

A CRITICAL ANALYSIS OF THE CODE OF CIVIL PROCEDURE, 1908 IN THE LIGHT OF ISLAMIC JURISPRUDENCE

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ABSTRACT

This article aims to explore those provisions of CPC, 1908 that are un-Islamic. There are certain provisions in CPC that are related to Riba (Interest) and Riba is prohibited under Shariah. As Pakistan is an Islamic State and constitution of Pakistan, 1973 prohibits the making of laws that are inconsistent with Islam. It is necessary to point out those provisions that are inconsistent with shariah and constitution of Pakistan.

We will see in this article that, whether there are any un-Islamic provisions in CPC, 1908, and whether they fall within the domain of Riba that is prohibited under Shariah. We will also see if there are any judgements of Federal Shariah Court in this regard.

Riba is prohibited/haram under Islamic law. There are numerous provisions in CPC, 1908 that empowers the court and some provisions bounds the courts to grant interest in certain civil suits. As we know that it is totally against the injunctions of Islam. Article 227 of constitution of Pakistan, 1973 also made it necessary to bring all existing laws in conformity with Islam. Article 203-D of 1973 constitution made it clear that the laws/provisions which are decided against Islam by federal shariah court shall be void to that extent as are decided un-Islamic.

Understanding Riba

Definition of Riba

"Riba is an increase in principal amount due to stipulation in loan agreement."

This definition obviously covers riba al-Nasai'ah or riba al-jahiliyyah.

Muhammad A'la Thanwi has defined Riba as

"Riba is an increase without any corresponding consideration which has been stipulated in favour of one of the two parties in a contract of exchange."

Riba in Quran

The first revelation on Riba in Quran is

وما آتيتم من ربا ليربوا في اموال الناس فلا يربوا عند الله وما آتيتم من زكوة تريدون وجه الله فاولئك هم المضعفون.

"Whatever loans you give, seeking interest at the expense of people's wealth will not increase with Allah. But whatever charity you give, seeking the pleasure of Allah, it is they whose reward will be multiplied".

The second revelation is

واخذهم الربوا وقد نهوا عنه واكلمهم اموال الناس بالباطل واعتدنا للكافرين منهم عذابا اليما.

"That they took usury though they were forbidden and that they devoured man's substance wrongfully, we have prepared for those among them who reject faith a grievous punishment."

The third revelation is

يا ايها الذين امنوا لا تاكلوا الربوا اضعافا مضاعفة واتقوا الله لعلكم تفلحون.

O Believers! Take not doubled and redoubled interest and fear God so that you may prosper."

The fourth revelation is

الذين ياكلون الربوا لا يقومون الا كما يقوم الذى يتخبطه الشيطان من المس ذلك بانهم قالوا انما البيع مثل الربوا واحل الله البيع وحرم الربوا فمن جاءه موعظة من ربه فانتهى فله ما سلف وامره الى الله ومن عاد فاولئك اصحب النار هم فيها خالدون. يمحى الله الربوا ويربى الصدقات والله لا يحب كل كفار اثيم. ان الذين امنوا وعملوا الصلحت واقاموا الصلوة واتوا الزكوة لهم اجرهم عند ربهم ولا خوف عليهم ولا هم يحزنون.

Those who consume interest will stand 'on Judgment Day' like those driven to madness by Satan's touch. That is because they say, "Trade is no different than interest." But Allah has permitted trading and forbidden interest. Whoever refrains—after having received warning from their Lord—may keep their previous gains, and their case is left to Allah. As for those who

The fifth revelation is

ياايها الذين امنوا اتقوا الله وذروا ما بقى من الربوا ان كنتم مؤمنين. فان لم تفعلوا فاذنوا بحرب من الله ورسوله وان تبتم فلكم رءوس اموالكم لا تظلمون ولا تظلمون. وان كان ذو عسرة فنظرة الى ميسرة وان تصدقوا خير لكم ان كنتم تعلمون.

