

P L D 1988 Supreme Court 670

Present: *Muhammad Haleem, C.J.,
Shafiur Rahman, Saad Saood Jan,
and Ali Hussain Qasibash, JJ*

Messrs Sh. ABDUR RAHIM, ALLAH DITTA--Appellants

versus

FEDERATION OF PAKISTAN and others--Respondents

Civil Appeals Nos. 70 to 72 of 1978, decided on 4th November, 1987.

(On appeal from the judgment and order dated 5th of March, 1976, of the Lahore High Court, Lahore, in Writ Petitions Nos. 2774/75, 2570/75 and 2571/75).

(a) Constitution of Pakistan (1973)--

---Art. 185(3)--Leave to appeal was granted to consider whether High Court was correct in deciding question of law against the appellant. [p. 675] A

(b) Customs Act (IV of 1969)--

---S. 18(2)(3)--Notification No.S.R.O.910(1)/75 dated 21-8-1975--Constitution of Pakistan (1973), Fourth Sched., Items Nos.43 & 59--Word "regulatory duty"--How to be construed--Doctrine of incidental and ancillary power--Application.

While construing the meaning of the word "regulatory duty" it is the substance and not the form which should be looked at. Therefore, in arriving at its true meaning the context in which it occurs must be given proper weight. [p. 675] B

Referring to subsection (2) of section 18 of the Customs Act, 1969 "regulatory duty" is a levy on all or any of the articles specified in the First Schedule which are chargeable to customs duty. The First Schedule under its separate heads prescribes the rates of duties chargeable on goods imported into Pakistan. The regulatory duty has, therefore, direct nexus to the goods imported which are liable to customs charge. If one were to give to it its dictionary meaning then it nowhere in the context in which it occurs exerts that meaning. In essence, therefore, it can have no other sense, but that of a customs charge imposed to maintain a proper balance in a fluctuating market although it is described by a different nomenclature which does not make it distinct from customs duty. Subsection (3) of section 18 of the Act further reinforces the concept of its being an additional customs charge. "Regulatory duty," comes within the ambit of Item No.43 of the Fourth Schedule. As to the applicability of Item No.59, the doctrine of incidental and ancillary power is that every legislature must have incidental and ancillary powers to make sure that legislation with respect to its enumerated powers may be effective. It follows from this doctrine that everything necessary to the exercise of a power is included in the grant of the power. Although the words "incidental" and "ancillary" literally mean things of lesser or subordinate degree or of consequential nature but in the legislative interpretation they mean more than this. [p. 676] C

In this context this item could be relevant for legislating matters to ensure the effectiveness of the legislation on the legislative item.

Atiqa Begum v. United Provinces AIR 1941 F C 16; Governor-General-in-Council v. Province of Madras AIR 1945 PC 98; Russell v. The Queen (1981-82) 7 A C 829; Shannon v. Lower Mainland Dairy Products Board 1938 A C 708 and Messrs Haider Automobile Ltd. v. Pakistan P L D 1969 S C 623 ref.

(c) Constitution of Pakistan (1973)--

---Art.70(1) & (4) & Sched.IV, Item 43--Customs Act (IV of 1969), 8.18(1)--Levy of customs duty--Scope of legislative power.

While considering the scope of the legislative power it should be borne in mind that it is a recognised principle of Constitutional law that except where limitations have been imposed by the Constitution itself the power of legislature to legislate on the enumerated subjects is unlimited and practically absolute. The Legislature is free to exercise this power as and when the occasion requires. Keeping this in view, a reading of Article 70(1) and (4) of the Constitution makes it plain that there is no constraint or limitation on the exercise of the power. It is essentially a legislative function to add, subtract, decrease or increase the customs duty so long as the subject of legislation is covered by item No.43, which is the touchstone of the validity of the legislative measure. Accordingly, it was futile to say that the power of the Legislature was exhausted either to impose the further charge itself or to authorise the Federal Government to impose the additional charge. The further argument that, as the power was exhausted it could not be delegated is also of no substance as it was always available and could be exercised from time to time. [p. 677] E

