

IN THE FEDERAL SHARIAT COURT

(Original Jurisdiction)

PRESENT

MR. JUSTICE DR. FIDA MUHAMMAD KHAN

MR. JUSTICE RIZWAN ALI DODANI

MR. JUSTICE SHEIKH AHMAD FAROOQ

SHARIAT PETITION NO. 8/I OF 2004 **Linked with**

1. Professor Kazim Hussain son of Sattar Ali, Associate Professor,
Federal Government College, H/9, Islamabad
2. Shaukat Ali Awan son of Muhammad Khan, Associate Professor,
Federal Government College, H/9, Islamabad

.... Petitioners

Versus

Government of Pakistan through the Secretary, Ministry of Law, Justice and
Parliamentary Affairs, Islamabad

.... Respondent

SHARIAT PETITION NO. 6/I OF 1994 **Linked with**

Dr. Mehmood-ur-Rehman Faisal, Chairman Tehreek-e-Inqilab Islami, Tench
Road, Rawalpindi

.... Petitioner

Versus

1. Government of Pakistan through the Secretary, Ministry of Law, Justice and
Parliamentary Affairs, Islamabad
2. Attorney General of Pakistan
3. Secretary Ministry of Finance Respondents

SHARIAT PETITION NO. 8/I OF 1994 **Linked with**

Javed Iqbal, President, Federal Teachers Association,
Islamabad

..... Petitioner

Versus

Federation of Islamic Republic of Pakistan through Secretary Finance Division,
Islamabad.

Respondent

SHARIAT PETITION NO. 12/I OF 1994 **Linked with**

Ch. Munir Sadiq son of Ch. Muhammad Sadiq resident of Maiken House ZB.349
Pirwadhai, Rawalpindi.

..... Petitioner

Versus

1. The Government of Pakistan through Secretary, Ministry of Law and Justice,
Islamabad

2. Government of Pakistan through Attorney General of Pakistan.
3. Government of Pakistan through Secretary Finance Division Islamabad.

..... Respondents

SHARIAT MISC. NO. 69/I OF 1994

Dr. Iftikhar Ahmed Punjab Medical College, Faisalabad

..... Petitioner

Versus

Secretary Finance Government of Pakistan, Islamabad.

.... Respondent

For the petitioners	...	Mr. Kowkab Iqbal, Advocate
For the Federal Government	...	Mr. Shabbir Mehmood Malik, Standing Counsel-II and Mr. Abdul Ghaffar, S.O. M/o Finance, Islamabad.
For Govt. of the Punjab	...	Ch. Saleem Murtaza Mughal, Assistant Advocate General, Mr. M. Javed Ali, District Accounts Officer, Finance Deptt: Punjab and Mr. Habib-ur-Rehman, S.O. Judicial-II, Home Deptt: Lahore.
For Govt. of Sindh	...	Mr. Muhammad Qasim Mirjat, Additional Advocate General
For Govt. of KPK	...	Mr. Aziz-ur-Rehman, Advocate and Mr. Amanat Ullah, SO, Finance Deptt: KPK
For Govt. of Balochistan	...	Mr. Azam Khan Khattak, Additional Advocate General
As Amicus Curiae	Barrister Feroze Jamal Shah Kakakhel
Dates of Institution of all Shariat Petitions	...	16.10.2004, 21.02.1994, 03.03.1994, 23.12.1994 and 01.06.1994 respectively
Date of hearing	...	19.06.2012
Date of decision	...	12.12.2012

Sh. Petition No.8/I of 2004
Sh. Petition No.6/I of 1994
Sh. Petition No.8/I of 1994
Sh. Petition No.12/I of 1994
Sh. Misc. No. 69/I of 1994

JUDGMENT

DR.FIDA MUHAMMAD KHAN, Judge: The petitioners Professor Kazim Hussain and Shaukat Ali Awan who have jointly filed Shariat Petition No.8/I of 2004, have challenged sub para (xiv) of O.M.No.F.2(3)/03 dated 31.7.2004 issued by Ministry of Housing and Works, Islamabad on the ground that it is repugnant to the Injunctions of Islam. The relevant portion of the impugned O.M. reads as under:-

“xiv) When both husband and wife are employed at the same station, only one of them shall be entitled to allotment of hired accommodation and house rent allowance shall not be paid to both of them and 5% rent charges shall be deducted from the pay of the allottee. In case they are serving at two different stations, one of them shall be allotted accommodation and the other one shall be allowed house rent allowance.”

The petitioners have prayed that the above mentioned para of the said O.M. may be declared repugnant to the Injunctions of Quran and Sunnah of the Holy Prophet (ﺻﻠﻰ ﺍﻟﻠﻪ ﻋﻠﻴﻪ ﻭﺍﻟﻪ ﻭﺳﻠﻢ).

2. We may mention that Dr. Mahmood-ur-Rehman Faisal, Javed Iqbal, Ch. Munir Sadiq and Dr. Iftikhar Ahmed, petitioners have also separately filed identical Shariat Petitions bearing Nos.06/I of 1994, 08/I of 1994, 12/I of 1994 and Shariat Misc. Application No.69/I of 1994, respectively, whereby they have challenged the sub paras (ii) and (iii) of

Sh. Petition No.8/l of 2004
Sh. Petition No.6/l of 1994
Sh. Petition No.8/l of 1994
Sh. Petition No.12/l of 1994
Sh. Misc. No. 69/l of 1994

4

O.M.No.F.5(17)/Gaz-Imp(i)/73 dated 20.11.1974 and O.M.No.F.2(1)-R.5/91

dated 25.8.1991 issued by Ministry of Finance Division. The same read as

under:-

“O.M. dated 20.11.1974

- “(ii) If both husband and wife being Government servants are residing together at the same station in a Government residence allotted to one of them, house rent allowance shall not be admissible to the other even if the station is a specified one.
- (iii) In a case at (ii) above if none of them has been provided with Government residence and both are residing together in a private house at a specified station the house rent allowance shall be admissible to either the husband or wife who elects to receive the allowance.”