O believers! Fear Allah, and give up outstanding interest if you are 'true' believers. If you do not, then beware of a war with Allah and His Messenger! But if you repent, you may retain your principal—neither inflicting nor suffering harm. If it is difficult for someone to repay a debt, postpone it until a time of ease. And if you waive it as an act of charity, it will be better for you, if only you knew.

So, it is understood from the abovementioned verses of Quran that Usury creates hatred, hardships, disharmony, unjust and unfair. Whereas charity creates brotherhood, harmony and cooperation in society. The excess demanded/taken on capital amount of loan is Riba and is prohibited. For a legitimate surplus one must bear all the risks by way of legitimate trade and investments. The creditors only have the rights to their capital sum. Writing off a debt altogether is an act of charity.

Riba in Sunnah/Traditions

From Abu Sa'id al-khudri, who said: the messenger of Allah said: "do not sell gold for gold except when it is like for like; nor misappropriate one through the other; nor sell silver for silver except like for like; nor misappropriate one through the other, nor sell things that are absent for those that are present."

From 'Ubadah Ibn Samit who said; "The Messenger of ALLAH (s.a.w.s) said: Gold for gold, Silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, like for like, in equal weights, from hand to hand. If those species differ then sell as you like as long it is from hand to hand".

persist, it is they who will be the residents of the Fire. They will be there forever. Allah has made interest fruitless and charity fruitful. And Allah does not like any ungrateful evildoer. Indeed, those who believe, do good, establish prayer, and pay alms-tax will receive their reward from their Lord, and there will be no fear for them, nor will they grieve.

Kinds of Riba

There are broadly two types of Riba

Riba al-duyun

It is a type of Riba in which one party lends money to other party and the other party (borrower) has to pay back to lender the principal amount along with interest. We may also call it interest based lending or debt transactions.

Riba al-buyu

It is a type of Riba in which two parties exchange same nature/specie of commodities. But one party receive more quantity than other party. For example, 1 date of superior quality is exchanged for 2 dates of inferior quality.

It also includes exchange of homogeneous/same specie commodities where one party receive commodity with deferment. If 1 tola of gold is exchanged with 1 tola with a delay of 1 year then it will amount to Riba because the price has risen from delay period.

Provisions related to interest in CPC

Firstly, we will discuss the meanings of some terms to better understand the interest related provisions in CPC.

Lease

Leasing is considered Islamic by many Jurists but with some conditions that are

- Promise by bank/financial institution to give machinery to client once after the bank takes its possession.
- The bank may also appoint its client as agent to buy machinery for bank through a separate contract. But it's not preferred.
- The bank after getting possession of machinery may give it to client on hire under

separate contract regardless of promise and agency.

- If machinery is destroyed during tenure, then the bank shall bear its liability but if machinery is destroyed due to client's negligence than client shall bear the loss.
- The bank may promise to its client that at the end of term the machinery will be gifted to him.
- Each contract shall be separate and contingent contracts are strictly prohibited.

Hire-Purchase

The concept of hire purchase is like the concept is of diminishing musharakah for house purchase etc. In hire-purchase the banks buy let's say a property in joint ownership with its client. The client then gives rent to bank to use bank's share in that property. And the client gradually in proportions purchases bank share and the rent is reduced proportionally. Things which shall be taken care of for valid hire-purchase are

- The contract of joint ownership, lease and purchase shall not be executed through a single contract. The bank may agree to lease its share after joint ownership to the client. And client may promise to the bank afterwards to purchase bank's shares in joint ownership gradually in separate units.
- The offer and acceptance are necessary for purchase of each unit at every date for purchase of unit.
- It is better that the price of unit should be decided according to prevailing market value at the time of purchase of unit by client. But it is permissible that a particular price for each unit be fixed at the time signing of promise of purchase by client.

Service charges

Bank is entitled to receive service charges for expenditures incurred in providing loan to its client. But that service charges should be limited to actual expenses incurred and any excess charged in respect of service charges above actual expenditure amounts to Riba/interest.

