

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

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PRESENT

Mr. Justice Aftab Hussain Chief Justice
Mr. Justice Ali Hussain Qazilbash
Mr. Justice Zahoorul Haque
Mr. Justice Ch. Muhammad Siddique
Mr. Justice Maulana Malik Ghulam Ali

SHARIAT PETITION No. 5/I OF 1982

Muhammad Bashir	---	Petitioner
	Versus	
Govt. of Punjab	---	Respondent
Counsel for the Petitioner	---	In person
Counsel for the Federal Govt.	---	Ch. Iftikhar Hussain Advocate
Counsel for the Govt. of Punjab	---	Hafiz S. A. Rehman Advocate
Date of hearing	---	6-2-1983

JUDGMENT:

MR. JUSTICE AFTAB HUSSAIN, CHIEF JUSTICE

The Punjab Highways Ordinance, 1959 was promulgated to consolidate and amend the Law relating to Highways in the province of Punjab. It provides inter-alia (a) for laying or making out a highway (b) turning, diverting or closing it or a part thereof either temporarily or permanently, (c) widening it, altering its level, improving or repairing it and (d) regulating the kind, number, and speeding of vehicle by means of barriers, diversion roads and all other means whatsoever. (Section 5). For this purpose it creates a Highway Authority (Section 3). It prohibits every body from making any encroachment on the Highway (Section 6). It prohibits opening or breaking of the surface of any highway, constructing or carrying any cable, wire, pipe, drain, sewer or channel of any kind, through, across, under or over

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any highway, repairing or altering or executing any work on, or in relation to any existing cable, wire, drain, sewer or channel of any kind, running through, in or over such Highways (except with the permission of the Highway Authority). But the Authority itself is exempted from the provisions of Section 6 and Section 7. It provides for temporary closure of highway inter-alia for diversion for which reasonable compensation is payable for damage caused to any land, to the owner thereof (Section 12). It also provides for the permanent closure of the Highway subject to the general notice and also subject to the facility of appeal against that order. If any interference or damage is caused by reason of any work on a highway which is done by the order of the Highway Authority, it provides for restoration of the thing interfered with or damaged, to its previous position and condition and in case such restoration be not possible, for replacement of the same facility and payment of compensation wherever necessary subject to the right of the person aggrieved to apply to the Government against the action of the Highway Authority in which case the government is obliged to refer the dispute for decision by arbitration. (Section 14). Provisions are also made for regulation of classes of vehicles or animals using a highway (Section 15, 19-22). In addition procedural provisions are added (Chapter VI and Section 23). A number of miscellaneous provisions are also added, for example (a) that all persons acting under the authority of the government or any Highway Authority shall be deemed to be public servants (Section 26), (b) that no suit, or

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legal proceeding shall lie for anything done in good faith under or in pursuance of the Authority or rules made thereunder, (Section 27), and (c) that the Government is empowered to frame rules for the purpose of carrying into effect the provisions of this Ordinance (Section 29).

Section 28(2) needs special mention as it provides that where the amount of compensation payable cannot be agreed upon it shall be determined by arbitration.

The provisions with which we are concerned in this petition are sections 8,9,16,17 read with Section 10 and 18. Section 8(1) provides that it shall not be lawful without the consent of the Highway Authority:-

- a) to construct or layout any means of access to or from the highway.
- b) to erect any building upon land within two hundred and twenty feet from the middle of the highway.

Section 9 authorises the Highway Authority to adopt these restrictions as respect ^{that} any Highway to which section 8 is not applicable after publication of public notices inviting objections and the sanction of the government.

Section 16 authorises the Highway Authorities to fix the building line other than that provided in Section 8 i.e., two hundred and twenty feet from the middle of the Highway. This can be done after proper notice inviting objections to the proposal and the publication of the building lines later determined by the Highway Authority. This addition is also subject to appeal to the government which shall refer the matter to arbitration. Section 17 prohibits the construction or laying out any means of access to or from the Highway, and to erect

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or re-erect any building etc between the building lines and the highway in respect of which it has been determined.