O.M dated 25.08.1991

“The undersigned is directed to say that the question of grant of house rent allowance to husband/wife serving in Government and posted at the same station, if accommodation is provided to one of them by Government, has been duly considered. It has been decided that if both the husband and wife are living together in residential accommodation provided by the Government at the same station, no house rent allowance shall be allowed to either of them. If, however, the spouse is living separately from husband/wife, the house rent allowance shall be admissible to one of them who does not reside in Government accommodation”.

Sh. Petition No.8/I of 2004
Sh. Petition No.6/I of 1994
Sh. Petition No.8/I of 1994
Sh. Petition No.12/I of 1994
Sh. Misc. No. 69/I of 1994

5

All these petitioners have prayed that para (ii) of O.M. dated 20.11.1974 and the first portion of O.M. dated 25.08.1991 may be declared as repugnant to the Holy Quran and Sunnah of Holy Prophet (ﷺ). They have also prayed that both husband and wife should be made entitled for house rent allowance.

3. In response to our Orders dated 09.04.1994, 05.12.1995 and 23.04.2007 in the above Shariat Petitions, the following written comments have been received:-

(a) Comments of Federal Government in Shariat Petition No.8/I of 2004. dated nil.

“1. That this petition is not maintainable as the petitioner has not indicated any provision of Holy Quran and Sunnah, against the violation of which it has been filed.

2. That the petitioner is seeking equality between male and female and is before wrong forum. The constitution provide remedy under article 25. (1) All citizens are equal before law and are entitled to equal protection of law.”

“(2) *There shall be no discrimination on the basis of sex alone.*”

“(3) Nothing in this article shall prevent the state from making any special provision for the protection of women and children.”

“On Merits

1. That the House Rent Allowance is a compensatory allowance and is paid in lieu of the government accommodation. Admissibility of house rent allowance to both the husband and wife if none of them is provided with the Government residence enables them to hire a private house as rentals of the housing units in the open market are considerably high.
2. That the husband and wife unless legally separate, are a single family unit and reside together. When official accommodation is provided to one of them, the other is not required to hire/get a house, and hence house rent allowance or independent house for the other is not warranted.
3. Though all the Government employees are entitled to official accommodation but Government provides accommodation to a small portion of the employees due to limited availability of housing units. The rentals levels in the open market being

considerably high, the husband/wives who have been provided government accommodation are in an advantageous position compared to those who have not been provided the housing facility.

In view of the above facts it is submitted that the rule of the Government which bars admissibility of house rent allowance to husband/wife if the other spouse is in occupation of a Government residence, is based on rationale and the same does not conflict with the Islamic injunctions or any provision of the constitution. It is, therefore, prayed that the honourable Federal Shariat Court may kindly be reject the claim of the petitioner as the same is not covered by the rules/policy of the Government.”

(b). Comments of Finance Division, Federal Government in Shariat Petitions No.6/I of 1994, 8/I of 1994 and 12/I of 1994 dated 08.06.1994.

“The petitioner has challenged the provision of rules contained in clause (ii) of the Finance Division’s O.M.No.5(17)-Gaz.Imp(I)/73 dated 20.11.1974 and first part of the O.M. No.2(1)R.5/91 dated 25.8.1991 which bars admissibility of house rent allowance to husband/wife if the other spouse is in occupation of a Government residence. The petitioner has held that the said provision of rules is against the spirit of Quran and

Sunnah. The petitioner has prayed that the rule in question may be declared as cancelled enabling the husband and wife to avail house rent allowance/house even if the other spouse is provided with Government residence.

2. Finance Division is concerned with the element of house rent allowance. Position in this regard is explained below.

3. Under the existing orders/instructions, house rent allowance is admissible to a Government employee not provided with the Government accommodation. In case of husband and wife, when both are serving members and posted at the same station and Government accommodation is not provided to either of them, house rent allowance is admissible to both the spouses. However, if both are living together at the same station in the Government accommodation provided to one of them, house rent allowance is not admissible to the other spouse even if the station is a specified one. The rationale of the said rules is as follows:-

“i) House Rent Allowance is a compensatory Allowance and is paid in lieu of the government accommodation. Admissibility of house rent allowance to both the husband and wife if none of them is provided with the Government residence enables them to hire a private house as rentals of the housing units in the open market are considerably high.

ii) Husband and wife unless legally separated form a single family unit and reside together. When official accommodation

is provided to one of them, the other is not required to hire/get a house, and hence house rent allowance or independent house for the other is not warranted.

iii) Second part of Finance Division's O.M. dated 25.8.1991 a permits house rent allowance to a spouse in case of legal separation and not ordinary separation.

iv) Though all the Government employees are entitled to official accommodation but Government provides accommodation to a small portion of the employees due to limited availability of housing units. The rentals levels in the open market being considerably high, the husband/wives who have been provided government accommodation are in an advantageous position compared to those who have not been provided the housing facility.

4. It is submitted that the rule disputed by the petitioner was reviewed by Finance Division at various occasions but it was not found desirable to amend the rule for the reasons mentioned above. The issue was also raised with the Honourable Wafaqi Mohtasib by a few complainants. However, the Honourable Wafaqi Mohtasib in his findings on two complaints rejected the demand with the following observations:-

“The complaint is for the grant of extra benefit which question relates to terms and conditions of a Government servant. I do not find any mal-administration in the matter on the part of the Agency and dispose of the complaint as not tenable.”

5. In 1989, Federal Service Tribunal Islamabad on similar two appeals of Mrs. Shamim Zafar Vaince and Mrs. Zehra Jafry versus Finance Division also upheld the stand taken by the

Finance Division and rejected the appeals of the two ladies for grant of house rent allowance.

6. As for the demand for allotment of independent houses to both husband and wife or provision of a house to them on the basis of their joint entitlement, it is also not covered by the existing policy of the Ministry of Works. However, that Ministry may be impleaded as party to express their view point.

7. In view of the above facts it is submitted that the rule of the Government which bars admissibility of house rent allowance to husband/wife if the other spouse is in occupation of a Government residence, is based on rationale and the same does not conflict with the Islamic Injunctions or any provision of the constitution. It is, therefore, prayed that the Honourable Federal Shariat Court may kindly reject the claim of the petitioner as the same is not covered by the rules/policy of the Government”.