Now I am going to reproduce provisions related to interest in CPC with my analysis on every provision that whether it is Islamic or not and to what extent.

1. Sec. 2(12). Mesne Profits of property means those profits which the person in wrongful

possession of such property actually received or might with ordinary diligence have received their from, together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession.

Analysis

Plaintiff can claim profits of property that is in wrongful possession of defendant and that profits include actual profits that defendant has received and plaintiff can also claim interest on that profit from defendants. This provision is un-Islamic only to the extent of interest.

2. Sec. 34. Interest, (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie. Sec. [34-A. Interest on public dues. (1) Where the Court is of opinion that a suit was instituted with intent to avoid the payment of any public dues payable by the plaintiff or on his behalf the Court may, while dismissing such suit, make an order for payment of interest on such public dues at the rate of two per cent, above the prevailing bank rate.

(2) Where the Court is of opinion that the recovery of any public dues from the plaintiff was unjustified, the Court may, while disposing of the suit, make an order for payment of interest on the amount recovered at the rate of two per cent, above the prevailing bank rate.

Explanation in this section,-

(a) "bank rate" means the bank rate determined and made public under the provisions of the State Bank of Pakistan Act, 1956 (XXXIII of 1956) and

(b) “public dues” include the dues of any bank owned by the Federal Government or of any corporation or undertaking owned or controlled by the Federal Government or a Provincial Government or of any local authority]

Sec. [34-B. Interest, etc. On dues of banking company.

(1) Where and in so far as a decree is for payment of money due to a banking company in repayment of a loan advanced by it, the Court shall, in the decree, provide for interest or return, as the case may be, on the judgment debt from the date of decree till payment—

(a) In the case of interest bearing loans, for interest at the contracted rate or at the rate of two per cent above the bank rate, whichever is the higher,

(b) In the case of loans given on the basis of mark-up in price, lease, hire-purchase or service charges, for the contracted rate of mark-up, rental, hire or service charges, as the case may be, or at the latest rate of the banking company for similar loans, whichever is the higher; and

(c) In the case of loans given on the basis of participation in profit and loss, for return at such rate, not being less than the annual rate of profit for the preceding six months paid by the banking company on term deposit of six months accepted by it on the basis of participation in profit and loss, as the Court may consider just and reasonable in the circumstances of the case, keeping in view the profit-sharing agreement entered into between the banking company and the judgment debtor when the loan was contracted.

Explanation. In this section in clause (a), “bank rate” has the same meaning as in section 34A.]

Analysis

Sec 34 of CPC gives courts discretionary powers to grant interest in money suits on principal sum adjudged from date of institution to date of decree, along with interest prior to institution of suit, and also from date of decree till payment or till such date as court directs. So, this provision is totally un-Islamic as it gives courts complete discretion to grant interest in money suits.

Sec 34A of CPC (1) gives court discretionary powers to grant interest at the rate of 2 percent above prevailing bank rates if court considers that suit was instituted by plaintiff to avoid payment of public dues.

(2) While if Court considers that any public dues recovered from plaintiff are unjustified then court may recover those dues from opposite party along with interest at the rate of 2 percent above prevailing bank rates from adverse party.

So, both these clauses of Sec.34-A are Un-Islamic as both gives courts discretion powers to grant interests in case of recovery of public dues.

Sec.34 -B (a) the court shall grant interest in money suits in case of interest-bearing loans due of a bank from the date of decree till payment at the contracted rate of interest between parties or at the rate of 2 percent above the prevailing bank rates whichever is higher.

(b) The court shall grant interest in case of loans due of bank that were given on the basis of markup, lease, hire-purchase or service charges at the contracted rate between the parties or at the latest rates of banking companies for similar loans whichever is higher.

(c) The court shall grant interest in case of loans given on the basis of participation in profit and loss at the rate of annual profit for the preceding six months.