(d) Legislation--

---Delegation of legislative power--Word "delegation"--Meaning--Question as to whether there has been an unconstitutional delegation of legislative power, the field in which the powers are granted is an important element of consideration, and in the final analysis the question is one of kind and degree and each case of questioned delegation of authority must depend upon the facts of that particular case. [pp. 677, 678, 681] F, G & I

Huth v. Clarke (1890) 25 QBD 391 at p.395; 16 Am J2nd Const. L S 240; Wayman v. Southard 23 US 1 at p. 43; Hampton Jr. & Company v. United States 276 US 394; Lock's Appeal (1873) 72 PA 491; Administrative Law Text, Third Ed., at p.26 and Province of East Pakistan v. Mirajul Huq Patwari P L D 1966 S C 854 ref.

(e) Words and phrases --

---"Delegation"--Meaning. [p. 677] F

Huth v. Clarke (1890) 25 QBD 391 at p.395 and 16 Am J2nd Const. L S 240 ref.

(f) Legislation--

---Delegation of legislative power--Prohibition--What is prohibited by the Legislature is the delegation of its function to make the law but not the authority exercised under and in pursuance of the law itself to another agency in regard to the provision of details when by the very nature these are incapable of being laid down by the legislature itself. [p. 679] H

Rafiuddin v. Chief Settlement and Rehabilitation Commission
PLD 1971 S C 252 ref.

(g) Customs Act (IV of 1969)--

--S. 18(2)--Notification No.S.R.O.910(1)/75 dated 21-8-1975--Levy of regulatory duty--Delegated legislation by Federal Government--Justification--Discretion to levy "regulatory duty" is a device to enhance the rate of duty at any time during the course of the year so as to achieve a balance, it cannot, therefore, be regarded as an abdication of its function by the Legislature but by law a valid delegation of a discretion to achieve the purpose of law.

By subsection (2) of section 18, Customs Act, 1969 the Legislature has delegated to the Federal Government the discretion to levy "regulatory duty" on all or any of the items specified in the First Schedule at a rate not exceeding fifty per cent of the rate, if any, specified therein or at a rate not exceeding hundred per cent of the value of such articles, as determined under section 25 and may, by a like notification, levy a regulatory duty on all or any of the articles exported from Pakistan in respect of the articles mentioned in the Second Schedule at a rate not exceeding thirty per cent of the rate specified in the Second Schedule or of the amount which would represent the value of such articles as determined under section 25; and in the case of articles not specified in the Second Schedule, at a rate not exceeding thirty per cent of the amount which represents the value of such articles as determined under section 25. Here what is to be noticed is the exercise of a discretion within a legislative framework i.e. firstly, that the discretion to levy is subject to such conditions, limitations or restrictions as the Federal Government may deem fit to impose; secondly, the specification of the articles by reference to the Schedule and the maximum of the rate of duty to be imposed; and thirdly, that the imposition of the levy was for a limited period of a financial year unless the levy was earlier withdrawn. The levy was described as "regulatory duty" as it was imposed to maintain a proper balance in a fluctuating market as a result of sharp fall in the international prices of iron and steel scrap and certain other iron and steel items with the result that the importers imported these materials at a much lower cost but regardless of it the prices did not fall to any substantial extent in the domestic market, and it were the importers only who were the beneficiaries and were earning windfall profits. Therefore, the discretion to levy "regulatory duty" was a device to enhance the rate of duty at any time during the course of the year so as to achieve a balance. The Legislature, in the circumstances could not know as to the details of the fluctuating international prices from time to time during the course of the year and for that matter could not also be in a position to enhance the levy to obtain a balance of the prices in the domestic market nor was it in a position to speculate the details of the conditions, limitations or restrictions which were necessary to be imposed for the levy of "regulatory duty". It was in these circumstances that it provided the framework for the levy of "regulatory duty" to be imposed and gave the discretion to the Federal Government to make a levy so as to achieve a balance in the price in the local market. If the Legislature delegates its power to make the law, that is, its own legislative function, then it would be invalid but if what is delegated is the authority to exercise the discretion in respect of

matters which had been finally determined by the Legislature itself, the delegated authority does not exercise a legislative function. In this context, the law itself provided the frame work and left it to the Federal Government to exercise the discretion in the manner laid down within the framework. It cannot, therefore, be regarded as an abdication of its function by the Legislature but by law a valid delegation of a discretion to achieve the purpose of the law.