Sub-section (2) of Section 17 provides that should any building or any part thereof lie within the prohibited area, as defined in the last preceding sub-section, the Highway Authority may, whenever such building or part has either entirely or in greater part burnt or fallen down, by notice, require such building or part when being rebuilt, to be set back to the building line, and if the portion of land thus rendered vacant is included within the boundaries of the highway in relation to which such building line has been determined such portion shall become part of the highway.

Like other provisions already noticed for the compensation of damage, sub-Section (2) of Section 17 states that the Highway Authority shall pay compensation to the owner of such portion of land or of the building which existed thereon for any damage caused to him by the setting back of the building.

Similarly Section 10 provides for compensating any person having any interest in land for any injury or damage caused to his interest by the impositions of restrictions laid down by the provisions of Section 8 or 9. This Section is reproduced below:-

"If any person having any interest in land proves that his interest is injuriously affected by the impositions of restrictions by or under the provisions of Section 8 or 9, he shall be entitled to recover from the Highway Authority compensation for any injury or damage to such interest.

Explanation: For the purpose of this Section the expression 'interest in land' shall mean the interest vested in such

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person on the day the aforesaid restrictions came into force.

- (2) No claim for compensation under the last preceding sub-section for injury or damage shall be entertained unless the claimant furnishes satisfactory proof:-
- (a) that proposals for development at the date of the claim for compensation are immediately practicable or would have been so if this Ordinance had not been passed; and
 - (b) that there is demand for such development.
 - (d) No compensation shall be payable for any injury or damage in so far as the land is subject to a substantially similar restriction under some other enactment, or where ~~compensation~~ in respect of some substantially similar restriction in force under this or any other enactment has already been paid.
 - (e) Subject to the other provisions of this section, compensation to be awarded shall be a sum by which the market value of the interest in land is reduced as a result of restrictions imposed under Section 8 or Section 9.

Section 18 authorises the Highway Authority to acquire any land between the Highway and the building line in accordance with the provisions of the Land Acquisition Act, 1894.

Moulvi Mohammad Bashir, Pettitioner who argued the case himself has challenged the provision of clause (b) of Section 8(1) which prohibits erection of any building upon land within two hundred and twenty feet from the middle of the highway. He has

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also challenged the consequential provisions of Sections 8(2), 9, 10, 11, 16, 17, 18. However during the argument he conceded that Section 18 which provides for acquisition is not repugnant to the Holy Quran and the Sunnah of the Holy Prophet, since the government has the right in shariah too, to acquire land for public purposes for the good of the public. However, he submitted that the price of the acquired land must be paid before possession.

The main argument of the petitioner on the vires of Sections 8, 9 and 16 is that it amounts to an illegal interference, not warranted by the Holy Quran and the Sunnah of the Holy Prophet, with the sacrosanctity of property rights of an individual. In support of this he relied upon Q. 2: 188 and Q. 4:29 which are as follow:

2: 188 "And eat not up your property among yourselves in vanity, nor seek by it to gain the hearing of the judges that ye may knowingly devour a portion of the property of other wrongfully."

4:29 "O ye who believe! squander not your wealth among yourselves in vanity, except it be a trade by mutual consent, and kill not yourselves. Lo ! Allah is ever Merciful unto you."

He submitted that these verses not only prohibits persons but also embody similar restrictions or prohibition against the State. In this connection he referred to Tafseer Almanar by Allama Rasheed Raza, ^{and} Islami Riyasat

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by Maulana Ameen Ahsan Islahi. He also referred to the verse:

"do justice it is very near piety"

The language of these verses demonstrate, that they do not deal with the relation of citizens and the state except to the extent that the property of others should not be interfered except in accordance with law, which means that the power cannot be exercised malafide or illegally or for personal aggrandizement even by the Ameer, Sultan, Caliph, Prime Minister or President or by whatever name the Head of the State be called. To this very effect is ~~that is~~ the opinion recorded by Maulana Madoodi as well as Maulana Ameen Ahsan Islahi. The verses do not however, deal with law making, which is necessary to secure the interest of the general public or any thing done in the public interest. This point was considered in Mohammad Ameen. V. Islamic Republic of Pakistan PLD 1981 FSC 23. I observed ~~at~~ pages 65-66.