So, all of the above-mentioned clauses of Sec.34 -B of CPC are un-Islamic as they all made it mandatory for the court to grant interest in money suits in case of loans due of banking company. As discussed above markup in banking system is un-Islamic and amounts to Riba. The concept of lease, hire-purchase and service charges are not un-Islamic subject to fulfilment of all the conditions mentioned by the jurists and some of the conditions are also mentioned above. But here in sec. 34-B(b) the court shall grant interest/return in money suits to the banking company according to the contracted rate in cases of mark-up, lease, hire-purchase and service charges. And in case of participation in profit and loss the interest/return shall be given on the contracted rate of profit. So, sec.34-B creates the right of banking companies to recover interest along with their principal sum that is clearly Riba. Sec.34-B also used the term return along with interest but here this term is very clear because it amounts to Riba in this section.

3. Sec. 35(3). Costs, The Court may give interest on costs at any rate not exceeding six per cent. per annum, and such interest shall be added to the costs and shall be recoverable as such.

Analysis

The sec. 35(3) is un-Islamic as it gives discretionary powers to courts to grant interests on costs and if the court grants interest, then such interest shall be recoverable along with costs. This subsection also makes interest as a cost if given by court and interest is recoverable in the same way as other costs.

4. Sec. 144. Application for restitution.

(1) Where and in so far as a decree is varied or reversed the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

Analysis

Sec.144 gives the court of first instance discretionary powers that if a decree is varied or reversed by appellate court than on the application of aggrieved party to the Court of first instance, so the court has power to grant costs, Mesne Profits and interest etc. So, we have already discussed Mesne Profits is un-Islamic to the extent if it includes the interest. Costs are Un-Islamic only to the extent if the interest is included in the cost. So, this section can be Islamised just by expelling the interest as whole and from Mesne Profits and costs.

5. Order XXXVII Rule 2(2).

(a) for the principal sum due on the Instruments and for interest calculated in accordance with the provisions of section 79 or section 80, as the case may be of the Negotiable Instruments Act, 1881, up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest up to the date of decree at the same rate or at such other rate as the Court thinks fit; and
 (b) for such subsequent interest, if any, as the Court may order under section 34 of this Code;

Analysis

Order 37 Rule 2[2(a)] empowers courts to give interest and also gives mechanisms for calculation of interest. That is if loan/principal amount is

given on the basis of interest than in accordance with the contracted percentage of interest or if the percentage of interest is not known than 6% per annum. And if principal amount is given on the basis of mark-up, service charges, lease, hire-purchase or participation in profit and loss then according the contracted percentage of mark-up, service charges etc respectively. The interest rate up to the date of institution of suit is calculated according to above mentioned formula. And the interest rate up to the date decree may be same as mentioned above or otherwise as the court thinks fit. This subrule 2[2(a)] of order 37 is Islamic only to the extent of recovery of principal amount only rest of it is totally un-Islamic and against the teachings of Islam for the reasons already mentioned in the analysis on Sec.34-B.

Order 37 Rule 2[2(b)] is overall un-Islamic as it empowers courts to grant interest under sec.34 of CPC.

6. Order XXI Rule 11(2)(g). The amount with interest (if any) (upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed”.

Order XXI Rule 38.

Every warrant for the arrest of a judgment Debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the cost (if any) to which he is liable, be sooner paid”.

Order XXI Rule 79(3).

Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser.”

Order XXI Rule 80(3).

Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some

person to receive any interest or dividend due thereon and to sign a receipt for the same; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself”.

Order XXI Rule 93.

Where a sale of immovable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid”.

Analysis

The above-mentioned rules of order 21 empowers Courts to grant interest and these rules are un-Islamic only to the extent of interest.

7. Order XXXIV Rule 2.

(1) In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree

(a) Ordering that an account be taken of what was due to the plaintiff at the date of such decree for-

- (i) Principal interest on the mortgage,
- (ii) Other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage-security, together with interest thereon;

(c) **Directing**

(i) That, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause(a), or from the date on which such amount is declared in Court under clause(b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant at his cost free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property; and

(ii) That, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule(1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest”.

