

IN THE FEDERAL SHARIAT COURT.
(ORIGINAL JURISDICTION)

OSA 17/91
(28) 92

PRESENT

MR.JUSTICE DR.TANZIL-UR-REHMAN, CHIEF JUSTICE.
MR.JUSTICE IBADAT YAR KHAN, JUDGE.
MR.JUSTICE DR.FIDA MUHAMMAD KHAN, JUDGE.
MR.JUSTICE ABDUL RAZZAQ A.THAHIM, JUDGE.

SHARIAT PETITION NO.1/1 OF 1986.

Amin Jan Naeem,
House No.13, Street No.18,
F-7/2, ISLAMABAD.

PETITIONER.

VERSUS

Federation of Pakistan
and others.

RESPONDENTS.

For the Petitioner

Ch.Riaz Akhtar,
Advocate.

For the Federal
Government.

Mr.Iftikhar Hussain
Chaudhry, Standing Counsel.
Dr.Riazul Hasan Gilani,
Deputy Attorney General.

For the Province
of Punjab.

Syed Sajjad Hussain Shah,
Assistant Advocate General
and Mr.S.M.Naeem, Advocate.

For the Province
of Sind.

Hafiz S.A. Rahman,
Advocate.

For the Province
of N.W.F.P.

Mian Mohammad Ajmal,
Assistant Advocate General
NWFP and Haji Mirza Abdul
Qayyum Mazhar, Advocate.

Juris-consults.

Maulana Mohammad Taseen,
Dr.Mahmood Ahmad Ghazi,
Allama Khalid Mahmood,
Dr.Abdul Malik Irfani,
Mohammad Salauddin Yousaf.

others.

Mr.Naeem Ahmad,
Deputy Director General,
Mr.Salauddin,
Deputy Military Estate
Officer and
Mr.Bashir Ahmad Ansari.

Date of filing.

13.1.1986.

Dates of hearing.

18.1.1991, 29.1.1991,
31.1.1991, 04.2.1991,
06.2.1991, 18.2.1991 and
19.2.1991.

Date of decision.

12.8.1991.

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① SAN 17/91
② 28/92JUDGMENT

DR.FIDA MUHAMMAD KHAN, J.- This Shariat Petition No.1/I of 1986 by Mr.Amin Jan Naeem (afterwards called the petitioner) challenges Section 3(1), Section 7 and Section 11 of the West Pakistan Requisitioning of Immovable Property (Temporary Powers) Act, 1956 (herein-after called the Act) on the ground that they are repugnant to the Injunctions of Islam. The impugned sections are as under:-

Section 3(1): "If in the opinion of the Provincial Government it is necessary or expedient to requisition any building for the use of any of the officers or offices or educational institutions of the Federal Government, the Provincial Government or any corporate body established by or under the authority of the Federal Government or the Provincial Government, the Provincial Government may after giving the owner thereof an opportunity of being heard and showing cause against the proposed action, by order in writing requisition any building and may make such further orders as appeared to it to be necessary or expedient in connection with the requisitioning:

Provided that no building used for the purpose of religious worship and no building situated in a cantonment within the meaning of the Cantonment Act, 1924, shall be requisitioned under this Act.

Provided further that no building which is used for imparting education through the private educational institutions shall be requisitioned:

Provided further that no building which is an evacuee property shall be requisitioned except with the prior approval of the Federal Government:

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Provided also that if a building is in occupation of any person, no order for its requisitioning shall be passed unless a notice of, at least, two weeks is given to the occupant to show cause against the action proposed to be taken and if and when an order of requisitioning is passed, the occupant shall be allowed a period of one month, at least, to vacate the building and such occupant shall thereupon comply with that order:

Provided that no owner in occupation of a residential house shall be required to vacate it".

Section 7: "As soon as possible after an order of requisition is passed, the Provincial Government shall determine the amount of compensation of the requisitioned building and deposit by the 5th of each succeeding month such compensation in the Court and if the amount of compensation assessed is enhanced by the arbitrator or by the High Court on appeal, the excess amount shall also be similarly deposited. In case the amount is not deposited within a period of three months from the date of requisitioning or the date of the order of the arbitrator or of the High Court, as the case may be, the Provincial Government shall be liable to pay interest on the principal amount at the rate of six per centum per annum till the date of deposit of payment, as the case may be".

Section 11: "(1) No injunction or an order for ejectment, delivery of possession or appointment of a receiver in respect of any building which has been requisitioned under this Act shall be granted or made by any Court or by any other authority.

2) No order made in exercise of any power conferred by or under this Act shall be called in question in any Court.

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3) Where an order purports to have been made and signed by any authority in exercise of any power conferred by or under this Act it shall be presumed that such an order was so made by that authority

2. The Petitioner has dwelt at large on stating the details of his personal case concerning the requisitioning of his house, his subjection to a lot of mental torture and his efforts to resist the same by legal means which ultimately could not prove successful. He has quoted a number of verses and has relied on a Hadith to show that there is no compulsion in Islam and that Islam has recognized as sacrosanct the private property of the citizens who are at liberty to enjoy the possession and use of their own property as long as that does not cause detriment to others. He is of the view that requisitioning of property by the State to provide residential accommodation to its functionaries causes immense anguish to the citizens and is thus against the injunctions of Islam. He has prayed that the impugned sections be struck off on the basis of their repugnancy to the Holy Quran and Sunnah.

3. It may be mentioned that the Federal Shariat Court, while examining the Act, in its judgment on S.S.M.No.70/NWFP/84, S.S.NO.84/P/83, S.S.M.No.83/S/84 and S.S.No.70/B/84 has held as follow:

"This Act provides for requisitioning of immovable property for the use of any officer or offices or educational institutions of the Federal Government. The requisitioning is obviously for public purpose. However, the provisions about compensation do not guarantee reasonable compensation which under Shariah must be paid to the owner of the property for its use. Clause (e) of Sub-section (1) of Section 6 provides for factor in making the award for compensation for use and occupation of the requisitioned property. The following factors are

enumerated there:-

- i)
- ii)
- iii)

The best guarantee for reasonable compensation is the prevailing rate of rent of similar building in the locality. This shall be added as proviso to clause (e) of Section 6(1).

This Section does not provide for enhancement of the rent although the provisions of such enhancement have now been introduced in another enactment i.e. the Punjab Urban Rent Restriction Ordinance, 1959. We direct the Governments of Punjab, Sind, NWFP and Baluchistan that the same principle and formula for periodical enhancement of compensation shall be laid down in this Act as is given in Section 4 of the Punjab Urban Rent Restriction Act, 1959".

4. We have thoroughly considered the contentions made in the petition and have heard a number of jurist consults/Islamic scholars. The Federal Government and Provincial Government were duly represented in the Court. Our findings and conclusions are summed up in the subsequent paras.