[p. 681] J

Ch. Khurshid Ahmad, Advocate Supreme Court and Tanveer Ahmad Advocate-on-Record for Appellants (in C.A.No.70/78).
Tanveer Ahmad Advocate-on-Record for Appellants (in C.A.No.71/78).

Tanveer Ahmad, Advocate-on-Record for Appellants (in C.A.No.72/78).

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Date of hearing: 4th November, 1987

JUDGMENT

MUHAMMAD HALEEM, C.J.--These appeals arise from a common judgment of the Lahore High Court, Lahore, dated 5th of March, 1976, by which Writ Petitions Nos. 2774 of 1975, 2570 of 1975 and 2571 of 1975, were dismissed.

In these appeals the vires of Notification No.S.R.O. 910(1)/75 dated 21st of August, 1975, issued under section 18(2) of the Customs Act, 1969 (hereinafter referred to as "the Act"), as amended by the Finance Act, 1975, is challenged. It reads as under:

"S.R.O.910(1)/75.- In exercise of the powers conferred by subsection (2) of section 18 of the Customs Act, 1969 (IV of 1969), the Federal Government is pleased to direct that regulatory duty shall be levied on all items of iron and steel scrap for re-rolling under the respective heads of Chapter 73 of the First Schedule to the said Act so as to increase the rate of duty to 62½ ad valorem in case of items the rate of which is lower than the said rates."

The appellants trade in importing iron and steel scrap for re-rolling. They were issued licences for the import of iron and steel scrap under Import Policy Order 1974. The import licences related to the goods under the heading No.73.03 (First Schedule) of the Pakistan Customs Tariff as amended by section 11 of the Finance Act, 1974. The customs duty leviable on the goods described against this heading namely "waste and scrap metal of iron or steel" was 12½ ad valorem. There was further amendment of this rate of duty which was increased to 32½ by the Finance Act, 1975.

It is common ground that the goods imported from abroad arrived in each case after 21st of August, 1975, and that the appellants presented bills of entry for clearance of the goods after this crucial date. It is also not disputed that the rate and amount of duty to be levied on the imported goods was such as was chargeable under the provisions of section 30 of the Act on the date of delivery of the bills of entry to the appropriate officer who, in these cases, was the Superintendent (Imports) Customs.

By section 7 of the Finance Act, 1975, section 18 of the Act, as it stood in the Customs Act, 1969, was substituted by the following:

- (1) for section 18, the following shall be substituted, namely:
- "(18) (1) Except as hereinafter provided, customs duties shall be levied at such rates as are prescribed in the First Schedule and the Second Schedule or under any law for the time being in force on--
- (a) goods imported into or exported from Pakistan;
- (b) goods brought from any foreign country to any customs-station, and without payment of duty, there transhipped or transported for, or thence carried to, and imported at any other customs station; and
- (c) goods brought in bond from one customs station to another.
- (2) The Federal Government may, by notification in the official Gazette, levy, subject to such conditions, limitations or restrictions as it may deem fit to impose, a regulatory duty on all or any of the articles specified in the First Schedule at a rate not exceeding fifty per cent of the rate, if any, specified therein read with any notification issued under subsection (1) of section 2 or subsection (1) of section 3 of the Protective Duties Act, 1950 (LXI of 1950), or at a rate not exceeding hundred per cent, of the value of such articles, as determined under section 25 and may, by a like notification, levy a regulatory duty on all or any of the articles exported from Pakistan.--
- (i) In the case of articles enumerated in the Second Schedule at a rate not exceeding thirty per cent of the rate specified in the Second Schedule or of the amount which would represent the value of such articles as determined under section 25; and
- (ii) in the case of articles not enumerated in the Second Schedule, at a rate not exceeding thirty per cent, of the amount which represents the value of such articles as determined under section 25.
- (3) The regulatory duty levied under subsection (2) shall be in addition to any duty imposed under subsection (1) or under any other law for the time being in force.
- (4) Any notification issued under subsection (2) shall, if not earlier rescinded, stand rescinded on the expiry of the financial year in which it was issued."