(c) Comments on behalf of Government of Punjab in Shariat Petitions No.6/I of 1994, 8/I of 1994 and 12/I of 1994 dated 23.04.1997

REPORT

“The Government of the Punjab does not allow House Rent Allowance to both the husband and wife if they are living together in a residential accommodation provided by the Government at the same station of posting. House Rent

Allowance shall be admissible to any one of them who does not reside in the Government accommodation (Annex: 'C')

Parawise Comments:

1. No comments.
2. No comments.
3. That House Rent Allowance is a compensatory allowance and is paid in lieu of government accommodation. Admissibility of House Rent Allowance to both the husband and wife if none of them is provided with the government residence, is a facility which enables them to go for better accommodation.
4. That both husband and wife if not provided with Government accommodation, shall each be allowed House Rent Allowance on the same place of posting.
5. No comments.
6. As in para 4 above.
7. As admitted by the petitioners themselves that House Rent Allowance would be allowed to both husband and wife in case they are not provided government accommodation. They are at liberty to get accommodation of their choice out of the House Rent Allowance admissible to them under the Government policy or live in their own house.

8. As stated in preceding paragraphs government has been trying to accommodate civil servants to the maximum within the available resources and there is no intention to violate any article of Constitution of Islamic Republic of Pakistan.

9. No comments being legal.

In view of the above, it is prayed that the Shariat Petition has no merit because House Rent Allowance is a compensatory allowance in lieu of Government accommodation. If accommodation is not provided, both husband and wife are allowed House Rent Allowance”.

(d) Comments Of KPK Government (N.W.F.P) in Shariat Petition No. 6/I Of 1994 dated 13.09.2007.

- 1- محکمہ مالیات کی طرف سے رائے نہیں دی جاسکتی کیونکہ یہ دفتری یادداشت مرکزی حکومت کا جاری کردہ ہے
- ۲- ہاں
- ۳- ہاں - آفس میمنڈم نمبر 1 F.2(1)R.5/9 مورخہ 1991/8/25 مرکزی حکومت کا جاری کردہ ہے۔ صوبائی حکومت نے اس ضمن میں مراسلہ نمبر FD(SR.II)8-2/78/Vol. IV مورخہ 1978/8/30 جاری کیا ہے۔ جس کے تحت میاں بیوی دونوں کا ایک سٹیشن پر ایک ساتھ سرکاری مکان میں رہنے کی صورت میں دونوں میں سے کسی کو بھی ہاؤس رینٹ نہیں ملے گی۔
- ۴- یہ صحیح نہیں ہے۔ محکمہ مالیات کے نوٹیفیکیشن نمبر -2(SOSR.II(FD)1/78/VOL. IV مورخہ 1978/8/30 کے مطابق جب دونوں میاں بیوی ایک سرکاری مکان میں رہائش پذیر ہوں تو ان میں سے کوئی بھی ہاؤس رینٹ کا حقدار نہیں۔ اس نوٹیفیکیشن میں تاحال کوئی ردوبدل نہیں کیا گیا ہے۔
- ۵- مرکزی حکومت کے مشورے سے صوبائی حکومت کا جاری کردہ مراسلوں نمبر FD/SR.II/8-1/78 مورخہ 1978/8/30 اور نمبر FD/SR.II/8-1/2001 مورخہ 2003/7/5 کے سارے مندرجات ہدایات بنوز برقرار ہیں۔

- ۶۔ میاں بیوی کی ازدواجی زندگی اور بچوں کے مستقبل کیلئے یہ بات لازم ہے کہ اکٹھے ایک ہی گھر میں رہیں۔
- ۷۔ میاں بیوی کا رشتہ اتنا کمزور نہیں ہو سکتا ہے کہ معمولی مالی فائدہ کیلئے علیحدگی پر متشرح ہو۔
- ۸۔ یہ بات مفروضے پر منحصر ہے جس کا کوئی قانونی حیثیت نہیں ہے۔
- ۹۔ کوئی رائے نہیں دی جا سکتی۔

(e) Comments of Finance Department Government of KPK (N.W.F.P) in Shariat Petition No.8/I of 1994 dated 03.01.2008

- “1. The para contains extracts from Federal Government letters dated 18/8/1973, 8/9/1972 and 20/11/1974 and Federal Government is in better position to confirm the same.
2. The said memorandum are in consonance with the spirit of Islam. Family is the most important social nucleus of Islamic society. Islam does not envisage separate residence for two inseparable components of this basic social nucleus.

Grounds.

- a) Entitlement to separate property does not entail separate accommodation for spouses. Separate accommodations for husband and wife is against the concept of unity of family life.
- b) Right payment of Zakat and Ushr by husband and wife does not imply subject to separate accommodations. Right to separate accommodation by husband and wife goes against the proper brought up and training of children which is the prime joint responsibility of family. Separate House Rent Allowance for husband and wife at the same working station may envisage separate living which may encourage physical separation and

consequently may become a cause of permanent separation.

- c) Common accommodation at the same working station is not only in interest of public but also in the interest of husband, wife and their children.”
- (f) Comments of Finance Department Government of KPK (NWFP) in Shariat Petition No.12/I of 1994 dated 08.01.2008

- “1. The para contained extracts from Federal Government letter dated 20.11.1974 and 25/8/1991 and this Department is of the view that it is in consonance with injunction of Islam.
2. The said memorandum are in consonance with spirit of Islam. Family is the most important social nucleus of Islamic society. Islam does not envisage separate residence for two inseparable components of this nucleus.
3. Government of NWFP (KPK) has issued policy instructions through letters strictly in line with Federal Government policy referred in the para.
4. Correct, the said Office Memorandum is operational and effective and Government of NWFP (KPK) holds that the same does not require amendment.
5. As per Rules of Business Finance Division’s issues all such instructions with the approval of Competent Authority and it cannot be termed as violation of Presidential scheme referred to above.
6. It is correct to the extent that if a Muslim civil servant marries more than one woman, amendment in the said

policy is required to be made to the extent that his 2nd, 3rd & 4th wife should be entitled to separate Government accommodation if she/they are in Government service.