5. Before any discussion on the subject, it would however, be more appropriate to ascertain the meaning of the word "Requisitioning" as used in the Act. The Lexicon Webster Dictionary by Mario Pei gives the following definition:

"An authoritative request, a demand; a written application or request, as for supplies; a demand for a levying of necessities by soldiers occupying a country, as quarters and rations; ..."
(Volume-II, page 815)

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Stroud's Judicial Dictionary of words and Phrases
by John S.Jams defines it as under:-

- "1.
2.
3. "Requisition" includes the taking of property in full ownership, the taking of the possession of property, and the acquisition of a right to have the property used in a particular manner without any taking of possession".
4. "Requisitioning" is not a term of Art and has different meanings. Its usual meaning is nothing more than hiring without taking the property out of the owner although the owner has no alternative whether he will accept the proposition of hiring or not." (Volume-IV, Fourth Edition, pages 2255-2256)

"Words and Phrases: Legally Defined" compiled under
the general editorship of John B.Saunders defines
it as under:-

"Requisition" means, in relation to any property, take possession of the property or required the property to be placed at the disposal of the requisitioning authority
Requisitioning may be, and usually is, nothing more than a hiring of the ship which does not take the property in the ship out of the owner, though the owner has no alternative whether he will accept the proposition of hiring or not, or it may involve a taking over of the absolute dominion of the vessel, though this

may not be ascertained in any given case until the terms are finally settled".

(Volume-IV, Second Edition, page 315)

6. Although the word "Requisitioning" includes the taking of property in full ownership, it has not been used in the Act in that sense. Section 4 of the Act makes it clear that the word "Requisitioning" used here only means (compulsory) hiring of a building by the Provincial Government for the use of officers or offices or Educational Institutions of the Federal Government, Provincial Government or any of their corporate body. This Act provides that the owner will be given an opportunity of being heard and showing cause against the proposed action, however, the requisitioning of any building, if considered necessary or expedient, could be done even without the consent of its owners. Section 11 of the Act grants exception from legal processes to the orders made in exercise of any power conferred by or under this Act.

7. Thus the actual points arisen in the petition to be examined by this Court, under Article 203-D of the Constitution of Pakistan 1973, are whether the Government can requisition the property of an individual for its Officers, Offices and Educational Institution without the consent of its owner and whether such requisitioning could be granted exemption from legal processes.

8. Since the requisitioning of property as provided in the Act constitutes a form of contract of IJARA, it would be more appropriate to first discuss

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the position of "Ijara" in the light of Quran and Sunnah and then examine it in the context of our collective life as envisaged in the ACT under consideration.

9. Ijara (اجاره) is the sale of a known benefit in return for its known equivalent. It is an "Aqd" (i.e. obligation) between the two parties and is composed of an offer (ايجاب) and an acceptance (قبول). Like sale, it becomes a concluded contract by mutual agreement of the contracting parties.

10. It will be appreciated to note that the basic injunction given by Islam in respect of all contracts is that they are to be effected with the mutual consent of the concerned parties. This principle is derived from verse 29 of Surah IV which reads as under:-

" يا ايها الذين آمنوا لا تأكلوا اموالكم بينكم بالباطل "

الا ان تكون تجارة عن تراض منكم ، (النساء : ٢٩)

"O ye who believe! eat not up your property among yourselves in vanities. But let there be amongst you traffic and trade by mutual good will".

As is clear from the text, herein the believers have been ordained to avoid taking away the property of one another through "Batil" means. "Batil" has been explained by Imam Ibn-Jarir Al Tabari, an eminent Mufasssir in the

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following words:

"الباطل الذى نهى الله عن أكل الأموال به هو ... مما حرمه على عباده
فى تنزيله أو على لسان رسوله صلى الله عليه وسلم" (جامع البيان فى تفسير
القرآن، لابن جرير الطبرى ج ٤ ص ٢١، مطبعة بيروت)

"Batil is that which Allah has forbidden
(to be used) for eating up the wealth
of others That has been mentioned
either in His revelation or through
His messenger (ﷺ) as Haram
for His believers".

further

"Batil" has been explained by Imam Fakhrud Din Razi,
a renowned Mufasssir in the following words:

"الباطل اسم لكل ما لا يحل فى الشرع كالربا والغصب والسرقة والخيانة
..... (التفسير الكبير لامام الرازى، مطبعة طهران، ج ١٠ ص ٦٩)

"Batil is all that is not lawful in
Shariah like usury, usurpation, theft,
dishonesty ..."

On the authority of Hazrat Abbas (r) and
Hazrat Hassan (r) he has further said:

"والثانى ما روى عن ابن عباس والحسن رضى الله عنهم أن الباطل هو كل
ما يؤخذ من الانسان بغير عوض (ايضاح ج ١٠ ص ٧٠/٦٩)

"It means that (wealth/property) which is forcibly
taken from a person without due compensation" and it
includes all that is in contravention to the established
norms and is morally and legally unpermissible. The verse
further directs that one of the lawful methods for exchange
of wealth and properties is trade by mutual consent and
this necessarily preconditions the absence of deceptive
measures as well as the avoidance of undue pressure. It
signifies that to be valid a contract must be free from
coercion and should be finalised by mutual agreement.
There are a number of Ahadith wherein this principle of
mutual agreement has been highlighted.

Hazrat Abu Huraira (r) narrates that the Holy
Prophet (ﷺ) said:

"لا يفرق اثنان الا عن تراض" (سنن ابى داود، كتاب البيوع باب فى
خيار المتبايعين، ج ٢ ص ١٣٤، مطبعة كراتشى)

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"The two (i.e. seller and buyer) must not part away (after making a deed) except with mutual consent".

It has also been reported in the following words:

"لا يتفرقن عن بيع الا عن تراض ، (جامع الترمذى كتاب البيوع ، ج ١ ص ٢٢٦ مطبوعة كراتشى)

"They must not part from (each other after) the sale except with mutual consent".

Hazrat Abu Saeed Khudri (r) has stated that the Holy Prophet (ﷺ) said:

"انما البيع عن تراض ، (سنن ابن ماجه كتاب البيوع)

"Verily the sale is dependant on mutual consent".

Hazrat Ali (r) stated that the Holy Prophet (ﷺ) prohibited from the (forced) sale wherein a person is subjected to compulsion".

"قد نهى النبي صلى الله عليه وسلم عن بيع المضطره (سنن ابى داود كتاب البيوع - باب فى بيع المضطر ج ٢ ص ١٢٣/١٢٤)

Abu Saeed Khudri(r) has quoted the Messenger

of Allah (ﷺ) to have forbidden "Munabaza" ... which is a bargain without seeing and without mutual consent.

"نهى رسول الله صلى الله عليه وسلم ... عن ... المناذة فى البيع ... والمناذة ان ينبذ الرجل الى الرجل بثوبه وينبذ الاخر ثوبه ويكون ذلك بيعهما عن غير نظر ولا تراض ، متفق عليه ، (مشكوة المصابيح ، باب المنهى عنها من البيوع ص ٢٤٧ ، مطبوعة كراتشى)

Mutual consent is therefore a condition for the validity of a contract and without that the contract becomes void. IJARA, the sale of benefits, is also a normally contract and it is valid and enforcible only when it is effected by mutual consent of the concerned parties according to the laid down principles.

10-A. The reason why mutual consent has been considered necessary is based on the concept that Islamic Injunctions

deem the individual property as sacred and inviolable. There are a number of Ahadith that highlight this fact and strictly prohibit the Muslims from any encroachment upon the rights of one another in this respect. The Holy Prophet (ﷺ) has been reported to have said:

"الا لا تظلموا لا يحل مال امرئ الا بطيب نفسه" (مشكوة المصابيح باب الغصب والعارية ص ٢٥٥) ايح ايم سعيد كمينى كراتشى

"Behold! Opress not. The (acquisition of) property of a person is not lawful without his voluntary consent."

