

IN THE FEDERAL SHARIAT COURT

(Original Jurisdiction)

PRESENT

**MR. JUSTICE DR. ALLAMA FIDA MUHAMMAD KHAN,
MR. JUSTICE SHEIKH NAJAM UL HASAN
MR. JUSTICE ZAHOOR AHMED SHAHWANI**

SHARIAT PETITION NO. 07/I OF 2005

The Pakistan Cotton Ginners Association (Regd) Pakistan through its
Secretary PCGA House, M D A. Road, Multan.

.. Petitioner

Versus

- 1 Federation of Pakistan through Ministry of Commerce through its
Secretary, Pak. Secretariat Islamabad
2. Cabinet Division through its Secretary Cabinet Block, Islamabad.
3. The Karachi Cotton Association through its Chairman
Cotton Exchange Building 11 Chandrigarh Road, Karachi.
4. Ministry of Textile Industry Government of Pakistan through its
Secretary G-5/2, FBC Building Attaturk Avenue, Islamabad
5. Kisan Board through its President, 225-Metro Plaza, Multan Cantt:
Multan.
6. All Pakistan Textile Mills Association (APTMA) through its Chairman,
97-A, Aziz Avenue, Canal Bank, Gulberg Road Lahore


.... Respondents

Counsel for the petitioner ... Dr. Muhammad Aslam Khaki,
Advocate

Counsel for the respondents .. Mr. Muhammad Zakir Sheikh,
Deputy Attorney General of
Pakistan, Mr. Khurram Shahzad
Baig, Standing Counsel, Syed Riaz
ul Hasan Gillani, Senior Advocate
for respondent No.3 and Mr.
Muhammad Yousaf, Section Officer
for respondent No 4

Date of Institution ... 25.06.2005

Date of hearing ... 07 04.2015

 Date of decision .. 16 04.2015

JUDGMENT

DR. ALLAMA FIDA MUHAMMAD KHAN, Judge.- This petition has been filed by the Pakistan Cotton Ginners Association (Regd) through its Secretary. The petitioner has challenged by-laws Nos. 45, 83, 134, 142, 143, 144 and 147, alongwith other relevant by- laws, of the Karachi Cotton Association and prayed that the same may be declared repugnant to the Injunctions of Islam.

2. On 9.4 2008, the petitioner had requested that the Ministry of Textile Industry, Kisan Board and Textile Mills Association may be added as respondent parties to the petition. Accordingly the petitioner was allowed to add them with a direction to file amended petition Accordingly, on 07 5.2008, the petitioner filed amended petition.

3. The petition was fixed on several dates but got adjourned for one reason or another On 03.09.2008 Syed Riaz-ul-Hasan Gillani, Senior Advocate for respondent No.3 i.e. Karachi Cotton Association raised preliminary objection and questioned maintainability of this petition. On

22.10.2008, after hearing the learned counsel for the parties, the petition was dismissed vide a short Order which reads as under:-

“We have heard learned counsel for the parties. Prima-facie no case is made out by the petitioner against the respondent. We dismiss the petition.”

4. The said short Order was challenged in Appeal before the Hon’ble Shariah Appellate Bench Supreme Court of Pakistan. On 21 04.2009, the said order was set aside and the case was remanded to the Federal Shariat Court for fresh decision, after hearing the parties

5. In compliance with the said directions, issued by the Hon’ble Shariah Appellate Bench, the case was re-fixed for hearing on several dates. In this connection, it is however, pertinent to mention that on 30.03.2010, a Full Bench of this Court passed an Order which, interalia, contained the following sentence:-

“We are inclined to admit this petition for regular hearing in the light of directions of the Hon’ble Supreme Court.”

As is obvious, no specific directions for its admission were given by the Court. However, notices were accordingly issued to the respondents who were directed to submit their written statements/comments. Moreover, in

view of the time constraint of six months period, fixed for decision of this petition, by the Hon'ble Shariah Appellate Bench, the learned counsel for petitioner was advised to move an application for grant of extension in time before the Hon'ble Apex Court. The learned counsel made an application accordingly, but its ultimate outcome has not been communicated to this Court till date.

6. On 16.01.2013, a public notice was ordered to be published in the leading papers of all the Provinces of Pakistan. In addition, it was also ordered that notices be repeated to the Jurisconsults. Accordingly a public notice was published and Maulana Muhammad Hussain Akbar, a renowned Jurisconsult, accordingly submitted his research notes

7. Thereafter, the petition finally came up for hearing on 7.4.2015. The parties were heard on the point of maintainability of this petition, in the context of Constitutional jurisdiction of this Court. The Order was reserved. We are now disposing of the Shariat Petition vide this judgment. The following paras contain detailed reasons about the issue in question.