7. Entitlement of single/same accommodation to husband/wife does not fall in the definition of "TATFEF" as Islam does not envisage segregation of husband & wife. It is rather obligatory for them to live together for proper brought a up of children and for discharge of mutual conjugal obligation.
8. The challenged part is strictly in consonance with the basic concept of unity of family.
9. Article 35 of Constitution does not envisage separate residence for spouses of a family.
10. Same as in para 8 above.

Pray has no solid grounds.

(g) Comments on behalf of Sindh Government in Shariat Petitions No.6/I of 1994, 8/I of 1994 and 12/I of 1994 dated 12.11.2007

- "1. That the petitioner has challenged the provision of rules contained in clause (ii) of the Finance Division's O.M. No.5(170-Gaz.Imp(I)/73 dated 20.11.1974 and first part of the O.M.No.2(1)R.5/91 dated 25.08.1991, which bars admissibility of house rent allowance to husband/wife if the other spouse is in occupation of a Government Residence. The petitioner has held that the said provision of rules is against the spirit of Quran and Sunnah. The petitioner has prayed that the rule in question may be

declared as cancelled enabling the husband/wife to avail house rent allowance/house even if the other spouse is provided with Government residence.

2. That the Finance Division is concerned with the element of house rent allowance. Position in this regard is explained below.

3. That under the existing orders/instructions house rent allowance is admissible to a Government employee not provided with the government accommodation. In case of husband and wife, when both are serving members and posted at the same station and Government accommodation is not provided to either of them, house rent allowance is admissible to both the spouses. However, if both are living together at the same station in the Government accommodation provided to one of them, house rent allowance is not admissible to the other spouse even if the station is a specified one. The rationale of the said rules is as follows:-

“i) House Rent Allowance is a compensatory Allowance and is paid in lieu of the government accommodation. Admissibility of house rent allowance to both the husband and wife if none of them is provided with the Government residence, enables them to hire a private house as rentals of the housing units in the open market are considerably high.

- ii) Husband and wife unless legally separated form a single family unit and reside together. When official accommodation is provided to one of them, the other is not required to hire/get a house, and hence house rent allowance or independent house for the other is not warranted.
 - iii) Second part of Finance Division's O.M. date 25.08.1991 permits house rent allowance to a spouse in case of legal separation and not ordinary separation.
 - iv) Though all the Government employees are entitled to official accommodation but Government provides accommodation to a small portion of the employees due to limited availability of housing units. The rentals levels in the open market being considerable high, the husbands/wives who have been provided government accommodation are in an advantageous position compared to those who have not been provided the housing facility.
4. That it is submitted that the rule disputed by the petitioner was reviewed by Finance Division at various occasions but it was not found desirable to amend the rule for the reasons mentioned above. The issue was also raised with the Honourable Wafaqi Mohtasib by a few complainants. However, the Honourable Wafaqi Mohtasib in his findings on two complaints rejected the demand with the following observations:

“The complaint is for the grant of extra benefit which question relates to terms and conditions of a Government Servant. I do not find any mal-administration in the matter on the part of the

Agency and dispose of the complaint as not tenable.”

5. That in 1989, Federal Service Tribunal Islamabad on similar two appeals of Mrs. Shamim Zafar Vaince and Mrs. Zehra Jafry versus Finance Division, also upheld the stand taken by the Finance Division and rejected the appeals of the two ladies for grant of house rent allowance.
6. That as for the demand for allotment of independent houses to both husband and wife or provision of a house to them on the basis of their joint entitlement it is also not covered by the existing polity of the Ministry of Works. However, that Ministry may be impleaded as party to express their view point.

In view of the above facts, it is submitted that the rule of the Government which bars admissibility of house rent allowance to husband/wife if the other spouse is in occupation of a government residence, is based on rationale and the same does not conflict with the Islamic injunctions or any provision of the constitution .

It is, therefore, prayed that the Honourable Federal Shariat Court may kindly reject the claim of the petitioner as the same is not covered by the rules/policy of the Government.”

(h) Comments of Finance Division Government of Pakistan (Again Submitted) in All the Shariat Petitions on 15.10.2008.

“Preliminary Objections:

The appeals are not maintainable for the following reasons:-

- (i) This appeal is time barred by limitation.
- (ii) The appeal of the appellant is in sheer violation of the Federal Government’s instructions/rules/orders.
- (iii) The appellant was a civil servant of the Federal Government and was subject to rules making authority of Federal Government (Finance Division) under Civil Servants Act. Of 1973.

Comments on Appeals:

The Government employees are entitled to House Rent Allowance @ 45% of the minimum stage of the relevant Pay Scales at 14 big cities and @ 30% of the minimum stage of the relevant Pay Scales in small cities. However, in case of married Government servants posted at the same station and living together in a Government accommodation provided to either of the two i.e. husband/wife, no House Rent Allowance is admissible to either of them. However, in case the spouse is living separately from husband/wife, the House Rent Allowance is admissible to one of them who does not reside in Government accommodation. A copy of Finance Division’s O.M. No.F.2(1)-R.5/91 dated 25.08.1991 bearing these instructions is annexed.

It may be submitted that House Rent Allowance is a concession given to Government servants to enable them to hire an accommodation. In case neither of them is provided with a Government accommodation, there is justification for permitting them House Rent Allowance so that they may pool their respective House Rent Allowances to have a house. But in case of a situation where a Government house is provided to one of the spouses, there is no justification or logic to allow the other to draw House Rent Allowance. It may be added that grant of House Rent Allowance is in substitution of and not in supplementation of provision of accommodation.

Prayers

The allegations leveled against the Government of Pakistan in this appeal are baseless, unfounded and subjective. The claim of the appellant in the appeal is not valid and logical. Keeping in view the above submissions, it is prayed that the appeals of the petitioners may kindly be dismissed.”

