

IN THE FEDERAL SHARIAT COURT
(ORIGINAL JURISDICTION)

PRESENT

MR.JUSTICE AFTAB HUSSAIN	CHIEF JUSTICE
MR.JUSTICE ALI HUSSAIN QAZILBASH	JUDGE
MR.JUSTICE CH. MUHAMMAD SIDDIQUE	JUDGE
MR.JUSTICE MAULANA MALIK GHULAM ALI	JUDGE

SHARIAT PETITION NO.K-2 OF 1982

Syed Maqsood Ali	Appellant
Versus	
Government of Pakistan & Government of Sind	Respondents
For the Petitioner	Mr.Faiz-ud-Din, Advocate
For the Govt. of Pakistan	Mr.Anwar Ahmed Qadri,Advocate
For the Govt. of Sind	Mr. Abbas Farooq Advocate
Court Juris-Consult - Dr.Qazi Mujibur Rahman	
Date of Hearing	5-4-1983 & 6.4.1983
Place of Hearing	Karachi High Court Building, Karachi.
Date of Announcement	22-11-1983

J U D G M E N T

AFTAB HUSSAIN,CHIEF JUSTICE

This order will dispose of S.P K-2 of 1982 and the suo-moto examination of the Prevention of Smuggling Act (Act XII of 1977).

2. The above petition was filed by Syed Maqsood Ali claiming that Notification No. S.R.O. 474(I)/77 dated 1st June, 1977 as amended by a Notification dated 1.7.1981 which permits import inter-alia of car only for use of the family or for making gifts, is repugnant to the Shariah to the extent that it imposes restrictions on the sale of that car during the period specified therein.

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3. The prayer in the petition is:-

"Under the circumstances it is respectfully prayed that the law which imposes uncalled for restrictions, checks or impediments beyond Islamic injunction upon the sale of legally imported goods in Pakistan and all rules framed thereunder and all actions taken or competently contemplated to be taken by the respondents under the present and feigned system of law, be declared as against the injunctions of Islam and punitive steps to punish innocent people as unIslamic and bad ab initio".

4. The prayer clause is rather broadly worded, but when the case was actually heard at Karachi, the learned counsel confined himself to the proposition as stated above.

5. Alongwith the petition were filed 'Fatawa' of Mufti Wali Hassan and of Mufti Waqar-ud-Din, of Madrasa Darul Ulum Amjadya in which it is stated that if a Pakistani who goes abroad in connection with business or service etc, brings from there foreign goods as a matter of right on which he pays customs duties, sales tax and other taxes, has full powers of disposal over it and under the Islamic Law no limitations can be imposed upon its sale. The buyer of such property is a lawful buyer.

6. A fatwa of Mufti Abdul Rauf of Karachi was also filed. It is stated there that the answer would depend upon the motives of the importer. If he imported the thing for use of his relatives he can dispose it off by sale also but if the import was effected for business purposes, it is not legal.

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7. The Prevention of Smuggling Act (Act XII of 1977) provides for Preventive Detention of a person indulging in smuggling, setting up of a Court of Special Judge to proceed against a person accused of smuggling, the procedure of the Special Judge and the nature of the order that can be passed by him and the provisions about appeal against the orders of the Special Judge. It also declares it unlawful for a person to hold either in his own name or in the name of any relative or associate any property acquired by smuggling, and provides for forfeiture of such property.

8. When the petition of Syed Maqsood Ali came up for hearing before a Bench of this Court on the 31st of July, 1982, it was admitted for a regular hearing with the following order:-

"We have heard Mr. Faiz-ud-Din at length. The Customs Act deals partly with the imposition of taxes and customs duties and partly with the import of goods for personal use or for gift with or without payment of the duties upon the same, and restrictions upon the transfer of those goods. So far as the first question is concerned we are afraid that our jurisdiction does not extend to such considerations nor this question is specifically raised in the petition. The second question, however, requires consideration. Petitioner submits that no restriction upon the sale or transfer of such goods can be placed on their imports in the country as those restrictions are in conflict with the right of property which Islam allows to every citizen. It may be expedient to clarify the Muslim Law on

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the subject referred to in the second problem. We, therefore, admit this case for consideration on that point only. Notice to the Federal Government as well as the Attorney General of Pakistan and any representative/representatives appointed by him or by the Central Government for appearance before the Court. The names of Juris-consults to whom notices shall be sent are the following:-

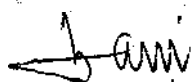
1. Maulana Muntakhibul Haq.
2. Maulana Sami-ul-Haq.
3. Syed Ghulam Abbas Shah Zaidi.
4. Dr. Qazi Mujibur Rehman."

