) placed reliance on verses 2:262 - 282, 3:130, 12:108, 18:49 - 50, 25:73 - 75, 30:39, 34:46 and 73:20 of the Holy Qur'an and relevant extracts from the books Tarjaman-ul-Quran by Maulana Abul Kalam Azad, Tafseer-ul-Quran by Sir Syed Ahmed Khan and Ma'arif ul-Quran by Mufti Muhammad Shafi to contend that verses 2:262 - 282 mainly refer to 'Sadqaat', i.e. spending in the cause and for pleasing of Almighty Allah. Riba was finally prohibited in verse 3:130 which reads as under:--

130. O ye who believe!

Devour not Usury,

Doubled and multiplied:

But tear Allah; that

Ye may (really) prosper.

He submitted that this verse does not prohibit what is reasonable and fair and all that it prohibits is 'doubled' and 'multiplied'. In verses 12:108, 25:73--75 and 34:46 emphasis has been laid on the use of reason. The word (bai) used in verse 2:275, includes sale, business, trade, investment, bargaining, etc., therefore, the present day banking business is covered by the term (bai). He submitted that the Shariat Appellate Bench has not properly distinguished the terms 'usury', 'Riba' and 'interest'. The term 'Riba' has not been defined in the Holy Qur'an and all that has been held in the judgment under review is based on Qiyas (analogy). The word 'usury' is a kind of 'Riba' whereas the term 'interest' refers to 'profit'. From verses 2:278 - 280 the following principles are deducible, viz. (i) the believers should give up the remainder of Riba and if they do not, it would be war against Allah and the Holy Prophet (p.b.u.h.), (2) if the debtor is in financial difficulty, he should be given time, and if it is remitted by way of charity, that is best for the believers. In verse 2:273, it is ordained that Sadqaa; (almsgiving) are for the poor and the needy who have been immobilized but they will not beg from all and sundry. Obviously, these principles are not applicable to an industrialist who has taken a loan of millions of rupees but to the poor and the needy. To the similar effect are verses 73:20, 18:49-50 and 2:270. There is a contrast/comparison between 'Sadqaat' and 'Riba' in the Holy Qur'an and emphasis has been laid on giving concessions/relaxations to the poor people. The banks cannot make 'Sadqaat' in favour of industrialists.

7. Mr. Raza Kazim, Advocate Supreme Court, learned counsel for the Federation argued that in view of the bar contained in Article, 203B(c) of the Constitution, the Federal Shariat Court had no jurisdiction to embark upon declaring Riba as Haram i.e. illegal or impermissible inasmuch as by virtue of Article 38(f) of the Constitution a duty had been cast upon the Federal Government and not the Federal Shariat Court to eliminate Riba as early as possible and therefore the Federal Shariat Court as well as the Shariat Appellate Bench of this Court had no jurisdiction to step into the shoes of the Federal Government to eliminate Riba by fixing a time frame. He submitted that in pursuance of the judgment of the Shariat Appellate Bench the Federal Government formed one Commission and two task forces. The Task Force on Government Borrowing was formed in the Ministry of Finance to direct and facilitate the transformation of interest-based Government borrowing into Islamic modes of financing. The other Task Force and the Commission were concerned with effecting a transition to compliance with Shari'ah in the financial sector and establishing a legal and regulatory framework to document an Islamic economy. The learned counsel pressed into service two affidavits filed on behalf of the Ministry of Finance and the State Bank of Pakistan. Para. 33 of the affidavit filed by the Secretary, Ministry of Finance, at page 14 of the paper book reads as follows:

"That Government of Pakistan has made best possible efforts under Article 190 and Article 203D(3)(a) of the Constitution of the Islamic Republic, of Pakistan, 1973 to find ways and means to implement the directives contained in paragraphs (7), (8) and (9) of the Order dated 23-12-1999 of Hon'ble Supreme Court of Pakistan (Shariat Appellate Bench) but has found that implementation of the said directives is not practical or feasible and if attempted will pose high degree of risk to the economic stability and security of Pakistan."