8. Dr. Muhammad Aslam Khaki, learned counsel for the petitioner submitted that this Court has the Jurisdiction to hear and decide this petition. After dwelling at large on the words "custom and usage" that occur in Article 203-B(c) of the Constitution, he contended that the impugned sections could be examined by this Court. In this connection, however, he submitted that both the words have to be interpreted in the light of their literal meanings, as given in the English Dictionaries. According to him any rule which infringes and affects the right of others can be included in its meaning. He, however, conceded to withdraw the petition if the impugned Rules were not covered in the definition of law, provided that respondents assured him in writing to this effect.

9. The respondent No.1 i.e the Ministry of Commerce, in its comments specifically mentioned that by-laws of the K.C.A are related to hedge marketing allies Satta Business and under Rules of Business, the hedge marketing comes under the purview of Ministry of Textile & Industry (MOTI).



10. Ministry of Textile Industries has also submitted written comments prepared by Ministry of Religious Affairs wherein, placing reliance on a number of fiqhi references it has interalia, commented that hedge marketing is a kind of "Bai-u-Salam" which has been permitted by Shariah in the light of various traditions of the Holy Prophet (صلی اللہ علیہ وسلم), as mentioned. It has been added that the cotton hedge marketing is for the welfare of the cotton growers as it has facilitated them to sell their crop in time and it has promoted the export of cotton and so more profits for the growers. It has been further added that all the apprehensions as to gharar, irtikaz and harm etc as expressed in the petition are baseless. Therefore, in view of the above, the said Ministry has prayed that this petition may please be dismissed.

11 Syed Riaz-ul-Hassan Gillani, Senior Advocate for respondent No.3 (Karachi Cotton Association) made submissions in respect of the jurisdiction of this Court as defined in Article 203-B(c) of the Constitution. He submitted written notes also. He contended that Ministry of Commerce who has been impleaded in this petition has no statutory role. He also

contended that by-laws are not laws/rules nor have any statutory status. He submitted that the Government does not figure in any where and neither Government Agency is involved nor it has any nexus with the impugned rules. He added that the respondent company is a limited company registered under the company Act and, vide Article 71 of its Articles of Association, its Board is fully competent to pass, alter, amend and give effect to its by-laws and no approval in this regard is required from the Government or legislature.

12. We have given our anxious consideration to the points raised in the petition but, as mentioned above, we are refraining to dwell upon merits of the instant petition as, at the outset, all the learned counsel appearing on behalf of the respondents unanimously opposed the petition in respect of its maintainability before this Court. We may point out that this Court exercises its jurisdiction conferred by virtue of Article 203A of the Constitution of the Islamic Republic of Pakistan, 1973. This Court is empowered under Article 203D to examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions

of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet (ﷺ). The word “law” has been defined in Article 203B(c) of the Constitution as follows -

“Law” includes any custom or usage having the force of law but does not include the Constitution, Muslim personal law, any law relating to the procedure of any Court or tribunal or,”

Article 203E of the Constitution elaborates the power and procedure to be adopted by this Court for the performance of its functions

13 Keeping in view the above discussion, it can be appreciated that any law or its provision can be examined by this Court on the touch stone of Injunctions of Islam as contained in the Holy Quran and Sunnah of the Holy Prophet (ﷺ). Likewise, “custom or usage” can also be examined if it has the force of law. Admittedly, the expressions “custom” and “usage” have not been defined in Article 260 of the Constitution. Therefore, instead of Dictionaries, we must search out their connotation as defined in the legal terms and phrases.

14. The words “custom” and “usage” have different shades of meaning which can be ascertained from the context wherein these are used.



These expressions signify any rule or practice which having been continuously and uniformly observed for a long time, have obtained the force of law among different societies, tribes or communities. Normally such custom or usage is observed in connection with inheritance, maintenance, custody, adoption, marriage and other matters pertaining to personal/social practices. In "Words and Phrases", published by West Publishing Co. a reference to these terms has been given in the following words:

"The essential elements of "custom" or "usage" are that it must be ancient, certain, uniform, compulsory, consistent, general, continued, reasonable, not a contravention of law or public policy, and acquiesced in by persons acting within the scope of its operation. *Geraeta Corporation v Silk Ass'n of America*, 222 N.Y.S. 11, 13, 220 App Div.293.