- (i) The Government of Balochistan adopted arguments and comments submitted by the Federal Government.
- (j). In response to our order dated 19.06.2012, fresh/additional comments on behalf of Federal

Government and Govt. of Punjab have been received which read as under:-

Comments of Federal Government

House Rent Allowance

House rent is allowed to all Government employees at the rate of 45 % of minimum basic pay scale 2008 in declared big cities and 30% of minimum basic pay scale 2008 in all other cities/stations (Annex-A). List of big cities is attached (Annex-B).

Reasons of difference between big cities and other cities regarding House Rent Allowance and Hiring facility. In big cities cost of living is higher and due to shortage of houses as compared to demand, rent of houses are higher than other cities.

Hiring Facility

Hiring Facility is allowed to Government Servants working in six big cities as per Ministry of Housing and Works O.M. No.F.2(3)/2003-Policy dated 31st July, 2004. These big cities are capitals of the four provinces and the twin cities of Islamabad/Rawalpindi being capital of the country (Annex-C). As per the Rules of Business, 1973 the subject matter relates to Ministry of Housing and Works (Annex-D).

Conveyance Allowance

- i. Under the revision of pay scales/Allowance and Pension of Civil employees of Federal Government (2005) vide O.M. No.F.1(1)Imp/2005 dated 1st July 2005, same Conveyance Allowance at the same rate was allowed to all employees in big cities (Annex-E).

- ii. This Allowance is allowed to all government servants irrespective of Gender and marital status at all stations/cities, excluding those who are allowed monetized value of Transport facility, w.e.f. 1st July, 2011 (Annex-A).
- iii. Conveyance Allowance is not allowed during leave period of an employee vide Finance Division U.O. No.454-Imp/77 dated 09.07.1977 (Annex-F).

Comments of Govt. of Punjab

- “* House Rent Allowance is not admissible to both the husband and wife being government servants where either of the husband/wife has been provided with government accommodation.
- * There is no bar on admissibility of Conveyance Allowance to married government servants where his/her spouse has been provided with government conveyance.
- * In case of an official who is working in Punjab, but is not the employee of the Government of the Punjab, i.e. an official on deputation is also not eligible for the grant of House Rent Allowance as per Notification No.FD.SR.I.9-8/80 dated 9.10.1991.

It is further observed that:

- * Government policies, rules & regulations including the house rent policy are non-discriminatory in nature and do not carry any gender bias as these are equally applicable to all civil servants.
- * Official residential accommodation is in fact a subsidy provided to a civil servant and his/her spouse by the Government. Moreover, House Rent Allowance is a compensatory allowance, which is allowed in lieu of Government accommodation. If either of the husband and wife is provided a government accommodation and they are residing together, then both are compensated and

there is no question of allowing compensatory allowance in the shape of House Rent Allowance to either of them as per considered policy of the Government realizing both live in an official residence.

- * Furthermore, the notification regarding non-admissibility of House Rent Allowance to both the husband and wife in case of allotment of government accommodation to either of them, in case both are living together, was adopted by the Punjab Government following the instructions of Federal Government.”

8. The KPK Government has filed the following remarks on 25.09.2012, while adopting again the above comments mentioned at paras

(d,e & f):-

- “i. That the Government of Khyber Pakhtunkhwa has already filed para-wise comments before the Hon’ble Federal Shariat Court, Islamabad in Shariat Petition No. 6/I of 1994, 8/I of 1994 and No. 12/I of 1994 wherein it has been categorically clarified that all the Notifications/orders of this Provincial Government in respect of grant of House Rent Allowance/Conveyance Allowance and deductions thereto from the spouses, serving the Provincial Government of Khyber Pakhtunkhwa at one and the same station of duty were issued strictly in line with Federal Government Policy on the issues in question. (Copies enclosed Annexure-I,II & III).
- ii. That all such Notifications/Orders issued by Federal Government as well as this Provincial Government still

hold good and do not require any amendment as the same are in consonance with Injunctions of Islam, hence can not be termed repugnant to the Quraan and Sunnah for the simple reason that all Government employees who joint civil service are legally bound to abide by the rules/regulations issued by the Federal/Provincial Government from time to time with regard to Terms & Conditions of Civil Servants.

- iii. Copies of all relevant Notifications/orders of Federal/This Provincial Government which are still intact are again sent herewith vide Annexure IV, V & VI.

In view of the above it is humbly prayed that there is no role of this Province in issuance of the relevant letters/policies of the Federal Government. Hence the comments already filed by this Province (Annexure-I,II,III) may please be considered as Ist and last.”

9. We have heard learned counsel for the parties and have also perused the record containing the comments submitted by the Federal Government and Provincial Governments of Balochistan, KPK, Punjab and Sindh.

10. Learned counsel for the petitioner Professor Kazim Hussain vehemently contended that the entitlement of house rent is not a bounty but it is a substantive right of the Government employees. He submitted that:

* No one can be deprived of his basic right;

- * The married Government employees though husband and wife are two separate individuals, having their own personal rights;
- * The position emerging from the impugned memo is that double rent of one and the same house allotted by the Government is deducted and this is a grave injustice.
- * Since both the husband and wife are entitled to separate conveyance allowance, they should also entitled to the house rent as well.

11. Learned counsel on behalf of the Federation supporting the impugned memo submitted that both husband and wife live in the same house provided by the Government and as such should not be entitled to the house rent. He added that the memo is applicable in only six specified cities while the cities other than those are not subject to this memo.

12. Learned Assistant Advocate General Punjab submitted that he has submitted comments which are self explanatory and comprehensive.

13. Learned counsel on behalf of Government of Balochistan also submitted that the husband and wife living together in the same house could not be entitled to a separate house rent.

14. Learned counsel appearing on behalf of Khyber Pakhtoon

Khwa and Sindh shared the same view. The comments submitted by them are already reproduced hereinabove.

15. We have given our anxious consideration to the points raised by the learned counsel for the parties and have gone through the impugned memo.