Para. 25 of the affidavit filed by the Deputy Governor, State Bank of Pakistan at page 89 of the paper-book reads as follows:--

"That having taken a series of steps to promote Islamic banking described in para. 21 above, and considering all other practical problems associated with the complete transformation of the financial system discussed herein, it is State Bank of Pakistan's considered judgment that a parallel approach will be in the best interest of the country. This means that Islamic banking is introduced as a parallel system of which a beginning has already been made, it is provided a level playing field vis-a-vis the existing conventional banks, and its further growth and development is supported by Government and State Bank of Pakistan through appropriate actions. This approach will eliminate the risk of any major costs/damage to the economy, give a fair chance to Islamic banks to develop alongside the conventional banks, and will provide a choice to the people of Pakistan, and the foreigners doing businesses in/with Pakistan, to use either of the two systems. "

8. Dr. Syed Riazul Hasan Gilani, Senior Advocate Supreme Court, learned counsel for the Federation at the outset formulated his contentions as under:--

(1) The impugned judgment has amalgamated legal and moral aspects of Riba. Failure to distinguish between legal and moral aspects of Riba has resulted in violation of the Injunctions of Islam as laid down in the Holy Qur'an and the Sunnah of the Holy Prophet (p.b.u.h.) as well as the juristic opinions of Imam Abu Hanifa and other great jurists.

(2) The enforcement of Makrooh Riba through State apparatus is against the Sunnah of the Holy Prophet (p.u.b.h.).

(3) The consolidated definition which covers legal as well as moral aspects of Riba has taken the impugned judgment outside the jurisdiction of this Court.

(4) While trying to define Riba the fundamental rule of Tafseer (interpretation) has been violated in the judgment inasmuch as while defining a negative injunction like Riba the prevalent practice and respective terminology, used by the pre-Islamic Arabs is relevant. For that, only the reports narrated by the Sahaba (RA) and Tabi'een are admissible. Juristic inferences in this regard are neither relevant nor admissible.

(5) Failure to define 'Qarz' has rendered the entire complexion of the impugned judgment against the Shariat. The English word 'loan' is not the exact counterpart of the word 'Qarz'.

(6) The alternate modes of finance employed in the so-called Islamic banking have been held to be Riba by the most eminent jurists including Abdullah bin Abbas and Abdullah bin Umer. Moreover, while suggesting measures for Islamization of the banking system, the views of Syed Muhammad Baqir-as-Sadar who represents Jafri School of thought have been ignored.

(7) In the judgment the views on Riba and banking practice expressed by Shaikh Muhammad Abduhu', Shaikh Rashid Rida, Abdul Razzak Sanhuri, the former Shaikhul Azhar Mahmood Shaltut, Cairo, the present Shaikhul Azhar Dr. Muhammad Sayyid Tantawi, Abdul Wahab Khallaf and Dr .Maroof Daoualibi have been misread.

(8) The law of Riba has wrongly been applied to the non-Muslims. In doing that not only the Holy. Qur'an and the Sunnah of the Holy Prophet (p.b.u.h.) but also Fiqah Jafria has been violated;

(9) The judgment under review holds indexation repugnant to the Injunctions of Islam without quoting any material from the Holy Qur'an and the Sunnah. While doing. that, the juristic opinions of A'la Hazrat Maulana Ahmed Raza Khan Bareilvi, Syed Muhammad Baqir-as-Sadar and present Sheikhul Azhaji Dr. Muhammad Sayyid Tantawi have been ignored.

(10) 'Zulm' i.e. exploitation/oppression is the 'Illat' i.e. .cause or essential ingredient of Riba. It has wrongly been held in the judgment that 'Zulm' is of 'Illat' but 'Hikmat' of Riba. Thus the express verse of the Holy Qur'an and juristic opinions of Imam Ibn e-Rushd and Maulana Ashraf Ali Thanvi have been opposed.

(11). Pre-determination of fixed profit is not the only criterion which makes a transaction Riba, It has been stated in the Hedaya and also opined by Maulana Ashraf Ali Thanvi that pre-determined fixed profit in a business trans 'on is the characteristic of Mudaraba

(12) The judgment under review has not taken note of the transformation of individualistic profit motive and risk factor to the society as a whole by virtue of the corporate business.