Hazrat Salem(r) from his father (r) reported that the Messenger of Allah (ﷺ) said:

"من اخذ من الارض شيئا بغير حقه خسف به يوم القيامة الى سبع ارضين رواه البخارى" (مشكوة المصابيح باب الغصب والعارية)

"whoso extorts any portion of land unjustly will be sunk down unto seven earths on the Resurrection Day".

In another Hadith the words are:

"whoso encroaches upon even a span of land without title therein will be put to bear the burden of its earth on the Congregation Day"

"من اخذ شبرا من الارض ظلما فانه يطوقه يوم القيامة من سبع ارضين متفق عليه" (مشكوة المصابيح باب الغصب والعارية ص ٢٥٤)

The same rule applies even to a small quantity. Hazrat Abu Hameed Saeed (r) states that the Holy Prophet (ﷺ) said:

"لا يأخذ احدكم عصا اخيه" (مشكوة المصابيح باب الغصب والعارية ص ٢٥٥)

"None of you should take a stick of his brother (without his consent.)"

In his sermon delivered on the occasion of his last pilgrimage, the Holy Prophet (ﷺ) said:

"ان دماءكم وأموالكم حرام عليكم كحرمة يومكم هذا ففى شعركم هذا ففى بلدكم هذا" (مشكوة المصابيح باب قصة حجة الوداع ص ٢٢٤/٢٢٥)

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"Your lives and properties are sacred and inviolable to you as the sacredness of this day of yours in this month of yours and in this city of yours".

Abu Huraira(r) reported Allah's Messenger (ﷺ) as saying:

"كل المسلم على المسلم حرام دمه وماله وعرضه" (صحیح مسلم کتاب البر والصله ج ٢ ص ١٩ مطبوعة بيروت)

"The whole of a Muslim is inviolable for a Muslim: his life, his wealth and his honour".

11. In view of these injunctions there is not a single Muslim jurist who could be reported to have a different view and thus there is a concurrence on the point that any contract of sale or letting is not valid unless it is made with the free consent of the parties. Eminent Muslim jurists like Imam Abu Hanifa and Ibn Hazm have further made it quite clear that there is no difference whether it is an individual who forcibly takes the property of another person or is any Government that does the same.

"فتح القدير لابن الهمام ج ٨ ص ١٦٦ / ١٦٧ مطبوعة بيروت"
"الحلى لابن حزم مسألة ١٤٠٨ ج ٥ ص ٣٣٥ / ٣٣٦ دار الفكر"
Without one's consent one's property is unlawful for all and no one could be permitted to unduly take away by force what belongs to other. "... you should direct them (i.e. rulers/collectors) not to transgress over people in their dealings, not to oppress them and never to take from them more than what is established against them" was written by Imam Abu Yusuf (كتاب الخراج ص ١٣٢ ادارة القرآن والعلوم الاسلامية كراتشي)

12. As an elaboration of the point in consideration it would be more appropriate to refer here to the issue of extension in Masjid-e-Nabavi (ﷺ) during the period of Hazrat Umar(r) as mentioned in السنن الكبرى in the following words:

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عن ابي هريرة رضى الله عنه قال لما اراد عمر بن الخطاب رضى الله عنه ان يزيد فى مسجد رسول الله صلى الله عليه وسلم وقعت زيادته على دار العباس بن عبد المطلب رضى الله عنه فماراد عمر رضى الله عنه ان يدخلها فى مسجد رسول الله صلى الله عليه وسلم ويعرضه منها فابى وقال قطيعة رسول الله صلى الله عليه وسلم واختلفا فجعلا بينهما أبى بن كعب رضى الله عنهم فاتياه فى منزله وكان يشقى سيد المسلمين فامر لهما بوسادة فالقيت لهما فجلسا عليها بين يديه فذكر عمر ما اراد وذكر العباس قطيعة رسول الله صلى الله عليه وسلم فقال ابي ان الله عز وجل أمر عبده ونبيه داود عليه السلام ان يبنى له بيتا . . . فقال العباس أليس قد قضيت لى بها وصارت لى قال بلى . . .

(السنن الكبرى للإمام البيهقي، ج ٦ ص ١٦٨ باب اتخاذ المسجد والسقايات وغيرها ، دار الفكر)

to
Hazrat Umar (r) decided to extend the mosque at Madina. When he wanted to pay the compensation and include the house of Hazrat Abbas (r), he declined and said that the said piece of land was given to him by the Holy Prophet صلى الله عليه وسلم. In order to sort out the difference both of them appointed Ubai Ibn Ka'ab (r) as arbitrator to decide the issue through mediation. Hazrat Ubai (r) was known as Chief of the Muslims. Both of them went to his house. He offered both of them a pillow and they sat in front of him. Hazrat Umar (r) informed him of his intention and Hazrat Abbas (r) also stated his plea. After hearing their contentions, Ubai Ibn Ka'ab (r) said that Almighty Allah had ordained his Prophet Hazrat Dawood (عليه السلام) to construct a house for Him and Hazrat Dawood (عليه السلام) had asked the Lord where the said house was to be constructed. Almighty Allah had replied: "At the place where you see an angel standing with a drawn out sword". Hazrat Dawood (عليه السلام) saw the angel at "al-Sakhra" but at that time there was a house of an Isra'elite child. Hazrat Dawood (عليه السلام) went towards him and told him that Almighty Allah had directed to construct His house at that place". The youngsters asked him whether Almighty

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Allah had asked him (i.e. Hazrat Dawood عليه السلام) to take the said house (owned by him) without his consent". Hazrat Dawood (عليه السلام) replied in negative. On this Almighty Allah revealed upon Hazrat Dawood (عليه السلام); " I have given you the treasures of the earth. So try to seek his consent and satisfy him". Hazrat Dawood (عليه السلام) again went towards him and said that he had been directed to seek his pleasure (approval) and offered him a certain amount of gold (قنطار). That youngster said "O! Dawood I would accept it but tell me which of the two is better (and more valuable): my land or that amount of gold?" On this Hazrat Dawood (عليه السلام) said, "your land is better". The Youngster said again, "Then try to please me". Hazrat Dawood (عليه السلام) said, "I will give you three times of the amount (i.e. three Qanateer) I have initially offered to you". Then he kept on insisting on his demand on Hazrat Dawood (عليه السلام) till he expressed his consent on nine "Qanateer". In another tradition it is added: when Hazrat Ubai(r) narrated this event Hazrat Abbas (r) said, "Is it not so decided in my favour?" Hazrat Ubai(r) replied "Most Certainly". Hazrat Abbas(r) said: [[I want you to be a witness that] I have donated it to the Muslims [for the Pleasure of Allah] without compensation. Hazrat Umar (r) accepted it and got it included in the mosque".

13. Thus it is absolutely clear that mutual consent occupies a very important place in all transactions and it leaves no room for any doubt to hold that according to Islamic Injunctions no one can be compelled to make a deal either of the sale or that of the "Ijara" under coercion, without being mutually agreed to do the same out of one's own free will. Such contracts are considered void. It is also clear from what has been stated above that the

same rule applies to the Government as much as it is applicable to the individuals and there is no exception to that in the normal day to day life.