Maulana Muntakhibul Haq and Maulana Sami-ul-Haq did not turn up nor sent their opinions in writing, which is regrettable. Syed Ghulam Abbas Shah Zaidi, President District Shia Board, Dera Ismail Khan, however, gave the same opinion as reproduced from the Fatwa of Mufti Wali Hassan. However, Dr. Qazi Mujibur Rehman appeared in person and addressed the Court at length, on two questions, namely, the concept of ownership of property in Islam and the right of the Government to impose such limits as stated above. Mr. Anwar Ahmed Qadri, Advocate appeared on behalf of the Government of Pakistan and supported the conditions in the above Notification.

9. These rules do not apply to the cars. The rules governing import of cars for gifts to a family member in Pakistan are known as Rules Regarding Import of Cars under Personal Baggage or as gift to a family Member in Pakistan

Rule 5 thereof provided:-

Rule 5: 'A Car imported under this scheme by a Pakistani National shall not be sold,



transferred or alienated in any manner within a period of one year from the arrival of the Car in Pakistan.

10. In view of the restriction on sale, transfer or alienation of the Car imported under these rules, the importers had to declare in Annexure III "that car imported under the provision shall not be sold/transferred within a period of one year from the date of its arrival in Pakistan" (clause V of Annexure III) and had to give an undertaking to the same effect in application form, Annexure I.

11. In the import Policy, 1980-81, the restriction on sales was lifted and permission for sale or transfer was granted to such importers.

12. By letter No. II (259)/78-Imp. V dated 23-9-1980 issued by the Ministry of Commerce the Pakistan Missions abroad were advised to strike off clause (5) of Annexure III of the Gift Undertaking Certificate referred to above.

13. The **P**assengers (Non Tourists) Baggage (Import) Rules, 1977 as amended on 1-7-1981¹ were substituted by the Rules of 1983 of a similar name. Rule 2 reproduced above from the rules of 1977 have undergone slight amendment in the language. Rule 2 of the Rules of 1983 is therefore reproduced below:

Rule 2: In these rules, unless there is anything repugnant in the subject or context, "Baggage" means used or new personal wearing apparel and other personal, professional or household effects of a passenger, excluding motor vehicles and motor cycles, provided that such articles are imported by the passenger for his family or for making gifts,

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whether such articles are exempted from customs duty or not".

The present position is that the restrictions on sale/transfer of cars imported under personal baggage or for gift to family members has been removed since long before the filing of the Petition. In a way this petition was infructuous. But Rule 2 of another set of rules of 1982 repeat in respect of other articles imported under Baggage Scheme by Pakistan nationals/^{and} still lay down that such articles can not be imported for sale but are meant only for the family of the importer or for making gifts. The arguments at the bar were also addressed on the basis of similar rules of 1977. Moreover, the Prevention of Smuggling Act XII of 1977 is also under consideration. It is for these reasons that we thought it advisable to dispose of these questions by a well considered judgment instead of dismissing the Petition as infructuous.

14. The Notifications containing the rules of 1977 and then of 1983 were issued in exercise of the powers conferred by Section 219 of the Customs Act read with Item 17 of the third schedule thereto. It deals with the rights for passing the incoming baggage at the customs station of passengers, other than tourists arriving from foreign countries other than India.

15. Mr. Faiz-ud-Din, the learned counsel for the petitioner merely referred to the principles cited in the grounds that what is "Halal" (permitted) cannot be made "Haram" (prohibited) and vice-versa and a person who is the full owner of the property has a right to sell it as stated in Section 366 of Mejalia (محلة الاحكام العرفية).

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16. In the petition, there is also a reference about the best earning as defined by the Holy Prophet (P.B.U.H) that it means that which is the result of labour by hands and trade in which the traders avoid dishonesty or fraud. It is also stated that the Holy Prophet (P.B.U.H) said that a trader who acts with honesty shall be in the company of the Prophets, honest persons and Martyrs on the Judgment Day. No further arguments on these points were addressed by the learned counsel.

17. This Court has already given a detailed judgment on the concept of property in Islam and the right of the State to acquire private property with or without compensation. The purport of these findings which were arrived at after consideration of Quranic Text and traditions of the Holy Prophet (P.B.U.H) traditions of His Companions and various Juristic opinions, is that private property does not mean that the owner thereof has full right over it. These rights are subject to the restrictions of public weal and elimination of mischief. In view of the rights of Ummah in the property of an individual it is open to the State to acquire it even without compensation where the acquisition is for public good. Though this principle will be applicable when the State finances are in a stringent position, but generally the Government should award compensation on the basis of market value.