9. Mr. Gilani contended that the judgment of the Federal Shariat Court and that of the Shariat Appellate Bench suffered from infirmities, in that, the most important and delicate questions having material bearing on the issues involved in these cases have not been dealt with. He contended that he had raised at least 33 propositions in course of the hearing, which were not attended to by the Shariat Appellate Bench. He argued that the judgment of the Federal Shariat Court is biased inasmuch as Mr. Justice Dr. Tanzil-ur Rehman, C.J (as he then was) had delivered the judgment with a predetermined mind because while delivering the judgment he had placed reliance on a report of the Council of Islamic Ideology of which he happened to be the Chairman at the relevant time which is apparent from a perusal of the judgment of the Federal Shariat Court in particular with reference to paragraphs 58, 59, 60, 62, etc. of the judgment. The Shariat Appellate Bench also proceeded to rely upon the said report and the writings of Dr. Tanzil-ur-Rehman. The Shariat Appellate Bench did not consider this aspect at all and proceeded to rely upon the work of Dr. Tanzil-ur-Rehman and therefore the judgment under review as well as that of the Federal Shariat Court lacked objectivity. The learned Judges of the Federal Shariat Court confined themselves to the opinions of a particular group of scholars having a particular view-point from whom the author of the judgment (Dr. Tanzilur-Rehman, C.J., as he then was) had derived inspiration for producing his works in the Council of Islamic Ideology as well as writing other books on the subject and kept out of consideration the opinions of other eminent jurists such as Shaikh Muhammad Abduhu', Shaikh Rashid Rida, Abdul Razzak Sanhuri, the former Shaikhul Azhar Mahmood Shaltut, Cairo, the present Shaikhul Azhar Dr. Muhammad Sayyid Tantawi.

10. Mr. Gilani vehemently urged that the alternate banking and financial system proposed in the judgment under review was not at all workable and the Government has found it incapable of being implemented. He argued that the Federal Shariat Court did not advert to the question of Riba-al-Fadl and its enforcement-related implications and this glaring omission escaped the notice of the Shariat Appellate Bench. In this context reference may be made to the following observations of the Federal Shariat Court at page 63 of the judgment which reads as under:--

"Riba, in law, signifies an excess (increase) in a (loan) contract in which such excess is, stipulated as an obligatory condition on one of the parties, without any return i.e. without any property (Mal), in exchange. (See Book XIV on Sale Chapter VIII on Riba or usury. Hedaya, English Translation by Hamilton, Lahore, page 289), Imam Fakhrud-Din Al-Razi (d.606 A.H.) in his well-known Tafsir al Kabir writes that the meaning of the word Riba is increase but it does not mean that to recover every kind of increase is Riba and is unlawful (haram). The forbiddance of Riba relates to special kind of contract which was known amongst the Arabs as Riba al Nasiyah i.e. increase on debt. (The other kind of Riba called "Riba al Fadl" is outside the scope of the present discussion. "

The exclusion of Riba-al-Fadl from consideration was reiterated at page 96 of the judgment in the following words --

"Presently in these petitions we are concerned with Riba-al- Nasi'ah The difference of opinion whatever is found is regarding Riba-al-Fadl and that is out of discussion in the context of Bank interest which is under our consideration. "

It is manifest from the perusal of the above findings of the Federal Shariat Court that the question of Riba-al-Fadl and its legal implications qua enforcement through legislation was kept out of consideration for the reason that the same was never treated subject-matter of the proceedings before it or a controversy to be set at rest. On the other hand, the Shariat Appellate Bench discussed Riba-al-Fadl in its judgment and after dividing it into three categories held that Riba-al-Qur'an and transactions of money covered by the first category of Riba-al-Fadl are more relevant to the modern business. Evidently, the Shariat Appellate Bench could not proceed to determine this issue in the appeals unless there was a finding recorded by the Federal Shariat Court. 'there is an error apparent on the record inasmuch as the Shariat Appellate Bench considered that the issue to be resolved by them did not relate to Riba-al-Nasi'ah alone but also to Riba-al-Fadl, therefore, they should have refrained from recording any finding on these concepts and ought to have remanded the case to the Federal Shariat Court for determination of the questions which were germane to the issue of Riba-al - Fadl. .

11. Mr. Gilani argued that all the Islamic banking system suggested in the judgment under review is a misnomer and except Musharika all other modes of finance are nothing but Heela, i.e. devices to avoid what is otherwise Riba which are in fact more harsh and oppressive having the element of 'Zulm' and are worst in consequences as compared to the various forms of interest prevalent in the present day banking system which have wrongly been termed as Riba al-Nasi'ah in the judgment under review. This aspect also requires thorough, and elaborate research on all its pros and cons and implications by an independent and unbiased mind. The judgment under review omitted to take into consideration the fact that the alternate system is not a consensus oriented system and had been bitterly opposed by many eminent jurists including Abdullah bin Omer and Abdullah bin Abbas.