14. However it would be appreciated to note that Islam is a practical dynamic way of life and it takes into account all circumstances and conditions. We all know that at times there are certain unavoidable conditions that are to be treated exceptionally. In such inevitable situations the injunctions that are given for the normal circumstances are slightly parted with to a certain extent and are substituted by others that are more apt to the changed conditions. The amended injunctions instead of involving the followers of Islam in difficult testing situations give them permission to utilize the given concession in the urgent requirements to an unavoidable limit. For example, the Holy Quran has forbidden the believers from the eating of dead meat, blood, flesh of swine and that on which any other name has been invoked besides that of Allah. This is an injunction which is to be followed and strictly adhered to in the normal circumstances. However, it has been made quite clear that in exceptional conditions the said injunction is to be made flexible enough to meet the changed situation in a way and to the extent it is required therein. The Holy Quran says:

"اليوم اكملت لكم دينكم واتممت عليكم نعمتي ورضيت لكم الاسلام ديناً فمن

اضطرفى مخصة غير متجانف لاثم فان الله غفور رحيم" (البقرة: ١٧٥ : ٣)

"This day I have perfected your religion for you, completed My Favour upon you and have chosen for you Islam as your religion But if any one is forced by hunger with no inclination to transgression, Allah is indeed Oft Forgiving, Most Merciful". (5:4)

2% . . . وقد فصل لكم ما حرم عليكم الا ما اضطررتم اليه . . .

(الانعام 6 : 119)

"He has explained to you in detail what is forbidden to you except under compulsion of necessity". (6:119)

2/ "انما حرم عليكم الميتة والدم ولحم الخنزير وما اهل به لغير الله فمن اضطر غير باغ ولا عاد فلا اثم عليه ان الله غفور رحيم"
(البقرة 2 : 173)

"If one is forced by necessity, without lawful disobedience nor transgressing due limits, then he is guiltless, for Allah is Oft-Forgiving, Most Merciful". (2:173)

15. Based upon these injunctions, the Muslims exegists have formulated the following juristic principles as mentioned in Al Mājallah:

"المادة ٢١ : الضرورات تبيح المحظورات"

"Necessities make forbidden things canonically permissible".

"المادة ٢٢ : الضرورات تقدر بقدرها"

"However, the necessity would be estimated according to its quantity".

"المادة ٢٣ : اذا زال المانع عاد المنوع"

"A thing permitted on account of an excuse would become unlawful on the cessation of that excuse"

Connected with these juristic maxims are some other principles that

"المادة ٢٠ : الضرر يزال"

"damage is to be put an end to",

"المادة ٢٦ : يتحمل الضرر الخاص لدفع الضرر العام"

"(ضرر) To repel a public damage a private damage is preferred"

"المادة ٢٧ : الضرر الاشد يزال بالضرر الاخف"

"and severe damage is made to disappear by a higher damage".

16. In this connection the following traditions and narrations would further throw light on the subject under discussion.

Uqba(r) says I submitted to the Holy Prophet (ﷺ) that at times we pass by certain tribes but they neither play host nor do they fulfill their obligations in respect of our due rights. We also do not take it from them. The Holy Prophet (ﷺ) replied "If without compulsion they refuse to do so, take it from them by force". This situation arose while the companions of the Holy Prophet (ﷺ) when going for Jihad used to pass by certain tribes. At times there was no food with them nor it was made available to them to be purchased even on price. The non-Muslims on such occasions usually would shut their shops and refrain from selling food stuff to the Muslim Mujahedeen. Since the Muslims were subjected to great trouble in such situations, they reported the matter to the Holy Prophet (ﷺ) who ordained that if those person (who possessed but) declined to sell their food commodities without coercion, that should be taken from them by force. This means that the Holy Prophet (ﷺ) gave permission to his companions to forcibly purchase the same by making the payment because in such circumstances the only alternative was to take the same by force, after making the payment.
 "جامع الترمذی: کتاب السیرج ۱ ص ۲۸۸ باب ما جاء ما يحل من اموال اهل الذمه"

Here we see that inspite of the fact that mutual consent is a requirement for the contract of sale, nevertheless in times of dire necessity the contract could be transacted even without that if pressed by the circumstances to avoid the worse condition.

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17. All these above mentioned quotations show that at the time of extreme necessity the injunctions given for the normal circumstances are re-adjusted and made somewhat flexible to a certain extent to alleviate a particular unavoidable emergent condition.

18. An event about the extension in Masjid-e-Haram that took place during the orthodox Caliphate ^{also} is/worth-mentioning. Allama Abul Hassan Al-Balazari writes;

وَلَمْ يَكُنْ لِلْمَسْجِدِ الْحَرَامِ عَلَى عَهْدِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَابِي بَكْرٍ جِدَارٌ يَحِيطُ بِهِ ، فَلَمَّا اسْتَخْلَفَ عُمَرُ بْنُ الْخَطَّابِ وَكَثُرَ النَّاسُ وَسِعَ الْمَسْجِدَ وَ اشْتَرَى دُورًا فَهَدَمَهَا وَزَادَهَا فِيهِ وَهَدَمَ عَلَى قَوْمٍ مِنْ جِيرَانِ الْمَسْجِدِ أَنْ يَبِيعُوا وَوَضَعَ لَهُمُ الْإِثْمَانَ حَتَّى أَخَذُوهَا بَعْدَ ، وَاتَّخَذَ لِلْمَسْجِدِ جِدَارًا قَصِيرًا دُونَ الْقَامَةِ . فَكَانَتْ الْمَصَابِيحُ تَوْضَعُ عَلَيْهِ . فَلَمَّا اسْتَخْلَفَ عُثْمَانُ بْنُ عَفَانَ ابْتَاعَ مَنَازِلَ وَسِعَ الْمَسْجِدَ بِهَا ، وَأَخَذَ مَنَازِلَ أَقْوَامٍ وَوَضَعَ لَهُمُ الْإِثْمَانَ فَضَجُّوا بِهِ عِنْدَ الْبَيْتِ فَقَالَ إِنَّمَا جَرَأَكُمْ عَلَى حُلِيِّ عَنَكُمْ وَلِيْنِي لَكُمْ لَقَدْ فَعَلَ بِكُمْ عَمَلٌ مِثْلَ هَذَا فَأَقْرَرْتُمْ وَرَضِيتُمْ ، ثُمَّ أَمَرَهُمْ إِلَى الْحَبْسِ حَتَّى كَلَّمَهُ عَبْدُ اللَّهِ بْنُ خَالِدٍ بْنُ أَسِيدٍ بْنُ أَبِي الْعَيْضِ فَخَلَّى سَبِيلَهُمْ .