18. According to Ibne Nujaim, ownership is the power recognized by the law-giver to utilize (the property). He says, it ^{is} admissible to add the word ^{الأكلانغ} (provided there is nothing to prevent) (Al-Asbbah wal-Nazair page 346)

19. The more important word are يتبناها الشارع (recognized by the Law-giver). The word شارع is used for Allah and the Holy Prophet (P.B.U.H) and, in a matter where there is no prohibition, اولوالالامر (person in authority).

Dr. Qazi Mujibur Rehman argued that the word share in the definition of Ibn Nujaim has been used to mean اولوالالامر (person in authority) who can legislate in matters which are not covered by the Quran and Sunnah of the Holy Prophet (P.B.U.H) - it appears to be correct since Ibn-e-Nujaim has subsequently qualified the definition with the words "provided there is nothing to prevent". These words clearly refer to a prevention or prohibition effected by the Quran and Sunnah. In Lane's Lexicon also the word شارع is said to include the learned man who practises what he knows and instructs others الشارع الرباني and hence it is applied to designate the Prophet (P.B.U.H) or as meaning the legislator or the announcer of the law; or who made manifest and framed the religion or religion of God.

20. If the word شارع is used in this meaning, one of the ingredients of the definition would be the recognition by the laws of the State of the powers of utilization of the property by the person claiming its ownership. Ownership is, therefore, subservient to State legislation.

20. As stated above, this Court has already held in Hafiz Muhammad Ameen etc. Versus Islamic Republic of Pakistan and others P.L.D. 1981 FSC 23(52) that Islam recognises private ownership to the extent that it is

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- 1) they are its guardians as trustees
- and 2) it is like their own property.

In fact, the reference Amwalokum suggests that the property of individuals is joint for all the members of that community, and is transferred from one hand to another and from one ownership to another ownership which means that this property is for them when they require it.

22. The second is the opinion of Abu Musa, Ibne- Abbas, Hasan, and Qatada. (Al-Jamiu Liahkamil Quran, Volume 5 page 29).

23. The important portion in this second view is that property has been made joint between **خلق الله** (Creation of Allah) which means that it is not only the individual owner who has an interest in property; the entire Ummah also has some interest or entitlement to it.

24. In this respect Allama Rasheed Raza is more specific. In Tafsir Al-Manar (Volume, 4 P.311) while commenting on the above verse he says:

"Here the word **اموالهم** "their property)" has not been used but the address is to the guardians although the property belongs to the foolish persons who are under their guardianship for the following reasons:-

Firstly, if the property is destroyed and nothing is left for the foolish person which he may spend, it would be obligatory upon the guardian to spend upon him from his own property (resources), the destruction of the property of the foolish will necessitate the expenditure from the property of the guardians. So the property (property of the foolish person) is his own property.

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Secondly, when these foolish persons acquire intelligence and their property is secured for them and they utilize it like intelligent persons and spend from it according to the dictates of the Shariah for the general and their particular benefit, it means as if the guardians have also shared it.

Thirdly, the security of provisions for the Ummah and the regard of welfare for any of its member is like the welfare of other members of the Ummah.

25. At page 312, Allama Rasheed Raza refers to the opinion of Imam Razi that the reference in this verse is to the joint welfare and benefit of guardians and their foolish heirs in the property which is evident. He then says that his own teacher (Mufti Abduhu) understood it in the sense of the unity of Ummah and the security of provisions for it about which there are many precedents in the Holy Quran.

26. Dr. Yousuf Qarzawi in his book deals with rules of earning or acquisition of money. He says that "the general principle of earning is that Islam does not permit its believers to earn money in any way they like". Islam differentiates for the Muslims between the permissible ways and those which are not permissible and this difference is based on public welfare. The fundamental basis for the difference is that it deals with acquisition of the property and if obtaining of benefits from it is not possible except by causing harm to others, it is not permissible. On the other hand all the means and sources of earning practised by the people in which they do not harm one another are permissible. At page 277, he writes "when the property of the

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person is so secured that it prevents another person from tress-passing over it or from destroying it, it is incumbent upon the owner also not to waste it foolishly because the principle is that the community has also a right in the property of an individual.