12. Mr. Makhdoom Ali khan, learned Attorney-General for Pakistan vehemently contended that the Federal Shariat Court as well as the Shariat Appellate Bench did not at all deal with the questions of jurisdiction as well as maintainability of the petitions before the Federal Shariat Court with reference to the provisions of Articles 29, 30(2), 38(f), 81(c) and 121(c) of the Constitution and have only referred to the Constitutional provisions relating to jurisdiction of the Federal Shariat Court to examine fiscal laws. We have also noticed that the payment of interest finds mention in Article 161 as well as the definition of the expression 'pension' in Article 260 of the Constitution. Regarding the provisions of the Constitution as contained in the Principles of Policy in relation to elimination of Riba it was observed by the Federal Shariat Court that the Government did not make any effort to achieve the objective set out therein and the judicial aspect of the case was not taken into consideration. In this behalf, reference may be made to the observations made by Dr. Tanzil-ur-Rahman, C.J . at page 51 of the judgment, which read as under:

"55. As to interest, Pakistan's Constitution; 1956 provides that the State shall endeavour to eliminate Riba as early as possible (Art.28-F), but no effort was made to realize that objective. In 1962 Constitution, it was again, provided in the principles of policy that Riba (usury) should be eliminated. Similar provision (was again made in the Constitution of 1973, (Art. 3 8-F).

It is also pertinent to mention that even the Shariat Appellate Bench did not examine all the jurisdictional aspects of the case in the light of the above provisions of the

Constitution as a whole and confined itself to striking down certain rules relating to operation of the Consolidated Fund.

13. We have noticed that the Federal Shariat Court did not at all deal with question of applicability or otherwise of the prohibition of Riba to non- Muslims and surprisingly the Shariat Appellate Bench proceeded to hold that the prohibition applied to the non-Muslims which was not the issue before it.

On this score also, the Shariat Appellate Bench ought to have remanded the case to the Federal Shariat Court to determine this question.

14. It was urged before us that the term 'Qarz' is confined to that type of transaction which is made in the name of Allah in the form of 'Sadaqa', 'Khairaat', i.e. almsgiving, etc. It was argued that the present system of bank accounts and investments in various schemes of the Government do not involve any transaction of loan, debt or Riba and are investment simpliciter. While entering into such transactions, the investor has no compulsion and he acts voluntarily in investing his money for purposes of security as well as earning of profit and, therefore, the receipt of profit by such a person in the circumstances particularly when there is no element of exploitation ('Zulm') which is a sine qua non in a transaction of Riba, cannot be termed as Riba. In this behalf, the cases of pensioners, widows, etc. were brought to our notice and it was urged that the continuance of the present day banking system and the Government sponsored savings schemes as well as the transactions which lack ingredient of 'Qarz' involving 'Zulm' (exploitation, oppression, etc.) as envisaged by the Holy Qur'an and Sunnah, was in the larger interest and welfare of the people. It was also urged that in case the judgment is implemented, it would lead to chaos and anarchy in the country and a duty is cast on an Islamic State to take all steps which are necessary in the public interest and the welfare of the people and avoid chaos and ` anarchy.

15. The Shariat Appellate Bench while proceeding to examine the fiscal questions relating to inflation, indexation, etc. made the following observation at page 734 of the judgment:-

"186. In order to solve this problem, many suggestions have been proposed by different quarters, some of which are the following:-

(a) That the loans should be indexed, meaning thereby, that the debtor must pay an additional amount equal to the increase in the rate of inflation during the period of borrowing.

(b) That the loans should be tied up with gold, and it should be presumed that the one who has loaned Rs.1,000 has actually loaned as much gold as could be purchased on that date for Rs.1,000 and must repay as much rupees as are sufficient to purchase that much of gold.

(c) That the loans should be tied up by a hard currency like dollar.

(d) That the loss of the value of money should be shared by both creditors and lender in equal proportion. If the value of money has declined at a ratio of 5 %, 2.5 % should be paid by the debtor and the rest should be borne by the creditor, because the inflation is a phenomenon beyond the control of either of them. Being a common suffering, both should share it.

187. But we feel that this question needs a more thorough research which before its final decision in this Court should first be initiated by different study circles of the country, especially, by the Council of Islamic Ideology and the Commission for the Islamization of Economy. Many international seminars have been held to deliberate on this issue. The papers and resolutions of these seminars should be analyzed in depth.