"The principle of Ghasb on which reliance was placed by the learned counsel for the petitioner is not applicable to acquisition of property by the State for public purpose as distinguished from confiscation by the Imam for personal use. This distinction has already been pointed out on the authority of Shah Waliullah from Fiqh Omar with regard to the expropriation by Hazrat Omar of land owned by Muslims for use as grazing ground without payment of any compensation".

It was also held that though in straitened financial circumstances and dire necessity the government has power to confiscate the property without paying compensation, the land should be

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acquired on payment of full compensation which should be equal to the market value of the land (vide page 66).

The Punjab Highway Ordinance provides in its S. 18 for acquisition on payment of compensation, ~~for~~ It also provides for payment of compensation (S.10) in cases where a person having any interest in land proves that his interest is injuriously affected by the imposition of of restriction by or under the provisions of Section 8 or 9. Prohibiting the erection of any building between the building and the Highway by the owners of any interest in land would ~~certainly~~ amount to encroachment upon their interests. On account of the restrictions imposed upon the rights of the owners to avail of the lands for building purposes, ~~Some damages~~ ^{doe ensue} ~~at expense~~ to the owners. Both these provisions are very salutary and are also in public interest. In these circumstances the petitioner's objection would have been unexceptionable if no provision had been made for compensation ^{for} this partial damage. But we find that Section 10 takes steps to remove this objection and relieve the owners of the injuries which might affect their interest by the imposition of these restrictions.

The petitioner conceded that Section 10(1) does provide satisfactory relief but he submitted that the proviso to sub-section 2 which defines interest in land takes away by the other hand the relief given by one hand by the main sub-Section. He referred to the fixation of time limit that for

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the purpose of assessing the damage the interest should have vested in the owner thereof on the day the restrictions came into force.

We have not been able to appreciate this argument. The expression interest in land could not have been left undefined. The definition would necessitate the fixation of point of time when the loss was suffered. Naturally the point of time will be the day, when the restriction came into force. This provision is thus very reasonable.

The formula of assesment of compensation given in sub-Section 4 of Section 10 is also just. It provides that the compensation shall be a sum by which the market value of the interest in the land is reduced as a result of restriction, imposed.

We are not therefore, able to subscribe to the argument that the proviso does not advance the object of the main sub-Section to which it is attached.

It was also argued that the compensation should be paid before taking possession of any land. This objection obviously cannot relate to the provision of Section 10 since in that case no property is required to be taken. Moreover the compensation does not automatically follow the imposition of restrictions but can be paid only on proof of injuries to the interest in land suffered or likely to be suffered by the person having such interest.

The objection in regard to payment of compensation prior to possession is not warranted for the

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reason. The Land Acquisition Act does provide for delivery of possession after assessment of fair compensation, which means that payment remains only a formal affair. But sometimes delay caused in the process of assessment may cause much greater harm to the public interest. In such cases delivery of possession must be given precedence over assessment of payment of compensation.

There are instances during the period of the Caliphs when the houses and properties of the others had to be expropriated for widening the premises of the mosque and compensation was paid later.

These instances are given in PLD 1981 FSC Mohammad Ameen V. Islamic Republic of Pakistan page 25 (pages 58). Another instance of confiscation is of land of Najran tribe after their expulsion from Yamen to Iraq under order of Hazrat Omar. In this case they were compensated for the land so confiscated by allotment of land in Iraq.

We asked the petitioner whether he had gone through the whole ordinance and could point out any other provisions which may be repugnant to the Holy Quran and the Sunnah of the Holy Prophet but he stated that he had not gone through the rest of the Ordinance. From this point of view, we have however, gone through it and reproduced its summary in this Judgment with this view.

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It is clear that the other provisions are merely regulatory about which the power of the State is not questionable under shariah. We do not find any portion of law to be repugnant to the Holy Quran and the Sunnah and dismiss the petition.

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CHIEF JUSTICE

NOOR A. RAJ

JUDGE - I

Zahoorul Haq

JUDGE - II

M. Siddiq

JUDGE III

H. J. Iqbal

JUDGE IV

Islamabad
February 6, 1983.

For the reporting
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