According to section 18(1) of the Customs Act, 1969, the goods answering to the description under the heading No.73.07, namely "blooms, billets, slabs and sheet bars (including tplate bars), of iron or steel, pieces roughly shaped by forging, of iron or steel", (First Schedule) were chargeable to duty at the rate of 37½ ad valorem. Under subsection (2) of section 18 of the Customs Act, 1969, a notification was issued for the levy of regulatory duty on all items of iron or steel for re-rolling under the respective head of Chapter 73 of the First Schedule to the Customs Act so as to increase the rate of duty to 62½ ad valorem. Upon the delivery of the bills

of entry after 21st of August, 1975 the Superintendent (Import) Customs classified the goods under the heading No.73.07 of the Pakistan Customs Tariff, and held them to be leviable to duty at the rate of 62½ ad valorem. It was the levy of this regulatory duty which was challenged in the writ petitions.

The contentions raised before the High Court were: firstly, that the Federal Legislature was empowered to enact law in accordance with Item 43 of the Fourth Schedule of the Constitution of 1973 which prescribed for the levy of "duties of customs including export duties", and as the regulatory duty did not fall within the ambit of this description, the provision of subsection (2) of section 18 of the Act as substituted by the Finance Act, 1975, authorising its levy was ultra vires the powers of the Federal Legislature; and further since subsection (1) of section 18, as amended, provided for the levy of customs duties at such rates as are prescribed in the First Schedule, the power to levy regulatory duty was exhausted, and hence the Federal Legislature was not competent either to impose a further charge itself or to authorise imposition of additional charge by the Federal Government. Consequently, the notification of 21st of August, 1975, authorising the regulatory duty was ultra vires the powers of the Federal Legislature or the Federal Government. And secondly, that as no guidelines were given by the Federal Legislature to the Federal Government for the levy of regulatory duties, there was on its part a total surrender and abdication of legislative functions. The impugned levy was, accordingly, hit by the rule of excessive delegation. On both these submissions, the High Court had held against the appellants.

Leave to appeal was granted to consider whether the High Court was correct in deciding these questions of law against the appellants.

The first question relates to the competence of Federal Legislature to enact subsection (2) of section 18 of the Act. In this connection it was pointed out that Item No.43 which relates to the "duties of customs" is distinct from "regulatory duty" which has a different connotation. It means regulative, and the word "regulative" in turn means "tending to regulate". The word "regulate" denotes control, limit, restrain or adjust. Therefore, this meaning should be assigned to the word "regulatory", and when used in conjunction with the word "duty" it does not convey the sense of the duties of customs nor can it be regarded as a duty in the nature of a customs duty. On the other hand it was contended on behalf of the respondent that the regulatory duty was in essence also a customs duty, and the purpose for the levy described as a regulatory duty was to maintain a proper balance in a fluctuating market. In other words, it was a customs duty intended to deal with a special situation and to remain in force for a limited period. It could be levied both on imports and exports. Since section 18 of the Act is a charging section for the levy of customs duty, the regulatory duty itself being a customs duty could have been levied under subsection (2) of section 18 of the Act. Therefore, this levy was not ultra vires the competence of the Federal Legislature.

The rule is that while construing the meaning of the word "regulatory duty" it is the substance and not the form which should

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be looked at. Therefore in arriving at its true meaning the context in which it occurs must be given proper weight.