(فتوح بلدان ص ٥٨ دار الكتب العلمية بيروت ايضا)
(ايضا الاحكام السلطانية لابي الحسن الماوردي ص ٦٢ ، الطبعة الثالثة مطبعة مصر)

"During the periods of the Holy Prophet (ﷺ)

and that of Hazrat Abu Bakar (r) there was no wall around Masjid-e-Haram. When Hazrat Umar (r) took over as a Caliph and the people increased in number, he got the mosque extended. He purchased the houses, demolished the same and included them in the mosque. He also demolished some of the houses adjacent to the mosque whose owners had refused to sell them. He assessed the prices (and kept the same in deposit). The same were taken by them later on. Hazrat Umar (r) got a wall constructed around which was a little less than the (normal human) height. When Hazrat Usman (r) took over as a Caliph, he purchased (other) houses and further extended the mosque with them. He forcibly took the houses of some persons (unwilling to sell the same) and

fixed their prices. When those persons protested near the mosque, he addressed them and said, "My patience and compassion has encouraged you against me (otherwise) Hazrat Umar (r) had done the same with you but you had endured and accepted that. Then he got them arrested. However on the recommendation of Abdullah Ibn Khalid Ibn Usaid he released them".

19. Earlier it has been mentioned that Hazrat Ubai Ibn Ka'ab(r) did not authorize Hazrat Umar (r) to use force to take the house of Hazrat Abbas (r) and get that included in the mosque of the Holy Prophet (ﷺ) when the same was being extended. So there is a need to reconcile the two apparently different points of view emerging from these incidents. On one side we find that no force was used by Hazrat Umar (r) to acquire the house of Hazrat Abbas (r) and get it included in Masjid-e-Nabavi and on the other hand we find both Hazrat Umar (r) and Hazrat Usman (r) using force to acquire, demolish and get the houses adjacent to Masjid-e-Haram included in the mosque. We have been told, as mentioned above, that Hazrat Usman (r) did not hesitate even to get some of the protesting men (reluctant to sell their houses) arrested until Abdullah Ibn Khalid intervened and got them released.

20. One of the reason of this different type of action could be attributed to the fact that the nature of land in Makka Mukarrama is different from lands in other parts of the world. The Holy Quran says:

"سواء العاكف فيه والبادء (الحج ٢٢ : ٢٥)

"We have made (open) to (all) men - equal is the dweller there and the visitor from the country ..."

A considerable number of Muslims jurists are of the view that lands of Makka Mukarrama cannot assume the

position of personal property, therefore, their sale/purchase is not permissible. (For details see:

(كتاب الاموال لابي عبيد القاسم، ص ٦٦ - ٦٩، دار الفكر، القاهرة)

It was for this reason that Hazrat Umar (r) and Hazrat Usman (r) both took the houses forcibly and got them included in the mosque at Makka Mukarrama. Moreover it could be said further that it is not known for certain what was the exact location of the house of Hazrat Abbas (r) and how much was its requirement in connection with the extension of the mosque. Was the requirement highly pressing and was unavoidable or could that be postponed to a subsequent time? It is well known that on the occasion of performance of Hajj all pilgrims gather at Makka Mukarrama one at the same time but it is not so in case of Madina Munawwara when they are divided at two places. Hence the requirement at Madina Munawwara was definitely less than that at Makka Mukarrama. The later conduct of Hazrat Abbas (r) however highlighted another ^{also} reason/why force was not used and he was spared. It seems that Hazrat Abbas(r) only wanted to show to the World the sanctity of his fundamental right in relation to his property and then donated the same voluntarily to set up an inspiring example to be followed later on. Where ever personalities of that type are available what could be the necessity for using forcible methods. Analysing the two events relating to the extension of mosques at Madina Munawwara and Makka Mukarrama we find that the houses were acquired in an urgent necessity and that too only in public interests, full payment was made to the owners, prices were enhanced to provide necessary incentive when the owners showed reluctance and ultimately as a last resort force was used when no other measure proved effective.

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24. In view of the above, the Muslim jurists have seriously considered the issue of acquiring individual property for public good and have declared permissible and lawful to acquire the property in case of emergency and strong compelling circumstances. As a matter of principle it has been stated in Al-Mejalla :

المادة ١٢١٦ : لدى الحاجة يؤخذ ملك كائن من كان بالقيمة بامر السلطان
ويلحق بالطريق لكن لا يؤخذ من يده ما لم يؤد له الثمن
(المجلة لاحكام العدلية)

(i.e. in time of necessity, by command of the Sultan, a man's property can be taken for its value, and joined to the road. But until the price is paid his mulk cannot be taken out of his hands). It has been stated in "Durr-e-Mukhtar"

تؤخذ ارض ودار وحنوت بجانب مسجد ضاق على الناس بالقيمة كرها (درمختار

كتاب الوقوف ج ٢ ص ٦٦٦ ، ايج ايم سعيد كمبني كراتشي)

(if a mosque has become insufficient to accommodate the people and adjacent to that is some land or house or shop, that can be acquired by force, ^{after} making the payment".

It is mentioned in Fatawa Alamgiri:

ولو ضاق المسجد على الناس وبجانبه ارض لرجل تؤخذ ارضه بالقيمة

كرها كذا في فتاوى قاضى خان (الفتاوى عالمكيري ج ٢ ص ٤٥٦ ، مطبوعة كوئته)

"If a mosque becomes small for public requirement and there is a piece of land adjacent to it, it will be taken by force on payment of price to its owner". Similarly "Fatawa Qazi Khan" says,

وللسلطان ان يجعل ملك الرجل طريقا عند الحاجة (فتاوى قاضى

خان على هامش الفتاوى الهندية ، ج ١ ص ٧٩ ، انورى كتب خانه بشاور)

"The jurists have authorised the Imam to acquire the property of the person concerned for a way at the time

of urgent need". Imam Mohammad Ibn Hassan Shibani writes, "If the owner of a horse declines to lend the horse to the commander who has no other alternative except to get that from him and hand it over to the emissary of the Muslims to send a message to the Centre, at the time of the urgent requirement, he can forcibly take the same from him". Imam Sarakhsi commenting upon the same says it is because of the fact that the commander is an over all supervisor and it is permissible for him to forcibly acquire the property of other at the time of urgent requirement provided he makes payment for the same."

(شرح السیر الکبیر مادة ۱۸۴۱ ج ۳ ص ۹۹۴، معمد المخطوطات بجامعة الدولی العربیة)

Dr. Yusuf Musa, a contemporary jurist of repute writes,

ونیختم هذا الباب بذكر الملك الذى یثبت بواحد من تلك الاسباب المتقدمة (35)

أو بأى سبب آخره هو ملك تام حقاً فلا یزول عن صاحبه بغير رضی منه ولكن هناك أحوال استثنیت من هذا الاصل، فتزول فیها الملكية جبراً عن المالك وهى:

إذا اقتضى ذلك المنافع العامة كالطریق والجسور والمصارف وتوسیع دور العبادة ونحو هذا كله فانه فی حالة من هذه الاحوال واشباهها ینزع الضرورى من الاملاك الخاصة للمصلحة العامة، ویعطى صاحبه قيمة، ولو كان غیر راضٍ وقد فعل عمر بن الخطاب ذلك حین أراد توسیع المسجد الحرام بمكة، واقتدى به عثمان بن عفان مرة اخرى.

والامثلة والنظائر العديدة فتوفى
الفقه الاسلامی، الدكتور محمد یوسف موسى، ص ۱۰۱، ۱۰۲، ۱۰۳، مطبوعة مصر
سرا

"With this we close this chapter with mentioning the fact that the ownership which is established by one of the afore-mentioned causes or by any other reason is complete rightful ownership and it can never remove from the owner without his consent. However there are some conditions excepted from this principle where the ownership is forcibly removed from the owner and they are as follow:

"If it is required in public interest like construction of roads, bridges, extension in places of worship etc. In these and other similar conditions, the private properties

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shall forcibly be taken for public welfare/interest and the owner will be paid its price even if he is not willing."