"Custom" or usage" to be binding, must be definite, uniform and well known, and be established by clear and satisfactory evidence, and shown to be long-established, reasonable, and generally acquiesced in". (page 546)

In "Law-Terms and Expression", (Edition 2012) the expression "custom" has been defined in the following words:

"A custom to be valid must have four essential attributes. First, it must be immemorial; secondly, it must be reasonable, thirdly, it must have continued without interruption since its

immemorial origin; and fourthly, it must be certain in respect of its nature generally, and the persons whom it is alleged to effect. These characteristics are the necessary corollaries of the definition of a custom as being local common law and they serve a practical purpose as rules of evidence when the existence of a custom is to be established or refuted. By immemorial is meant that the custom must have been in existence from time preceding the memory of man. The test of reasonableness is the artificial and legal reason warranted by authority of law for its enforcement. The test of continuity involves habitual usage 1984 SCMR 1081; PLD 1981 SC 42.” (page No. 454-455) ”

15. In this background, we may add that Parliament which is the law-making authority, passes Acts and empowers the Government under the relevant law to make necessary Rules for conducting its business, Enactment of a statutory law is in fact an expression of the collective will and wisdom of the legislature and, in case the Parliament is not in session, the laws are enforced through an Ordinance, issued by the competent authorities designated and authorized for this purpose in the Constitution. The said Act/Ordinance is then termed as the “statutory law”. Subsequently, the Rules framed under the powers conferred by the “statutory law”, make integral part of the same law and those Rules, if considered repugnant to the Injunctions of Islam, can be challenged in a

Shariat Petition by any citizen of Pakistan and, if allowed, the same would be further proceeded with in accordance with the procedure referred to above

16. So far the legal definitions of "custom or usage" given above are concerned they are self evident. We agree with the learned counsel for the respondents that the impugned by-laws framed under sub para (e) to para iii of the Memorandum & Articles of Association of the Karachi Cotton Association have not been framed by the Government but still require its approval, as mentioned by the learned counsel for the respondents.

17. In this connection it is highly pertinent to refer to the comments received from Federation (Government of Pakistan) read as mentioned hereinunder.

"The Federal Shariat Court expresses its verdict by judgment which are to be implemented by the Federal Government or Provincial Government under Article 203D(3)(a) and (b). In this Shariat Petition there is no such law enacted by the Federal Government or Provincial Government.

The by-laws challenged before this Court by one association against another Cotton Ginner Association

are in the nature of domestic dispute of the association. These by-laws are meant for running of their own affairs and can be amended by the associations, themselves.

The by-laws challenged are neither framed nor approved by the Federal Government or Provincial Government and cannot be treated as "statutory rules" as these have not been framed under any specified legal requirement of any statutes.

It is, therefore, prayed that above noted preliminary objection with respect to jurisdiction may kindly be taken up first before going into the merits of the case"

In this view of the matter, we have no doubt in our minds that until and unless approved by the legislature, the impugned Rules which have been made by a Private Ltd Company and which can always be changed, any time, only by the respondent Association, without the intervention of the Government, enjoy a non-statutory status and thus remain beyond the pale of jurisdiction of this Court, as determined by the Constitution

18. Thus it is crystal clear that by no stretch of imagination the impugned Rules can be brought inside the scope of "usage or custom" as mentioned in the said definition of law. We consider it necessary to mention that the meaning and legal connotation of the expression "custom and usage" cannot be left to the discretion or notions of an individual but has to be clearly spelt out in the light of its legal import. Hence, it would not be permissible at all

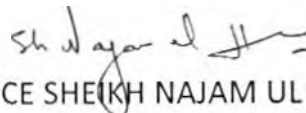
to exercise such free imagination to the extent that its nexus with the law is lost. Its meaning should always be consistent with ethos and spirit of legal tinge and must be properly spelled out very clearly to remain limited to only certain situations as and when they would emerge from time to time and should not be un-necessarily given un-limited expansion. If this principle is relaxed, every now and then minor "usage and custom", only local and insignificant in nature, having no legal import, would un-necessarily start coming to the Court for adjudication.

19 Learned counsel for the petitioner could not persuade us to believe that this court while exercising its Constitutional Jurisdiction could proceed to examine the Rules impugned by him in the instant petition

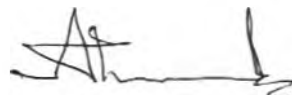
Considering the petition misconceived, we dismiss it accordingly



JUSTICE ALLAMA DR FIDA MUHAMMAD KHAN



JUSTICE SHEIKH NAJAM UL HASAN



JUSTICE ZAHOOR AHMED SHAHWANI



Announced in open Court
at Lahore on 16 04 2015
*Mujeeb ur Rehman/**

Fit for reporting