16. Before dealing with the question raised by the petitioners, it is pertinent to point out that one of the functions of this Court, as specifically referred to in Article 203D(1), is to examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam as laid down in the Holy Quraan and the Sunnah of the Holy Prophet

(صلى الله عليه وآله وسلم). In this connection it is obvious that the jurisdiction of this Court while dealing with the examination and subsequent decision about repugnancy or otherwise of any law or provision of law is different from the one exercised by Wafaqi Mohtasib or Federal Service Tribunal, whose decisions have been relied upon by the counsel representing the State. The

jurisdiction conferred on this Court by the Constitution is confined only to the Injunctions of Islam as contained in the Holy Quraan and Sunnah of the Holy Prophet (ﺻﻠﻰ ﺍﻟﻠﻪ ﻋﻠﻴﻪ ﻭﺍﻟﻪ ﻭﺳﻠﻢ) and no other consideration or extraneous circumstance could have any bearing on its judgments in Shariat Petitions. Therefore any reference to the decisions of Wafaqi Mohtasib or Federal Service Tribunal would not be relevant.

17. Keeping in view the above constitutional position, now we would like to refer to some Quranic Verses which clearly show that one of the principles which is the hallmark of Islamic injunctions is the principle of equality before law and equal protection of law for all people, irrespective of their gender, colour or creed. The guidelines provided by the Holy Quraan and Sunnah of the Holy Prophet (ﺻﻠﻰ ﺍﻟﻠﻪ ﻋﻠﻴﻪ ﻭﺍﻟﻪ ﻭﺳﻠﻢ) are replete with such Injunctions.

18. To quote, one verse mentioned in the Holy Quran is as follows:

“O mankind! We have created you from a male and a female”
(4:1).

This clearly means that all human beings have only one common origin.

They are descendents of one and the same grand parents and the differences in colour, race, tribe etc., which are only incidental, are designed by Almighty Allah just for mutual introduction and recognition. The only criteria laid down for determination of their interse superiority will be on the basis of their piety, nobility and quality of deeds. (49:13). That's why, Islam has emphasized again and again that people must remain careful of their duty to their Lord who created them from a single soul. He created its mate therefrom and from both of them spread abroad multitude men and women throughout the whole world (4:1).

19. There are several traditions of the Holy Prophet (صلى الله عليه وآله وسلم) in support of this proposition. The Holy Prophet (صلى الله عليه وآله وسلم) on one occasion said:

الناس سواسية كاسنان المشط

“People are like the teeth of a comb”

(Address at the last Hajj i.e. Hijjatulwida)

This simile is very apt since it exemplifies complete unity and equality between the people. Continuing his address on the occasion of *Hijjat-ul-Widaa*, the Holy Prophet (صلى الله عليه وآله وسلم) further added:

لافضل لعربي علي أعجمي ولا لأحمر علي أسود إلا بالتقوي -
(مسند احمد، جلد5، صفحه 411)

“No Arab has any superiority or excellence over a non-Arab and no red-coloured man has any superiority or excellence over any black coloured man, save in respect of piety and fear of Allah.”

In Sahih Muslim this Hadees is reported in the following words:-

ألافضل لعربي علي أعجمي ولا لأحمر علي أسود ولا لأسود إلا بالتقوي - (مسند احمد، جلد5، صفحه 411)

“No Arab has any superiority over a non-Arab, nor any non-Arab over an Arab nor any white man over a black man, nor a black man over a white man, save in respect of piety and fear of Allah.”

This fraternity and equality is all pervading and is not only a matter of form but is indeed a matter of substance. It emphasises equality before law and equal protection of law. In this respect, Sharia does not make any distinction between the citizens of an Islamic State. Here we find no concept of discrimination in the administration of justice between one person and another on any basis. In social and legal perspectives, no human being can be denied or deprived of any fundamental right, nor any juridical right can

be reserved for any particular group on the external consideration of his wealth, status caste or colour or any other ground. It clearly shows that equality before law and equal protection of law is the cardinal principle which runs like a golden chord in all Injunctions of Islam.

20. While dealing with the public at large, therefore, the Holy Quraan has laid great emphasis on fair transparent administration of full justice, as is evident from the following Verses of the Holy Quran:-

وَأْمُرْتُ لِأَعْدِلَ بَيْنَكُمُ

* And I have been ordered to do justice among you.(42:15)

إِنَّ اللَّهَ يَأْمُرُ بِالْعَدْلِ وَالْإِحْسَانِ

* God commands justice, and gracious dealings (to all people).
(16:90)

وَأَوْفُوا الْكَيْلَ وَالْمِيزَانَ بِالْقِسْطِ-

* Give measure and weigh with full justice. (6:152)

فَأَوْفُوا الْكَيْلَ وَالْمِيزَانَ وَلَا تَبْخَسُوا النَّاسَ
أَشْيَاءَهُمْ

* Give just measure and weight. Do not withhold from the people the things that are their due.(7:85)

وَأَوْفُوا الْكَيْلَ إِذَا كِلْتُمْ وَزِنُوا بِالْقِسْطِاسِ الْمُسْتَقِيمِ
ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا-

* Give full measure when you measure and weigh with a balance that is straight. That is most fitting and most advantageous in the final determination. (17:35)

وَزِنُوا بِالْقِسْطِ الْمُسْتَقِيمِ - أَوْفُوا الْكَيْلَ وَلَا تَكُونُوا مِنَ
الْمُخْسِرِينَ -

- * Give just measure and cause no loss to others by fraud. Weigh with scales true and upright. And withhold not things justly due to men. (26:181-182)

وَأَقِيمُوا الْوَزْنَ بِالْقِسْطِ وَلَا تُخْسِرُوا الْمِيزَانَ -

- * Establish weight with justice and fall not short in the balance. (55:9)

لَقَدْ أَرْسَلْنَا رُسُلَنَا بِالْبَيِّنَاتِ وَأَنْزَلْنَا مَعَهُمُ الْكِتَابَ
وَالْمِيزَانَ لِيَقُومَ النَّاسُ
بِالْقِسْطِ

- * We sent aforetime our apostles with Clear Signs and sent down with them The Book and the Balance (Of Right and Wrong), that men shall stand firm in justice.(57:25)