Another very prominent scholar Professor Abu Zahra also writes in this connection,

والاحوال التي ينتزع فيها الملك من غير رضا صاحبه ترجع الى ثلاث :
أولها - نزع الملك لمنافع الكافة كنزع الملك للطريق العامة ، أو شق الترع .
وقد اعتبر بعض الفقهاء من المنافع العامة توسيع المساجد ، حتى لا تضيق بالناس
فقد نقل في حاشية الى السعود على منلا مسكين عن الزيلعي انه اذا ضاق
المسجد على الناس ، وجنبه أرض لرجل توخذ بالقيمة كرها ، لانه لما ضاق
المسجد الحرام اخذ الصحابة بعضا حرله من الاراضى بكرهه ، وادخلوها
في المسجد وهذا من الاكراه الجائز ،

والاصل في هذا هو ترجيح منفعة الكافة على منفعة الاحاد ولانه لا يترتب
على الاخذ من المالك كبير ضرره لانه يعرض بالقيمة و القيمة تقدر بمعرفة
اهل الخبرة العدول .

(الملكية ونظرية العقد في الشريعة الاسلامية . للامام ابو زهرة ، دار الفكر العربي)
(رد 144 / 145)

"And the conditions where the ownership is forcibly taken from its owner without his consent are based on three (principles):

First: Withdrawal of ownership from the owner in public interest like expansion of thorough fare etc. Some of the Fuqaha have considered expansion of mosques also, in the public interest, so that it does not fall short for the people. It has been mentioned on the authority of Abu Al-Saud who relates from Al-Zailai that if a mosque gets small (to accomodate people) and, there is a land of a person that shall be forcibly acquired on payment of price, because when the Masjid-e-Harram got small (for the people), the Sahaba forcibly took some of the surrounding lands and got them included in the mosque. This kind of compulsion is permissible."

Thes basic principle herein is the preference of public interest over individual interest. Moreover such

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acquisition does not cause great harm to the owner because he is compensated by payment of price which is to be fixed/assessed by just persons having expert knowledge."

22. These are some of the examples that show beyond any shadow of doubt that individual property is sacred and inviolable in normal circumstances and no one is permitted to take it without the consent of the owner. However at the time of urgency the rule has been relaxed to a certain extent in the public interest. There are several other injunctions also that establish the power of an Islamic just Government to the effect of interference in private property/life whenever urgently required in public interest. Some of the injunctions are as follows:-

- a) The people are at liberty to sell/ purchase things according to their free will. Therefore normally, the price control has been discouraged because the Holy Prophet (ﷺ) when asked about in this respect is reported to have said:

ان الله هو الصعر القابض الرزاق وانى لارجوان القى
الله وليس احد منكم يطالبني فى دم ولا مال (سنن ابى داود
كتاب البيوع ، باب التسعير)

However, in exceptional circumstances, the state is considered by many Muslim Jurists empowered to interfere and fix the same on reasonable basis. Imam Ibn Taimiyya and Allama Ibn Qayyim have discussed the issue in great detail.

(For details see:

(الحسبة فى الاسلام ، ابن تيمية ، ص ٢٠١ ، المكتبة العلمية مدينة منورة)
(الطرق الحكمية ، ابن القيم ، ص ٢٢٣ - ٢٣٩ ، دار نشر الكتب الاسلامية كراتشي)

- b) The right of pre-emption is another example wherein is found a preferential right of purchase which lays certain restrictions on free sale/purchase in public interest.

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- c) Normally there is no embargo on the people to collect/store things as much as they like to own. However, there are circumstances that the state has to interfere when there is dearth of some essential commodities that are required by the people. In such circumstances, as mentioned earlier, the Qazi is permitted to compel the hoarders to sell the essential commodities to the deserving persons.
- d) Another example is that of "Hajr" given in the Holy Quran in the following words:

ولا تؤتوا السفهاء اموالكم التي جعل الله لكم قياما وارزقوهم
فيها واكسوهم وقولوا لهم قولا معروفا (النساء ٤ : ٥)

"To those weak of understanding
Make not over your property,
Which Allah hath made
A means of support for you,
But feed and clothe them
Therewith, and speak to them
Words of kindness and justice.

Abdullah Yousaf Ali writes, "This applies to orphans, but the wording is perfectly general, and defines principles like those of Chancery in English Law and the Court of Wards in Indian Law. Property has not only its rights but also its responsibilities. The owner may not do just what he likes absolutely; his right is limited by the good of the community of which he is a member, and if he is incapable of understanding it, his control should be removed. This does not mean that he is harshly dealt with. On the contrary his interests must be protected, and he must be treated with special kindness because of his incapacity.

Your property: Ultimately all property belongs to the Community, and is intended for the support of you, i.e. the community. It is held in trust by a particular individual. If he is incapable, he is put aside but gently and with kindness. While his incapability remains, the duties and responsibilities devolve on his guardian even more strictly than in the case of the original owner; for

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he may not take any of the profits for himself unless he is poor, and in that case his remuneration for his trouble must be on a scale that is no more than just and reasonable." (See his commentary on the above verse)

- e) There are other occasions also when the State as a matter of right can intervene and compel the individuals to perform certain functions, assist the State in certain areas and extend specific financial and physical support to the State in emergent conditions i.e. during war, extreme shortage of necessary skilled labour and various other conditions related to public interest in the field of defence, education, developmental projects, social security etc. besides fulfilling its obligations and taking necessary measures in respect of maintaining law and order situation and public peace. Dr. Abdur Razzaq Alsinhori and Dr. Yousuf Musa have elaborately discussed various aspects of the matter in their books and the details may be perused over there.

مصادر الحق في الفقه الاسلامي : عبد الزاق احمد السنهوري
ج ٢، ص ١٩٤ - ١٩٨

الاموال ونظرية العقد في الاسلام ص ٢٠١ / ٢٠٢

23. The reasons why the State may do so is strongly related to the functions it has to perform. The Islamic State is duty bound to enjoin all that is good, forbid all that is evil and enforce Islamic injunctions at all collective and individual levels. Islamic state is the vicegerent of Allah Almighty to whom the entire universe belongs. He is the Creator and Owner of all things found over here. Human beings are actually the trustees of their wealth and property etc. Almighty Allah has delegated the authority to the citizens of the State who through their chosen representatives do exercise that within the limits prescribed by Him as a sacred trust. So in its capacity as the vicegerent of Almighty Allah the Islamic State exercises its powers and authority for the

individual and collective welfare and progress of its people. The Messenger of Allah (ﷺ) has been reported to have said:

السلطان ولي من لا ولي له (سنن ابى داؤد ، كتاب النكاح)

State is the guardian of those who have no guardian. This guardianship is not limited to Nikah and inheritance only. It extends to all matters of life because the State is duty bound to provide the requirements of its citizens. Allama Ibn Hazm a great Muslim jurist writes,

٧٢٥ - مسألة - قال ابو محمد وفرض على الاغنيا من اهل كل بلد ان

يقوموا بفقرائهم ، ويجبرهم السلطان على ذلك ، ان لم تتم الزكوات بهم ، ولا فؤ سائر اموال المسلمين بهم ، فيقام لهم بما يأكلون من القوت الذى لا بد منه ، ومن اللباس للشتاء والصيف بمثل ذلك ، وبمسكن يكفهم من المطر ، والصيف و الشمس وعيون المارة (المحلى : لا بن حزم ج ٦ ص ١٥٦)

"It is the responsibility of the wealthy persons of a country to look after their poor people. If the income from zakat and Fay is not sufficient to meet the requirement, the State (i.e. ruler) shall compel them (i.e. the wealthy persons) for the same. The State shall make arrangement to provide such financial measures for the poor that would suffice for their food, according to their requirements, clothes for winter/summer seasons and a house that may provide them shelter from rain, heat and eyes of the way farers".

