

IN THE FEDERAL SHARIAT COURT

( Original Jurisdiction )

OSA 9/89  
②90

PRESENT

Mr. Justice Gul Mohammad Khan CHIEF JUSTICE  
Mr. Justice Dr. Mufti Syed Shujaat Ali Qadri  
Mr. Justice Ibadat Yar Khan  
Mr. Justice Allama Dr. Fida Mohammad Khan

SHARIAT PETITION No. 5/K of 1984.

Shaikh Mushtaq Ali, -- Advocate	Petitioner
Versus	
Government of -- Pakistan	Respondent
Counsel for the -- petitioner	Sh. Mushtaq Ali, Advocate, in person Mr. Muhammad Asar Hussain, Advocate.
For the Federal -- Government	Dr. Riazul Hassan Gillani, Deputy Attorney General. Mr. Anwar Ahmad Qadri, Advocate. Hafiz S.A. Rahman, Advocate.
For the Punjab Govt. --	M/s Farooq Bedar, and Syed Iftikhar Hussain Shah, AAG, Punjab.
For the NWFP Govt. --	Mr. Rehman Khan Khalil, A.A.G., NWFP.
For the Baluchistan -- Government	Mr. Muhammad Yaqoob Khan Yousafzai, Advocate.
For the Sind Govt. --	Mr. Abdul Waheed Siddiqui, Advocate, on behalf of A.G. Sind.
For the State Bank -- of Pakistan	M/s Zafar Muhammad Khan, Ziauddin Soori, Muhammad Latif, Assistant and Mr. Hasanuzzaman.
<u>OTHERS:</u>	Mr. G.M. Saleem, Advocate.
Dates of hearing --	30-6-1987, 19-2-1989, 20-2-1989 and 21-2-1989
Date of decision --	<u>15-6-1989</u>

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JUDGMENT:

GUL MOHAMMAD KHAN, CHIEF JUSTICE.--Mr. Mushtaq Ali, Advocate, has filed this petition challenging section 294-A of the P.P.C., on the ground that the same is repugnant to the Injunctions of Islam as contained in Quran and the Sunnah of the Holy Prophet. The section reads as under:-

"294-A.--Keeping lottery office.-Whoever keeps any office or place for the purpose of drawing any lottery not being a State lottery or a lottery authorised by the Provincial Government shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

And whoever publishes any proposal to pay any sum, or to deliver any goods, so to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number of figure in any such lottery shall be punished with fine which may extend to one thousand rupees."

A similar prohibition against the public is contained in section 294-B, P.P.C., which will also be considered alongwith the above.

2. The specific objection taken to the part I of the section 294-A is that though undoubtedly the lottery has been made illegal and impermissible so far as the general public is concerned, yet the same is made permissible and lawful if it is to be run by a Government. It is contended that according to Article 2 of the Constitution, Islam is the State religion of Pakistan which can only mean that every institution and every functionary of the State must not violate the Injunctions of Islam in its performance

of the affairs of the State. That Article is a *part of* ~~the~~ substantive part of the Constitution ~~and~~ is, therefore, operative and effective. Article 2-A read with the Objectives Resolution further states that laws of Allah shall not only be supreme but the State of Pakistan has to exercise its authority as a delegate within the limits prescribed by Him. Consequently, it is urged that even the State through its functionaries must not violate the Injunctions of Islam and any law permitting it must be struck down. In this view of the matter, it is contended that the words 'not being a State lottery or a lottery authorised by the Provincial Government' are liable to be deleted. The petitioner further submits that certain types of 'Quraa (lotteries) are permitted by Quran and the Sunnah of the Holy Prophet and therefore, they should not have been prohibited.

3. We issued notices to all the Governments and also requested some of the Juris-consults to assist in this matter of great importance. The contention raised by Mr.Riazul Hassan Gillani, on behalf of the Federal Government was that the section impugned here recognizes only the permissible and valid types of lotteries but excludes the public to run these so as to avoid the simple people of the masses being exploited or fleeced. He, however, was not able to show if the section permitted operation of only the valid or permissible lotteries or that there was restriction imposed only against the prohibited and impermissible ones. He is also not able to explain as to how the masses may be exploited or put to undue losses if the public operators of the lotteries were to do so validly and lawfully.

4. Before going into the question raised, it will be necessary to see as to what is meant by a lottery. According to Oxford English Dictionary, lottery means "an arrangement

for the distribution of the prizes by chance among persons purchasing tickets. Slips or lots, numbered in correspondence with tickets and representing either prizes or blanks as are drawn from a wheel. Usually intended as a means of raising money for the benefit of the promoters of the State or some charitable institution. Decision by casting or drawing of lots, sortilege, appeal to the lot. Also: chance, issue of events as determined by chance. Something which comes to a person by lot or fortune.....A round game at cards in which prizes are obtained by holders of certain cards..... The Chamber 20th Century Dictionary, gives its meaning as under:-

"An arrangement for distribution of prizes by lot: a matter of chance: a card game of chance....."