فَلِذَلِكَ فَادَعُ وَاسْتَقِيمْ كَمَا أُمِرْتَ وَلَا تَتَّبِعْ
أَهْوَاءَهُمْ وَقُلْ أَمِنْتُ بِمَا أَنْزَلَ اللَّهُ مِنْ كِتَابٍ وَأُمِرْتُ
لِأَعْدِلَ بَيْنَكُمْ اللَّهُ رَبُّنَا وَرَبُّكُمْ لَنَا أَعْمَالُنَا وَلَكُمْ
أَعْمَالُكُمْ لَا حُجَّةَ بَيْنَنَا وَبَيْنَكُمْ اللَّهُ يَجْمَعُ بَيْنَنَا
وَالِيهِ الْمَصِيرُ -

- * Call (them to the faith) and stand steadfast as you are commanded, nor follow their vain desires but say: "I believe in the Book which Allah has sent down; and I am commanded to judge justly between you. Allah is our Lord and your Lord. For us (Is the responsibility for) Our deeds, and for you, for your deeds. There is no contention between us and you. Allah will bring us together, and to Him is (Our) final goal. (42: 15)

يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوْمِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ
وَلَوْ عَلَىٰ أَنْفُسِكُمْ أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ إِنْ يَكُنْ
غَنِيًّا أَوْ فَقِيرًا فَاللَّهُ أَوْلَىٰ بِهِمَا ۖ فَلَا تَتَّبِعُوا
الْهَوَىٰ أَنْ تَعْدِلُوا وَإِنْ تَلَوْا أَوْ تُعْرَضُوا فَإِنَّ اللَّهَ
كَانَ بِمَا تَعْمَلُونَ خَبِيرًا -

* O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor for Allah can best protect both. Follow not the lusts (Of your hearts), lest ye swerve, and if you distort (justice), or decline to do justice, verily Allah is well-acquainted with all that you do. (4:135)

يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوِّمِينَ لِلَّهِ شُهَدَاءَ بِالْقِسْطِ وَلَا يَجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلَىٰ أَلَّا تَعْدِلُوا ۖ إِعْدِلُوا ۖ هُوَ أَقْرَبُ لِلتَّقْوَىٰ وَاتَّقُوا اللَّهَ ۖ إِنَّ اللَّهَ خَبِيرٌ بِمَا تَعْمَلُونَ-

* O ye who believe! Stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others make you swerve to wrong and depart from justice. Be just' that; is next to piety: and fear Allah, for Allah is well-acquainted with all that you do.(5:8)

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا ۚ وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَعْدِلُوا بِالْعَدْلِ ۚ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ ۗ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا -

* Allah certainly command you to render back your trust to those to whom they are due; and when you judge between man and man, that you judge with justice; verily how excellent is the teaching which He giveth you! for Allah is He Who hears And sees all things.(58:4).

These Verses ordain that the rulers must enjoin what is right and forbid what is wrong and, while deciding matters between people, remain absolutely just and fair. Even the Holy Prophet (صلى الله عليه وآله وسلم) was asked to judge

between people with complete justice. These verses command all the believers to stand out firmly for justice. The administration and dispensation of justice according to these Verses is mandatory and absolute in terms and not tagged with any other consideration. More over these Verses reiterate again and again that justice is to be done for the sake of Allah. These verses explicitly show that giving just measure and weight is a mandatory duty incumbent upon all. Withholding from the people any thing which is their due right is strictly prohibited and the order is to be followed in letter and spirit otherwise, in case of its violation, it may lead to corruption in the land. This implies that justice is to be imparted in full and any dispute regarding the rights of the people is to be settled amicably and graciously.

21. Now coming to the issue under consideration the following

Verses of the Holy Quraan are worth serious consideration:-

a) - لِّلرِّجَالِ مِمَّا كَتَسَبُوا ۖ وَلِلنِّسَاءِ مِمَّا كَتَسَبْنَ

“The men are entitled to what they earn and the women to what they earn” (4:32).

b) - لَهَا مَا كَسَبَتْ وَلكُمْ مَا كَسَبْتُمْ وَلَا تُسْأَلُونَ عَمَّا كَانُوا يَعْمَلُونَ

“For them is what they earned, and for you is what you earned.
(2:143).

c) - وَأَنَّ اللَّهَ لَا يُضِيعُ أَجْرَ الْمُؤْمِنِينَ-

“Allah would not let the reward of the believers be lost”.(3:171).

d) - إِنَّا لَا نُضِيعُ أَجْرَ مَنْ أَحْسَنَ عَمَلًا-

“Of course, we do not waste the reward of those who are good in deeds.(18:30).

e) - وَوَفَّيْتُ كُلَّ نَفْسٍ مَّا عَمِلَتْ -

“And every one will be paid in full for what he did”.(39:70)

These Verses clearly confirm the right of earning, owning and possessing by male and female - all in the like manner – and emphasis again and again that no one can be deprived of his/her due share for any reason. Both are equally entitled to their own individual shares on the basis of their services, duties and functions performed by each one. Each one is at par with the other in this respect, without any discrimination. The rights of each one accrued thus in no manner could be infringed, curtailed or diminished.

22. In order to determine the question under dispute the following facts would be relevant for proper consideration. If both the spouses are civil servants:

- a) they perform their official duties separately and independently of each other;
- b) they are entitled to medical allowance, conveyance allowance and other service benefits without any discrimination;
- c) in case their sons/daughters who are also civil servants – whether dependent or independent – and reside with them in the same hired/government accommodation they are duly entitled in accordance to the NPS they hold, to all perks/privileges/benefits (including the house rent); and there is no bar that deprives them of this right.
- d) due to shortage of Government accommodation, most of the civil servants do not get appropriate accommodation, commensurate to their entitlement, and they have no option but to accept, on account of forced circumstances, any accommodation, however below their entitlement or which is only according to the entitlement of the one who is in lower scale (i.e. smaller accommodation).
- e) after getting married the civil servants, like all other people, have increased liabilities and responsibilities which keep on increasing multifold with passage of time, and there seems no reason that just on account of getting married, why should any one of them suffer financial loss or be subjected to a major change in their terms and conditions of service, of which they are not at all made aware at a time when they join the service;

- f) it is also worth consideration that the position emerging from the impugned OMs shows that house rent of one and the same house, allotted by the Government to one of the spouses, is deducted from both the spouses and, more over, additional 5% as rent charge is also deducted from the allottee. Obviously, the deduction of double house rent for one and the same house appears to be a grave injustice.