Order XXXIV Rule 4.

(1) in a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in clauses (a), (b) and (c) (i) of sub-rule(1) of rule 2, and further direct that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same;

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule(1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest”

Order XXXIV Rule 7.

(1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree

a. Ordering that an account be taken of what was due to the defendant at the date of such decree for

(i) Principal and interest on the mortgage,
(iii) Other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon;
c. Directing-

(I) That, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause(a), or from the date on which such amount is declared in Court under clause(b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10 together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff at his cost free from the mortgage and from all incumbrance created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interests, the defendant shall be entitled to apply for a final decree

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule(1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest."

Order XXXIV Rule 11.

In any decree passed in a suit for fore-closure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:-

(a) Interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage

(i) On the principal amount found or declared due on the mortgage, at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable,

a. On the amount of the costs of the suit awarded to the mortgagee, at such rate as the Court deems reasonable from the date of the preliminary decree, and

b. On the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage money, at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine percent per annum; and

(b)Subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable-

(i) On the aggregate of the principal sums specified in clause(a) and of the interest thereon as calculated in accordance with that clause; and

(ii)On the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under rule 10."

Order XXXIV Rule 13.

(1) Such proceeds shall be brought into Court are applied as follows:-

First, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

Secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith;

Thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

Fourthly, in payment of the principal money due on account of that mortgage; and

Lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(3) Nothing in this rule or in rule 12 shall be deemed to affect IV of the powers conferred by section 57 of the Transfer of Property 1982.

Analysis

Order 34 empowers the courts to grant interest to mortgagee in respect of principal amount, cost of suits and any other costs or expenses properly incurred in respect of mortgage security. The court is empowered to grant such interest up to the date of preliminary decree and court is also empowered to grant interest up to the date of actual payment. So, the order 34 of CPC is un-Islamic to the extent of interest and powers granted to court to grant such interest.

8. Order XXXIX Rule 9.

Where land paying revenue to Government, or a tenure liable to sale, is the subject-matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure;

And the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit”.

Analysis

The rule 9 of order 39 is un-Islamic only to the extent of interest and the rest of provision has no issues at all.

Constitutional Requirements

The preamble of 1973 constitution and makes it very clear that steps should be made to enable Muslims to order their lives in accordance with teachings and requirements of Islam. Article 31

makes it mandatory. Article 227 made it necessary to bring all existing laws in conformity to Islam.

Article 230(c) made the responsibility of Islamic Ideology Council to made recommendations to bring existing laws in conformity with Islam. So according to the Article 230(c) it is the duty of Islamic Ideology Council to examine the above-mentioned provisions of CPC related to interest and make recommendations to parliament to Islamize those provisions.

Article 203(D) empowers federal shariah court to examine the existing laws either on the petition of any citizen or on its own motion that if these laws are inconsistent with Islam. And if they are decided to be inconsistent with Islam then those laws shall be void on the date when decision will take effect. But unfortunately, prior to 26th amendment the decision shall be stayed if an appeal is preferred before SAB and till the decision of SAB. After 26th amendment the decision will take effect as per the specified date by FSC, even if an appeal is preferred before SAB. In the present case the provisions of CPC 1908 mentioned above were declared un-Islamic by FSC but because an appeal was preferred against FSC decision before SAB so the decision of FSC is stayed till today.

Case laws

PLD 1992 FSC 1

In Shariat Petition no 21/L, 27/L, 8/K of 1990 and Shariat Petition no 1/K, 4/K, 24/L, 25/L, 17/I, 31/I, 45/I, 16/I, 72/L, 74/L, 57/I, 3/I of 1991 various provision of the Code of Civil Procedure, 1908 were challenged in Federal Shariah Court.

Some of the provisions of the CPC,1908 were challenged before federal shariah court through above petition but some of the provisions of CPC, 1908 were examined by federal shariah court by taking Suo moto notice of those provisions through Shariah Suo Moto notice no. 3 of 1991.