5. It will thus be seen in the light of the above definitions that the above section permits the Government the operation of all types of lotteries and similarly prohibits the public from all these types. The section 294-A, therefore, does not distinguish between valid or invalid types of lotteries and thus, it is not correct to say that it deals with only the lawful and valid ones.

6. It may also be noted that according to the Islamic Injunctions, the lotteries could be both valid and invalid and, therefore, this distinction is necessary to be made in the law. Verse 44 of Surah Al-Imran speaks about valid lotteries and reads as under:-

"This is of the tidings of things hidden. We reveal it unto thee (Muhammad). Thou wast not present with them when they threw their pens (to know) which of them should be the guardian of Mary, nor wast thou present with them when they quarrelled (thereupon).

It will be appreciated that Allah Subhanahu would not have

approved this method of decision in respect of Hazrat Maryam and Hazrat Zakria if it was reprehensible.

7. The above verse refers to the incident when the mother of Hazrat Maryam, according to her commitment, came to Baitulmaqdas' to leave her there. There a dispute arose between the care-takers/servants as to who would have the privilege of maintaining and bringing up Hazrat Maryam. Hazrat Zakria, the uncle of Hazrat Maryam was one of them. To resolve this dispute it was decided that all the candidates will throw their pens in the running water and if the pen of any of them stopped and was not carried away by the current he will be entitled to bring up and maintain Hazrat Maryam. Hazrat Zakria succeeded and, therefore, he was given the charge of Hazrat Maryam. Thus such a way of deciding between the various competing and contesting interests is valid and, therefore, it cannot be prohibited to be followed.

8. Reference may also be made to verses I39 to I4I Chapter 37 (Al-Saffat) where Hazrat Younas a Prophet is mentioned to have been off-loaded a boat on being unsuccessful in the drawing of lots and was discovered by a fish. The incident seems to have the approval of Allah Almighty. See 2I:87 and 68:48-50. It is reported by Muhammad Al-Qurbaṭi, in Tafseer Qurtabi, Vol:IV page 86 Cairo 1967 from Abu Ubaid that three Prophets Hazrat Younas, Hazrat Zakria and Muhammad (PBUH) also drew lots on various occasions. It is also recorded at the same place that there is consensus of the Doctors of Islamic law on this aspect.

9. In fact there is a Chapter in the Bokhary on this aspect (Sahibul Bukhary Vol:II p.IIO Print Beirut) which gives a number of Traditions on the point under discussion. It is narrated by Ummul Ala that Usman Ibn

Mazoon fell to their share when the 'Ansars' drew lots for the lodging the "Mohajirin" who had migrated from Makka. There is another Tradition reported by Hazrat Aisha that whenever the Holy Prophet intended to undertake a journey he would draw lots about his wives as to who would accompany him. It is further reported by Abu Huraira about the Holy Prophet saying that if the Muslims come to know of the amount of reward in the 'azan' and offering prayers in the first row they would rush to the mosque in such numbers that lots may have to be drawn for them.

IO. Musnad Ahmad Ibne Hambal gives another Tradition on the same point. When the Holy Prophet reached Madina on migration, every member of Ansaar wanted to have the privilege of playing host to him. As this was not possible the Ansaars agreed to draw lots to settle the matter (Vol:V p.414 Beirut).

II. Ibne Qayyam in his Al-Turqul Hikmiyyah p. 265 also mentions the use of lots in deciding disputes and refers to verse 44 of Surah Al-Imran reproduced above. He also mentions the drawing of lots for the maintenance and upbringing of Hazrat Maryam. He also states that Hazrat Younas reached the belly of the fish on being dropped in sea as a result of drawing of lots to off-load the excess weight, in order to save the boat from sinking.

I2. Ibne Qayyam also mentions a Tradition from Imran Ibne Hussain that the Holy Prophet drew lots to see as to which two slaves of Imran's six were freed, according to his wish at the time of death. The Holy Prophet, as stated by Umme Salma, is said to have approved the division of property by two Contestants, who had no evidence in respect of their claim, by drawing of lots.