Indeed, the real owner of the property is Ummah and it is for this reason that in Q.4:5.

community is authorised to restrain a ^{سفيه} from destroying his property". Dr. Yousuf Qarzawi has followed the view of Mufti Abduhu that the Verse Q.4:5 addresses the Ummah (and not the guardians) and the word ^{الاولم} has been used with reference to Ummah because in fact the property of each individual is the property of the Ummah (Al-Hala^l Wal Haram, page 156 and 272).

27. The whole legislative process in Islam, whether there be specified legislation in the Quran and the Sunnah or the legislation is left, by way of ^{اجتهاد} to the Imam, is based upon the principle that laws should advance the benefit of the Ummah and should remove from them possibilities of mischief. It is for this reason that as stated in ^{الدر المختار} (Urdu) Vol. 2 page 456 Imam has also to sentence a habitual thief to death in the interest of Ummah while according to the Quran the sentence is of cutting of hands. This has been permitted in the interest of the State and the people living therein. The sentence of death is pronounced with the object of elimination of mischief.



28. The power to allow export or import and to regulate it is exercised by the State in the interest of industrialization, trade and business of the country as well as to save the foreign exchange reserves ^{from} /exhaustion. There can be no two views on the point that each State has to accumulate and keep in reserve foreign exchange because on it would depend the purchasing power of the country of its own money as well as its own spending. The source of earning of foreign exchange is primarily the export of goods from a country. The import of goods which involves the expenditure of foreign exchange is regulated so as to maintain the reserves. In poor countries like Pakistan restrictions have to be placed on imports of goods so that saving of foreign exchange may be ensured and the amount of foreign exchange spent on import should be less than the amount of foreign exchange earned. Sometimes the import has to be prohibited from a particular country which is hostile to one's own country.

29. There is at least one instance in which the supply of food grain to Meccans was cut off from a Muslim tribe. This was not disapproved by the Holy Prophet (P.B.U.H). On the other hand, when the Meccans beseeched to lift the ban, he graciously lifted it. The story may be reproduced from the Muslim Conduct of State by Dr. Muhammad Hamidullah, Section 392 (C) at page 196.

Section 392 (C)

"Thumamah bin Uthal was a Chieftain of Yamamah. Early in the year 6 H, he was taken prisoner by a Muslim detachment, and

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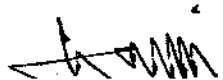
brought to Madinah. Here the gentle treatment of the Holy Prophet impressed him so much that he embraced Islam. On return journey, he passed through Mecca and heard some abusive cuts on his conversion. He said: Not a grain of Yamamah can now be imported into your city, unless the Holy Prophet directs otherwise. A famine is said, consequently, to have ensued in Mecca. The Meccans were constrained humbly to beseech the Prophet to lift the ban, which he graciously did. Although many details of this case lie in darkness, it is sufficient for us to conclude that it all depends upon a government to direct its subjects whether and how far they may trade with an enemy".

* There are some cases regarding import. The Holy Prophet (PBUH) refused to fix prices of the food grains because it was imported from outside and the fixation of price was likely to interfere with the import of essential goods. Hazrat Umar similarly, liberally encouraged import of food grains during famine.

30. These instances establish that it is within the powers of the State to allow or disallow or restrict export or import of goods as may be found expedient in public interest or in the interest of the State. About the customs duty also Dr. Muhammad Hamidullah cited number of rules and examples from Abu Yousuf and Al-Shaibany in para 282.

Para (282)

"The Prophet himself took the initiative of giving impetus to trade and commerce even at the expense of State income. Thus it was that he abolished all inter-provincial customs duties within the realm, and the many treaties concluded by him with tribes submitting to his authority expressly stipulate that. Foreign trade, however, remained subject to the usual tithe or whatever percentage was stipulated for by express treaties and conventions between



States. The treaty for levying a tithe on the traders of Manbij (Hierapolis) is said to be the first of its kind in the time of Umar. The words tariff and douane ~~are~~ cognate words in European languages, borrowed from Arabic, have a history in themselves. There is an implied reference in the writings of Ash-shaibany that sometimes the goods for trade belonging to minors or women or in custody of slaves were exempted in Islamic territories from customs duties. Again, goods of less value than 200 drachmas belonging to a person were customs free. Abu Yousuf records an interesting correspondence exchanged between 'Omar and his governor, Abu Musa Al-Ash'ary

Al-Ash'ary wrote:

"Some traders of ours go to non-Muslim territory where they are subjected to tithes. Omar replied: Levy thou also on theirs as they levy on Muslim traders".