24. So it is quite evident from the above that although the individual is at liberty to gain, sell, purchase, invest, transfer and utilize his property as he likes to do so; ~~However~~ there are some circumstances where his powers to do so could be curtailed, to a certain extent, in the public interest. These circumstances are related to the dire necessity and other

special requirements. The Muslim Jurists have dwelt at large on such circumstances and have thrown light on them. Commenting upon the maxim **ما اباح للضرورة يقدر بقدرها** as discussed by Allam Ibn Nujaim, Allama Sa'ad Ahmad Ibn Muhammad Hamavi has written:-

"في الفتح القدير ههنا خمسة مراتب ضرورة وحاجة ومنفعة وزينة وفضول فالضرورة بلوغه حدا ان لم يتناول الممنوع هلك او قارب وهذا ما لا يجوز الحرام والحاجة كالجائع الذي لو لم يجد ما يأكله لم يهلك غيرانه يكون في جهد ومشقة وهذا لا يبيع الحرام ويبيع الفطر في الصوم والمنفعة كالذي يشتهي خبز البر ولحم الغنم والطعام الدسم والزينة كالمشهي بحلوى والسكر والفضول التوسع باكل الحرام والشبهة (الاشياء والنظائر لابن نجيم مع شرح غزعيون البصائر للحموى طباعت ادارة القرآن كراتشي ج 1 ص 119)

"The need has five stages according to its requirement:

- Necessity (ضرورة)
- Special requirement (حاجة)
- Utility (منفعة)
- Luxury (زينة)
- Redundant (فضول)

Necessity is reaching (of the individuals) to a stage that if he does not take the unpermissible thing, he will die or will be about to die. Such occasions make the utilization of Haram as permissible. Special requirement is like the condition of a hungry person who wouldn't die if he does not take 'Haram', however he would encounter great difficulty and hardship. Such a stage does not permit (eating/taking of) Haram. However it does make it permissible to break fast. Utility need of a person is his desire to take bread and butter and mutton (although he has enough other edible things). Luxury need of a person is his desire for sweets etc. Redundant needs are his extended ambitions to take Haram and doubtful things."

25. As is clear from the above discussion the stage of necessity is such that makes the utilization

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of "haram" as permissible to the unavoidable degree. The second stage of special requirement is such that it does not call for the permissibility of a prohibited thing. However, if the same condition prevails and assumes a general collective requirement, that also takes the place of dire necessity and consequently causes change in the Shariah injunctions.

26. Most of the above discussions pertain to the acquisition of individual property in public interest which in certain urgent conditions is permissible to a certain unavoidable extent as is held by the Shariat Appellate Bench, Supreme Court of Pakistan (PLD 1990 SC, page 99). Since requisitioning is comparatively much less in severity, the same injunctions could be conveniently and more forcefully made applicable in case of requisitioning of immovable property in public interest at the time of necessity by the Islamic State.

27. At this stage it also seems necessary to refer to the words "public interest" and "public purpose", used frequently, and explain their meaning for a better understanding of the context they are used herein. As a matter of fact no hard and fast rule can be drawn for determining precisely what is meant by "public interest/purpose". That can better be determined by the facts and circumstances in each case. However for the sake of convenience, as a general rule, it can be held that public interest, as we have used it, means something in which the interests of the public, the community at large, are kept in view and are duly looked after.

"Words and Phrases Legally Defined" compiled under the Editorship of John B. Saunders, highlighting the meaning

of "public purpose," writes:

"The word 'public purpose' means a purpose approved and authorised by law. A public purpose has for its objective the promotion of the public health, safety, morals, welfare, security, prosperity, and contentment of all the inhabitants or residents within a given political division".

(Permanent Edition-35, page 555)

The same book gives a citation regarding the word "public interest" as follows:

"The 'public interest', where such is essential, before Legislature may, in an exercise of state's police power, subject private property to public regulation and control, must be a legal interest and not merely a desire born of personal concern, convenience or economy covetous of use of another's property".

(Permanent Edition-35, page 229)

It further gives another citation as under:-

"The 'public interest' necessary to justify subjecting private property to public regulation and control must amount to something more than a desire to regulate conceived out of personal concern as to future events, convenience, or covetous use of another's property, and mere curiosity or the interests of particular localities which may be affected by the matter in question do not constitute such public interest".

(Permanent Edition-35, page 230)

28. It means that it would not be enough merely to use the word "public interest" or "public purpose" to justify grabbing of whatever is considered expedient or necessary. The public interest and public purpose must

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be objectively ascertained before taking any action for the requisitioning of any property. "Public interest" and "necessity" are the only consideration that would justify the interference to an unavoidable limit.

29. Keeping in view the above mentioned details we have come to the conclusion that the property of an individual can be requisitioned on proper rent if it is urgently required in public interest. For this purpose the following broad principles however would be applied:

- a) It is not permissible to compel anyone to effect an "ijara" deed in the normal circumstances.
- b) (Compulsory) requisition of property is only permissible at the time of extreme necessity and urgent requirement. As explained above it also includes the condition where without effecting the same the people will be confronted to severe hardship.
- c) Before taking action as mentioned above at (b) it is to be confirmed that there is no other way out except resorting to the same measure. Such decision is to be taken after thorough consideration of all possible solutions. It means that a mere vague pretext of "public interest" is not sufficient to resort to use force unless the necessity or general requirement is clearly ascertained. As far as possible the requirement is to be objectively analysed and assessed so that no undue torture is caused to the citizens of the State.
- d) While giving hearing to the owner, if he is reluctant for the same, his personal present or future requirements are to be duly and compassionately considered.

(2)

- e) For acquisition of this nature, the rent of the same is to be justifiedly determined according to the current market value by keeping in view the locality rates in the adjacent areas, covered area, total area, and any other yard stick that is normally applied in such cases. The investments of the owner and his monthly instalments of loan of HBFC/Banks should also be taken into consideration for a just and fair assessment. The rent must not be arbitrarily fixed in any case. Depending on the nature of the requirement, the rent may be enhanced to provide further incentive to the un-willing owners. The Holy Quran says:

"ولا تنقصوا المكيال والميزان" (هود : ٨٤)

"And give not short measure or weight". (11:84)

"ويا قوم اوفوا المكيال والميزان بالقسط ولا

تبخسوا الناس اشياءهم" (هود : ٨٥)

"And O my people! give just measure weight, nor withhold from the people the things that are their due".

(11:85)

"واقبوا الوزن بالقسط ولا تخسروا الميزان"

(الرحمان : ٥٥ : ٩)

"So establish weight with justice and fall not short in the balance".