I3. We also note the same sort of practice in the companions of the Holy Prophet. Once there was a dispute as to who would make call to the prayer which was resolved

through drawing of lots (Turqul Hikmiyya p.267). At page 304 of the same book is reported a decision whereby Hazrat Ali decided as to which of the contestants should make oath to prove the ownership of a mule. In the same capacity of Qadhi of Yemen Hazrat Ali ordered a litigant to draw a lot to decide as to which one of his four wives was divorced by him. (p.274). Another of his decisions, to find as to who should take the disputed child and who should get diyat (compensation), by drawing of lots was approved by the Holy Prophet, when he smiled after this decision was narrated to him. (Sunan Ibne Maja Vol:II p.50 - Lahore, Deeni Kutab Khana).

14. Quran also refers to certain other types of lotteries which are not permissible. In verse 3 of Surah Al-Maida (5:3) it is ordained that "Forbidden unto you for.....that he swear by the divining arrows. This is an abomination....." Similarly in verse 90 of the same Chapter it is directed "O ye who believe! strong drink and games of chance and idols and divining arrows are only an infamy of Satan's handiwork leave it aside in order that he may succeed." It is the games of chance and the divining arrows that we are concerned with here. In the dark days of Arabia, some persons jointly purchased a camel and would draw arrows from a container in order to distribute its meat. Some of the arrows had written on them different shares while some were blank. The blank arrows meant no shares which meant that their money was gone. The other unequal shares were either distributed to the poor or taken away by allotties. The writing on the arrows was ascribed to Allah Almighty. The above verse prohibited this practice which was partly a game of chance and partly it ascribed the unjust distribution to Allah.

15. The abominability of gambling (games of chance) is also mentioned in verse 2:219. The types of lotteries as prevailing at the advent of Islam were gambling with dices, collecting money for charitable purposes with arrows marked with a sign for a particular share of camel meat; and finding out with divining arrows as to how to act in a particular situation that may be confronting

a person at that time. These arrows carried a message ascribed to Allah. The verses prohibited all those practices.

16. Thus we find two contradictory forms of lotteries and in that situation it is necessary that a test be devised to see as to which one is permitted and which is not. A scrutiny of the above Verses and Traditions would show that in the approved forms no one should have any personal right or vested interest in the matter and no one was to be deprived of what he already had or contributed in that process. Further, if the exigency of a situation dictated that some out of them had to forego any right, the solution was to make not arbitrarily but through drawing of lots, in the absence of any other valid or agreed form as in the case of Hazrat Younas. Again, wherever a donor, grantor or a man in authority had to select some of those persons who had equal footing in order to confer some right, privilege or concession on them, the matter could be decided by drawing of lots. Such a form of lottery in such cases will be permissible. However, wherever it was a question of causing loss to some in the drawing of lots with the result that others would benefit at the cost of those who lost the lottery, it will be the prohibited type.

17. We may take into consideration certain forms of the lottery prevailing in the modern times to illustrate and to ascertain which one is valid. The Governments or certain local authorities and other organizations have sometime to allot plots or houses or other benefits like selecting few thousands out of a larger number of applicants for performing pilgrimage or making grants for pilgrimage to certain deserving persons. The number of applicants in such cases may be much higher than the available plots etc. Consequently, lots are drawn and whosoever are successful are allotted the plot etc. In this example no body had a



right to any of the plots etc. The Governments, on the other hand, had to give it to a certain categories of persons who were deserving. Consequently, no body loses any of his own property or right but may benefit if he is successful in the drawing of lots. This will thus be a permissible form.

18. Some other kinds of lotteries are operated by certain charitable or philan-thropic organizations or even the Government. They ask the people to buy numbered tickets as in T.B.seals, Hilal-e-Ahmar tickets etc. Subsequently, lots are drawn and various types of prizes are distributed among the successful. The main idea behind is to lure people to contribute towards the religious or charitable objects. These types are similar to those prevailing at the advent of Islam for the purpose of looking after the poor and the needy or the deserving but they were forbidden. In such types there are twin vices. One is that a person may not be successful in the drawing of lots and so his contribution is lost while those successful benefit from the contribution of the losers. Secondly, it erodes the morals of people who would contribute to a pious project not to please Allah and His Prophet but they have to be persuaded by a material gain. Such appeals for contribution encourage the love of material gains as against the spiritual ones. Allah warns in Verses 8:28 and 64:15 to say "And know that possessions and your children are a test and that with Allah is immense reward."

19. There are certain schemes of the Government where it has floated prize bonds of various denominations. The given purpose of the schemes is to collect money to be used for various development schemes for the benefit of the people. The incentive provided to the investors is not the profit accruing on the investment but prizes of preascertained and announced amounts by drawing of

lots. So instead of a fixed amount of interest, ultimate profit or a determined profit on the investment, the contributors found successful in the drawing of lots are given the various prizes. The amounts of these prizes vary but in majority of cases the prize money is many times more than the profit that would normally be due on such investment or a contribution.