The initiative taken by the Holy Prophet (PBUH) in abolishing Internal/Provincial customs duty within the region was not for legalizing free trade and prohibiting permanently any restrictive law on trade. It was clearly to give stimulus to trade and commerce in those days for maintaining supply of essential goods. The matter in fact pertains to State Policy at a particular time or in a particular age. It is permissible for the State to impose restriction on export or import in the interest of public or lift any or all of those restrictions. If the free trade is in public interest, it ~~be~~ may taken resort to. If restriction is necessary to be placed in matter of import or and export, action can be taken accordingly.

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31. It is presumably for the State to impose customs duty or to exempt any category of persons from it. The Customs Act confers powers on the Federal Government to provide for restriction on bringing into or taking out of Pakistan of any goods of specified description by air, sea or land (S.16) and also prohibit certain categories of goods from being imported into Pakistan (S.15). It also provides for sanctions against the violation of the provisions of Section 15 or a Notification issued under Section 16. None of these provisions can for the above reasons be said to be repugnant to the Quran and Sunnah.

32. The Act also deals with levy of and exemption from customs duty which for the same reasons are also not repugnant to the Holy Quran and the Sunnah of the Holy Prophet.

33. Now, I may resume consideration of the actual point involved in this petition. Chapter 15 of the Customs Act makes a special provision regarding baggage and goods imported or exported by post. Section 139 provides that the owner of the baggage whether passenger or crew shall have to make a declaration about the articles carried with him or contained within his baggage and shall produce such baggage and such articles for examination. Section 140 is for the determination of rate of duty in respect of baggage but Section 141 deals with bonafide luggage which is exempted from duty.

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34. According to the baggage rules, a person may bring the articles specified therein, provided they are bonafide meant for his own use or for making gift. The bonafide imports for one's own use or for making gifts excludes the possibility of permission for bringing such goods for sale. The Question therefore, is not whether the property on which customs duty has been paid and which is subject to the restrictions of bonafide gifts is the property of the person who imported it or of the donee. The restrictions on its sale is only laid down to stress that it is bonafide import for One's use or for the purpose of gifts. The permission to import is a conditional permission and if a person imports some goods as a part of his baggage, he agrees to abide by the conditions. It, therefore, becomes a contract between the said importer and the Federal Govt. and the principle being *المسلمون على شروطهم الا شرطا حلالا حراما او حراما حلالا* (the Muslims are bound by their stipulations except when it permits a prohibited act or prohibits a permissible act) the importer as well as all those persons in whose hands property comes are bound by conditions under which the importer had agreed to import any property as a part of his baggage.

35. The other principle which is applicable is *لا ضرر ولا ضرار* which means that damage and retaliation by damage is not allowed (see Section 19 ^{مقابلة} *مجلس*). It has already been discussed above that it is permissible to impose restrictions on imports and exports inter-alia to eliminate possibilities of any mischief. Loss or damage to the public interest is such a mischief.

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Mr. Anwar Ahmed Qadri, Advocate referred to the principle of *مذورة* or expediency. The principle is *الضرورات تبیح المحظورات*

(necessity legalizes even what is prohibited).

It is not necessary to discuss this principle since in our view the State is functioning within its legislative powers by imposing restrictions on imports and exports and hence the question of necessity legalizing what is prohibited is not relevant.

Mr. Anwar Ahmad Qadri Advocate also referred to the principle of *بالفضل* ^{Ribh al Fazl} but in our view that principle also is not relevant.

36. The petition is liable to fail.

37. The Prevention of Smuggling Act XII of 1977 has been enforced to control the anti-social activities of smugglers, who bring within the country or take out from it their goods about which restrictions have been imposed under Section 16. They also do not pay the customs duty imposed by the Act and sell the property so imported quite cheap in the market. They thus cause damage and loss to the businessmen who bonafide import the same goods after payment of customs duty. They also flood the market with foreign goods and thus cause damage to the process of manufacture of those goods in the country. They cause damage to the coffers of the State. In these circumstances, the provision about elimination of anti-social elements or of their prosecution and forfeiture of the smuggled goods

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are in the interest of the State and its citizens. We do not find any repugnancy in this Act with the Quran and Sunnah.

39 The petition is dismissed.

Atta-ur-Rehman
CHIEF JUSTICE

Atta-ur-Rehman
JUDGE- I

M. J. Akbar
JUDGE- III

Atta-ur-Rehman
JUDGE IV

Announced at Karachi
Atta-ur-Rehman 22/11/83
Karachi, the 22nd of November, 1983
Atta-ur-Rehman

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23/11/83
File for reporting
Atta-ur-Rehman