(55:9)

- f) Besides fixation of the rent according to the market rate, payment of the same is to be done according to the prevalent custom of the locality i.e. lumpsum payment of rent for a period of two years etc or in any other manner as the case may be.

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- g) The rent is to be periodically indexed to keep it just and fair according to the nearby area.
- h) The payment of such rent is to be done as soon as possible without any unavoidable delay excepting only the delay that is normally required for obtaining the approval of concerned officer and sanctioning/issuing the requisite amount.
- i) The requisitioning is to be done for a fixed period, according to the requirement and the property requisitioned as such must be vacated in accordance with the terms of the contract.

30. Consequently after considering all necessary aspects relating to the Act under consideration we have found as under:-

- (1) Section 3(1) authorises the requisitioning of building by the Government whenever it is found necessary or expedient for the use of Officers or Offices or educational institutions of the Federal/Provincial Governments or any corporate body established by or under their authority. The building used for the purpose of religious worship, imparting education through the private educational institutions, in occupation of the owner (including the successor-in-possession of a lessee for a fixed period who has paid rent for the whole of that period in advance), evacuee property and buildings situated in cantonment are exempted from requisitioning under the proviso of this section. However, another provision has also been added to this sub-section that:

"if a building is in occupation of any person, no order for its requisitioning shall be passed unless a



notice of, at least, two weeks is given to the occupant to show cause against the action proposed to be taken and if and when an order of requisitioning is passed, the occupant shall be allowed a period of one month, at least, to vacate the building and such occupant shall thereupon comply with that order".

- (2) Since this section authorises the Provincial and Federal Governments and corporate bodies mentioned therein to requisition any building in public interest, whenever it is necessary or expedient and also provides the owner of the building an opportunity of being heard and of showing cause against proposed action, there is found no repugnancy to the injunctions of Islam, as far as the requisitioning for offices and educational institutions is considered. However the requisitioning of a building for the use of officers is not justified on the ground that it does not fall in the category of "public interest". The said officers could also be directly or indirectly a party and it wouldn't be possible for them to be the judges of their own cause. The established norms of justice would thus be violated and undue pressure or partiality would be exercised. So requisitioning of buildings without the consent of their owners for the use of officers is not in conformity with the injunctions of Islam as discussed earlier and is thus repugnant to the injunctions of Islam. Moreover the fourth proviso about the ejectment of an occupant of the house ^{who} could also be a tenant for a certain period according to an agreement but who would not be an owner within the meaning of sub-section (iii) to Section 2 in the sense, to have paid rent for the whole of that period in advance is also repugnant to the injunctions of Islam. The Holy Quran says:

"واوفوا بالعهد ان العهد كان مسئولا"
(بنى اسرائيل ١٧ : ٣٤)

"Fulfill (Every covenant
For (every) covenant
Will be enquired into
(On the day of Reckoning). (17:34)

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and the Holy Prophet (ﷺ) has said:

"المسلمون على شروطهم" (سنن أبي داود، كتاب

القضاء، ج ٢ ص ١٥٠، إيجام سعيد كميني كراتشي)

(The Muslims are to abide by their conditions). Such an occupant is to be allowed to stay in the building undisturbed for the period he has made an agreement thereof with the owner, even if he has not paid the rent in advance.

31.

(1) Section 7 is regarding the payment of the amount of compensation payable monthly to the owner for the use and occupation of the requisitioned building and depositing the same in the court by 5th of each succeeding month after an order of requisitioning is passed. This section also authorises payment of the amount of assessed compensation within a period of three months from the date of requisitioning and in case the amount is not deposited within that period, the Provincial Government has been made liable to pay interest on the principal amount at the rate of six percent per annum till the date of deposit or payment as the case may be.

(2) This section provides the payment of interest on the principal amount in case the amount of compensation is not deposited within a period of three months. Obviously this portion is not in accordance with the injunctions of Islam. The compensation to be fixed must be appropriate and in accordance with the prevailing rates of rent of similar building in the adjacent locality as mentioned at para 29 above and must be paid to the owner without fail so that besides fulfilling the condition of the agreement of IJARA, no harm is caused to the owner. There must be provided a penalty in the Act for the Officer who

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fails to perform his duty in this respect. After making such enactment, there will remain no need for the payment of interest which is forbidden by Almighty Allah and is against the injunctions of Islam.

32.

- (1) Section 11 authorises exemption from legal processes whereby no injunction or an order for ejectment, delivery of possession or appointment of receiver in respect of any building which has been requisitioned under this Act shall be granted or made by any Court or by any other authority and no such order shall be called in question in any Court. Similarly Section 12 also provides protection of action under this Act. Sub-section 2 of this Section further specifies that no suit or other legal proceedings shall lie against the Government for any damage caused or likely to be caused by anything in good faith, done or intended to be done in pursuance of this Act or any order made thereunder.
- (2) This section alongwith section 12 provide ouster of judiciary and exemption from legal processes and gives an unbridled authority to the Requisitioning Officers and as such against the injunctions of Islam as contained in verse 59 of Al-Nisa:

" يا ايها الذين آمنوا اطيعوا الله واطيعوا الرسول واولى الامر منكم فان تنازعتم في شئ فردوه الى الله والرسول ان كنتم تؤمنون بالله واليوم الآخر

ذلك خير واحسن تاييلا (النساء: ٥٩)

"O ye who believe!

Obey God, and obey the Apostle, And those charged

With authority among you.

If he differ in anything

Among yourselves, refer it

To God and His Apostle

If ye do believe in God

And the last Day

That is best, and most suitable

For final determination." (4:59)

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A golden principle as mentioned by the Holy Prophet (ﷺ) is
"لا ضرر ولا ضرار" (سنن ابن ماجه، كتاب الاحكام،

حديث رقم ٢٣٤٠، دار احياء الكتب العربية)

"Damage and retaliation by damage is not allowed".

The Holy Quran says:

"لا تظلمون ولا تظلمون" (البقرة: ٢٧٩)

"Deal not unjustly and ye shall not be dealt with unjustly". (2:279)

33. In result this Shariat Petition is allowed to the extent as stated above and in view of the reasons stated we consequently hold that sub-section (1) to Section 3 of this Act to extent of requisitioning of property for officers and to the extent of the fourth proviso relating to the ejectment of an occupant of a building, Section 7 to the extent of failure to pay rent as well as subsequent payment of interest thereon, and Sections 11 and 12 to the extent of ouster of judiciary are repugnant to the injunctions of Islam as contained in the Holy Quran and Sunnah. To bring these sections in conformity with the injunctions of Islam, therefore, we order that all these sections be amended according to our observations made at paras 30, 31 and 32 stated above. The necessary amendments shall be made by 31st December, 1991 whereafter the said sections/provisions shall cease to be effective and operate as law.

(DR. FIDA MUHAMMAD KHAN)
JUDGE

(DR. TANZIL-UR-REHMAN)
CHIEF JUSTICE

(IBADAT YAR KHAN)
JUDGE

(ABDUL RAZZAQ A. THAHIM)
JUDGE

Islamabad, 12th Aug, 1991
M. Arshad Khan.

File for reporting
Muhammad

Amended by our Lady
Tanzil-ur-Rehman
(Chief Justice)