20. In order to know where the money for prizes came from and if the amounts of the prizes were equal to or ab-out the profit/interest we asked the representative of the Government to send for some competent persons. He produced M/s Hasnuzzaman, Zafar Muhammad Khan and Ziauddin Suri, Officers of the State Bank of Pakistan Karachi, but they could not explain. Be that as it may such a payment over and above the amount of loan or contribution is like interest and so prohibited as stated by Wahaba Zuhaillee "كل قرض حرام لغوا مقهوريا" Vol:V page 178. It says "الفقه الاسلامي وادلتها" Further, the very way of luring people to contribute towards objects which are pious or charitable appears to be a rebellion against the Injunctions of Islam. It is neither the fear nor love of Allah but the temptation of a windfall that tempts the investors to bring contributions for the stated purposes. See al-Qurān: 34:39, 2:245, 2:26I and 8:60. The philosophy of Islam in this respect, however, is that contribution for pious and charitable purposes are considered as loan to Allah who repays many times over. See verse 2:245. Verse 2:26I in this respect reads as under:-

"The likeness of those who spend their wealth in Allah's way is as the likeness of a grain which groweth seven ears, in every ear a hundred grains. Allah giveth increase manifold to whom He will. Allah is All-Embracing, All-Knowing."

See also Verses 8:60 and 34:39. The net result is that \*

luring people to contribute for pious and charitable causes on the temptations of monetary and wordly gains in such schemes would not only amount to paying exhorbitant interest in that form but also defeating the Quranic dictates.

21. The provision which is similar to 294-A is section 294-B. It reads as under:-

"Whoever offers, or undertakes to offer, in connection with any trade or business or sale of any commodity, any prize, reward or other similar consideration, by whatever name called, whether in money or kind, against any coupon, ticket number or figure, or by any other device as an inducement or encouragement to trade or business or to the buying of any commodity, or for the purpose of advertisement of popularizing any commodity and whoever publishes any such offer, shall be punishable with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

22. We find that manufacturers and shopkeepers generally advertise their products and give prize when a particular slip, a coupon, or a number of any other distinctive mark is found by a purchaser with the purchased products. They involve an exercise of chance. Another way is that on buying a product a purchaser gets some quantity over and above the normal quantity or something in addition to the thing purchased. The first type pertains to the game of chance and so prohibited but the second one falls in the category of sale ( bai) and so is not objectionable. However, section 294-B spells out a total prohibition and makes even the valid acts as offences

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punishable which is not correct. Thus both the sections are partly repugnant to Quran and Sunnah of the Holy Prophet.

23. We have given above the principles governing such transactions but there may be found reasons prohibiting them in verse 188 of Surah Al-baqra, verse 29 of Surah Al-Nisa, verse 161 of Surah Al-Nisa and verse 34 of Surah Al-Tobah. These are as under:-

188:2 "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 others wrongfully."

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

161:4 "And of their taking usury when they were forbidden it, and of their devouring people's wealth by false pretences. We have prepared for those of them who disbelieve a painful doom."

34:9 "O ye who believe Lo many of the (Jewish) rabbis and the (Christian) monks devour the wealth of mankind wantonly and debar (men) from the way of Allah.

The Holy Prophet had also prohibited any fee to a astrologer as it was considered a forbidden act. See Nail-ul-Autar Vol:V page 162. Every transaction, therefore, should be tested on the touch-stone of the principles as enunciated in Quran and Sunnah of the Holy Prophet.

24. The section 294-A is thus repugnant to the Injunctions of Quran and Sunnah for the reasons:-

- a) It permits the Provincial Government <sup>or the State</sup> to operate lotteries which may be against the Injunctions of Islam.
- b) It prohibits even the lawful lotteries as discussed above.
- c) Again even section 294-B does not differentiate between lawful and unlawful lotteries.

The two sections thus need to be suitably amended in the light of the above discussion to conform to the Injunctions of Islam.

25. We, therefore, desire that the President of Pakistan shall take steps to amend the sections 294-A and 294-B suitably as stated above on or before the 1st of December, 1989, failing which they shall cease to have effect.

*Gul Muhammad Khan*

GUL MOHAMMAD KHAN, C.J.

*Shujaat Ali Qadri*

Shujaat Ali Qadri, J.

*Ibadat Yar Khan*

Ibadat Yar Khan, J.

*Fida Mohammad Khan*

Fida Mohammad Khan, J.

Approved for reporting

Karachi dated the 15th June, 1989

ABDUL RAHMAN

*Announced in open court after notice*

*15-6-89*

*Ibadat Yar Khan 15/6/89*