Altogether the provisions of CPC, 1908 that were declared un-Islamic are

- Sec. 12(2)
- Sec. 34
- Sec. 35(3)
- Sec. 144(1)
- Order. XXI Rule 11(2)(g), Rule 38, Rule 79(3), Rule 80(3) and Rule 93.

- Order. XXXIV Rule 2, Rule 4, Rule 7, Rule 11 and Rule 13.
- Order. XXXVII Rule 2(2)
- Order. XXXIX Rule 9.

These provisions were declared un-Islamic by FSC because they are within its jurisdiction. Mere the fact that these provisions were in procedural law does not prohibits FSC to try them. These provisions create rights and liabilities on the litigants to pay and receive interests which falls within the ambit of substantive law and within jurisdiction of FSC. The FSC was fully empowered to examine fiscal laws including banking practices and procedures after 26/6/1990 due to powers conferred on it under 203B(c) of Constitution.

These above-mentioned provisions of CPC, 1908 are related to interest and were declared un-Islamic by federal Shariat court on 14/11/1991. And the judgement shall take effect from 1/7/1992. But till today the above-mentioned provisions of CPC, 1908 are still operational because the judgement of FSC relating to these provisions was challenged in Shariat Appellate bench of Supreme Court due to which the decision of FSC was stayed.

PLD 2000 SC 225

The Shariat Appellate Bench of Supreme court in this judgement held that all the laws that were declared against the injunctions of Islam by FSC were rightly declared by Federal Shariat Court in the judgement dated 14/11/1991. The impugned judgement was upheld.

PLD 2002 SC 801

A review petition against impugned judgment dated 23/12/1999 in which it was held that the some of the laws that were declared un-Islamic by FSC requires detailed consideration before declaring them un-Islamic. So, the judgements dated 14/11/1991 and 23/12/1999 were set aside and the matter was remanded to FSC for deciding afresh.

PLD 2023 FSC 47

The FSC in this judgement held that Riba in all its forms is un-Islamic and the above-mentioned provisions of CPC,1908 were un-Islamic and the word interest shall be deleted therefrom, and where in these provisions the word interest is

used for compensation/costs then it shall be replaced by any suitable word and the amount of compensation shall not be fixed by Government as each case has its own facts.

The judgement was announced on 28/4/2022 and these provisions shall cease to effect from 1/6/2022. And the Federal and Provincial Governments shall have to amend the laws till 31/12/2022. This judgement shall have prospective effect.

Conclusion

I conclude that Riba/interest is prohibited under Shahrīah. Riba is generally of two kinds that is Riba al-duyun /Riba al-nasi'ah and Riba al-buyu. The provisions of CPC,1908 discussed above relates to Riba al-duyun/Riba al-Nasi'ah and all those provisions discussed herein above are Un-Islamic due to interest.

It is constitutional requirement under article 227 to bring all existing laws in conformity with Islam. And for that purpose, Islamic ideology council is created to make recommendations for Islamization of laws after that it is duty of parliament to bring those laws in conformity with Islam. But still there exists un-Islamic provisions in CPC,1908 as mentioned above.

Federal Shariah Court was created with purpose to struck down all un-Islamic laws. FSC in its judgement dated 14-11-1991 that has to take effect from 1-7-1992 declared various provisions of CPC un-Islamic because they are related to interest. But that judgement of FSC was challenged in SAB of SC. The SAB upheld the impugned judgment in its decision dated 23/12/1999. Review was filed against the impugned judgement which resultantly set aside the judgements dated 1/7/1992 and 23/12/1999 to decide afresh all the matters. The FSC has finally vide its judgement dated 28/4/2022 declared Riba as well as the above-mentioned provisions of CPC,1908 un-Islamic and they shall cease to effect from 1/6/2022.

But the above-mentioned provisions of CPC are still its part and no amendments have been done till date.

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