188. On the other hand, having held that this question does neither justify interest nor provides a substitute for it in the banking transactions, we do not have to resolve this issue in this case, nor does the decision about the laws under challenge depend on it. We, therefore, leave the question open for further study and research. "

In the face of the above observations and the finding of the Federal Shariat Court on the question of indexation that it was not permissible the Shariat Appellate Bench, before striking down any law, ought to have remanded the case to the Federal Shariat Court to decide the issues of inflation and indexation afresh which according to the Bench itself required elaborate discussion, research, further study and in-depth analysis of the papers and resolutions of international seminars. In this context Mr. Gilani argued that the definition of 'Ra'sul Maal', i.e. the principal amount which is liable to be returned in a transaction of 'Qarz' must be re-defined keeping in view the scope of its intrinsic value in relation to inflation so that there should be no exploitation as regards the equities of the parties.

16. We may observe here that before the Federal Shariat Court Mr. Khalid M. Ishaque, learned Senior Advocate Supreme Court had raised the following three contentions:--

"38. Mr.Khalid Ishaque, Advocate, who appeared on 10-6-1991 on behalf of National Bank of Pakistan and State Life Insurance Corporation, filed interim written reply on behalf of his clients and raised the following pleas:--

(i) The Banks in Pakistan are working within the framework of Banking instruments prescribed by the State Bank, with the approval of Council of Islamic Ideology, as valid Islamic Instruments.

(ii) There is a considerable juristic opinion available to the fact that an increase to offset the inflation would have legal justification and would not be counted as Riba.; and

(iii) There is juristic opinion available to the fact that Bank interest does not fall in the category of prohibited Riba (interest). According to his opinion, Banks participate in the procedure processes of the Society/Community, make productive labour possible, increase social wealth, and take only a fraction of the profit that accrues to them which is not Riba. "

These contentions were not resolved on the ground that the learned counsel who had raised the same did not send the texts in support thereof. In this behalf, Dr. Tanzil-ur-Rehman, C.J. (as he then was) made the following observations:

"44: We have gone through the aforesaid Note wherein the opinions of Ibnal-Qayyim, Muhammad Abduhu, Rashid Raza, Sanhuri, Daualibi, Shaikh Draz, Maulana Abul Kalam Azad, Maulana Abul A'ala Maudoodi, Maulana Mufti Muhammad Shafi and Dr.Wahba Al-Zuhaili are alleged to be in favour of the plea about Bank interest, as raised by the counsel No text was sent Therefore, unless and until the exact writings of the great Imams or jurists are laid before us by the counsel we are unable to place any reliance on the secondary source of the said Nabil."

In this view of the matter, it was all the more necessary for the Shariat Appellate Bench to have remanded the cases to the Federal Shariat Court for giving a clear verdict after considering all the relevant material.

17. A case for review of the impugned judgment is made out as there are errors floating on the surface of record as highlighted in the preceding paragraphs. In this view of the matter we find no force in the contention that the submissions made in support of the review petition amount to a plea for rehearing of the case.

18. In the light of the foregoing discussion, we are of the considered view that the issues involved in these cases require to be re-determined after thorough and elaborate research and comparative study of the financial systems which are prevalent in the contemporary Muslim countries of the world. Since the Federal Shariat Court did not give a definite finding on all the issues involved the determination whereof was essential to the resolution of the controversy involved in these cases, it would be in the fitness of things if the matter is remanded to the Federal Shariat Court which under the Constitution is enjoined upon to give a definite finding on all the issues falling within its jurisdiction.

19. Resultantly, Civil Shariat Review Petition No. 1 of 2000 filed by the United Bank Ltd. is allowed, the judgment, dated 23rd December, 1999 passed by the Shariat Appellate Bench of this Court in Shariat Appeals Nos. 11 to 19 of 1992 and the judgment, dated 14th November, 1991 of the Federal Shariat Court passed in Shariat Petitions Nos.42-I + 45-I of 1991 etc. are set aside and the cases are remitted to the Federal Shariat Court for determination afresh in the light of the contentions of the parties noted above and the observations made which are germane to the controversy. Besides the points raised before this Court, the parties would be at liberty to raise any other issue relevant to these cases and the Federal Shariat Court may also, on its own motion, take into consideration any other aspect which may arise or may be found relevant for determination of the issues involved herein.

20. Before parting with the Order we would like to record our deep appreciation for the valuable assistance rendered by the learned counsel for the parties and the learned Attorney-General for Pakistan and their associates.

M.B.A./U-17/S

Petition accepted.