23. We have minutely examined the provisions contained in the impugned OMs/rules, reproduced herein above, and we are of the considered view that these are not in consonance with the injunctions of Islam as contained in the Holy Quran and Sunnah of the Holy Prophet (صلى الله عليه وآله وسلم). These are also in violation of the provisions contained in Article 25 of the Constitution. We must not lose sight of the fact that OMs/Rules formulated under any Act could never be intended to over rule the specific provisions contained in the Constitution or the injunctions of Islam referred to above. It is also a well-entrenched legal proposition that the rules made in pursuance of a delegated authority must be consistent with the Statute under which they came to be made. The authority is delegated only to the end that the provisions of the Statute may be better carried into effect, and not with the view of neutralizing or contradicting those provisions. The purpose of

framing the OMs/Rules is just to facilitate and provide for procedural matters which are subsidiary to the provisions of the Act itself. By now it is a well recognized principle of the interpretation of Statutes that if the rules framed under the statutes, or bye-laws framed under the rules, are in excess of the provisions of the Statute or are in contravention of or inconsistent with such provisions, then these provisions rules etc. must be regarded as ultra vires of the statute and cannot be given effect to.

24. We may also mention that all civil servants have equal rights and there must be no discrimination between any one of them serving in the same scale. The terms and conditions should be one and the same according to the seniority, status and grade they hold. Each one of them is entitled to what he or she earns. We agree that it is not possible to provide Government accommodation to all civil servants, however, each one in his own individual capacity has a right to get house rent according to his entitlement as defined in the terms and conditions of service. Marriage is not a disqualification nor an offence and, therefore, we see no reason why a civil

Sh. Petition No.8/I of 2004
Sh. Petition No.6/I of 1994
Sh. Petition No.8/I of 1994
Sh. Petition No.12/I of 1994
Sh. Misc. No. 69/I of 1994

38

servant after getting married should be penalized or deprived, of his/her due house rent. Both spouses are entitled to get conveyance allowance even if they are working at the same station and the same place. The same logic applies to the house rent as well. We may also mention that there is no bar in these OMs/Rules for the sons/daughters of both or any of the spouses, who are civil servants and reside with their parents in the same house as they are equally entitled to house rent in their own individual capacity. Moreover we see no reason why, in case Government accommodation is allotted to the married couple, both should lose 100% house rent and the allottee husband or wife, in addition to that, should also pay an additional 5% of his/her pay for the same accommodation while their other colleagues who are residing in the same type of accommodation pay only 5% of her/his pay, if the other spouse is not a civil servant. This means that the marriage inflicts severe blow to their financial position to which they are otherwise entitled. As observed above, at times, none of them get proper accommodation according to his or her entitlement and in that case too it would be great miscarriage of

justice to subject them to deprivation of the house rent to which he or she is duly entitled if not married, and especially so if one of them who is not the allottee is in a higher grade than the other life partner. Terms/conditions are usually not well known to the employees at the initial stage when they join the civil service and afterwards, at some stage, get married to each other. Both the spouses, therefore, being separate entities must remain entitled to the house rent as they are already considered individually entitled to conveyance allowance and medical allowance as well. It is also worth consideration that they pay income tax etc. individually and independently and get no extra convenience, concession or latitude on account of their marital status. Moreover, it may also be worth consideration that in case of non entitlement to their due house rent, the present system may encourage the married civil servants to resort to fake certificates or make false statement about their marital status. Since they perform their functions independently of each other, plain and simple logic also demands that they shall be entitled to the benefits of service in their individual capacity

because, as stated above, they get no extra financial concession or latitude on account of their marital status. The following Hadith rather suggest that instead of depriving one of the spouses of his or her due right, the married couple be entitled to double concession as compared to that of a single one.

601- عوف بن مالک کہتے ہیں کہ رسول اللہ صلی اللہ علیہ وسلم کے پاس جب فئے (کامال) آتا تو آپ اسے اسی دن تقسیم فرما دیتے تھے۔ آپ شادی شدہ کو دو حصے اور کنوارے کو ایک حصہ دیتے تھے۔

602- سفیان بن وبب خولانی کہتے ہیں کہ حضرت عمر نے (ایک دفعہ فئے) لوگوں میں تقسیم کی، تو ہر تنہا فرد کو آدھا دینار ملا۔ اور جو اپنی بیوی کے ساتھ تھا اسے ایک دینار دیا۔ (کتاب الاموال، ابو عبید القاسم بن سلام، اردو ترجمہ صفحہ 362)

25. In view of the reasons stated above, we have come to the conclusion that the impugned OMs/Rules to the extent of depriving one of the spouses - who are civil servants and one of whom is allotted Government accommodation - of the house rent allowance are repugnant to the Injunctions of Islam and, therefore, in view of Article 203D(3) of the Constitution, the Federal Government as well as the Provincial Governments of Punjab, Sindh, Balochistan and KPK and the relevant autonomous bodies and Institutions including the Universities are directed to take necessary

Sh. Petition No.8/I of 2004
Sh. Petition No.6/I of 1994
Sh. Petition No.8/I of 1994
Sh. Petition No.12/I of 1994
Sh. Misc. No. 69/I of 1994

41

steps to amend impugned OMs/Rules so as to bring the same in conformity with the Injunctions of Islam. The necessary action shall be taken for this purpose by 30th June, 2013 where-after the said OMs/Rules will become void and shall be of no effect to the extent stated above.

26. The prayers of the petitioners for relief in personem, however, cannot be granted as it is beyond the scope of jurisdiction conferred upon this Court by the Constitution under the provisions of Article 203D. They may seek relief at the appropriate forum, if advised to do so.

27. These Shariat Petitions are allowed in the terms specified above.

JUSTICE DR.FIDA MUHAMMAD KHAN

JUSTICE RIZWAN ALI DODANI

JUSTICE SHEIKH AHMED FAROOQ

Announced in open Court
at Islamabad on 12.12.2012
Umar Darz/Mujeeb/*