In this connection, it would be worthwhile to refer to the decisions which have eminently laid down this principle and aid can be taken from them. In *Atiqa Begum v. United Provinces* (AIR 1941 F C 16) the question was whether the impugned Act was within any of the three legislative Lists, or in none at all. It was held by Sulaiman, J., that it was the duty of the Court to consider the Act as a whole, and decide whether in pith and substance the Act is with respect to a particular category or not, and that this could be inferred only from the design and purport of the Act as disclosed by its language and the effect which it would have in its actual operation. In *Governor-General-in-Council v. Province of Madras* (AIR 1945 PC 98), it was held that it was not the name of the tax, but its real nature, that is, its "pith and substance" as it has sometimes been said, which must determine in what category it falls. In *Russell v. The Queen* (1981-82) 7 A.C. 829, it was laid down: "the true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs." In *Shannon v. Lower Mainland Dairy Products Board* (1938) A.C. 708, Lord Atkin remarked: "It is well established that you are to look at the 'true nature and character of the legislation'."

Referring now to subsection (2) of section 18 of the Act, "Regulatory duty" is a levy on all or any of the articles specified in the First Schedule which are chargeable to customs duty. The First Schedule under its separate heads prescribes the rates of duties chargeable on goods imported into Pakistan. The regulatory duty has, therefore, direct nexus to the goods imported which are liable to customs charge. If one were to give to it its dictionary meaning then it nowhere in the context in which it occurs exerts that meaning. In essence, therefore, it can have no other sense, but that of a customs charge imposed to maintain a proper balance in a fluctuating market although it is described by a different nomenclature which does not make it distinct from customs duty. Subsection (3) of section 18 of the Act further reinforces the concept of its being an additional customs charge.

In conclusion, therefore, having applied the above principle while construing the words "regulatory duty", we are of the view that it comes within the ambit of Item No. 43 of the Fourth Schedule. As to the applicability of Item No. 59, the doctrine of incidental and ancillary power is that every legislature must have incidental and ancillary powers to make sure that legislation with respect to its enumerated powers may be effective. It follows from this doctrine that everything necessary to the exercise of a power is included in the grant of the power. Although the words "incidental" and "ancillary" literally mean things of lesser or subordinate degree or of consequential nature but in the legislative interpretation they mean more than this. While interpreting the words "incidental" and "ancillary" in *Messrs Haider Automobile Ltd. v. Pakistan* (P L D 1969 S C 623), it was observed:

"The items in the legislative list, as was observed in the case of the *United Provinces v. Mat. Atiqa Begum* and others

(AIR 1941 PC 16) are not to be read in any narrow or pendant sense. Each general word therein should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended within it. These items describe only comprehensive categories of legislation by a word of broad and general meaning."

In this context this item could be relevant for legislating matters to ensure the effectiveness of the legislation on the legislative item. D

The next limb of this contention namely that the power to impose regulatory duty was not available as the Federal Legislature had already exercised the power by making a provision of the levy of customs duty in subsection (1) of section 18 of the Act, is also of no substance. While considering the scope of the legislative power it should be borne in mind that it is a recognised principle of constitutional law that except where limitations have been imposed by the Constitution itself the power of legislature to legislate on the enumerated subjects is unlimited and practically absolute. The Legislature is free to exercise this power as and when the occasion requires. Keeping this in view, a reading of Article 70(1) and (4) of the Constitution makes it plain that there is no constraint or limitation in the exercise of the power. It is essentially a legislative function to add, subtract, decrease or increase the customs duty so long as the subject of legislation is covered by Item No. 43, which is the touchstone of the validity of the legislative measure. Accordingly, it was futile to say that the power of the Legislature was exhausted either to impose the further charge itself or to authorise the Federal Government to impose the additional charge. The further argument that as the power was exhausted it could not be delegated is also of no substance as it was always available and could be exercised from time to time. E

Now as to what "delegation" means is amply illustrated by the opinion of Wills, J., in *Huth v. Clarke*, (1890) 25 QBD 391 at p. 395:

"Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself. The best illustration of the use of the word is afforded by the maxim, *Delegatus non potest delegare*, as to the meaning of which it is significant that it is dealt with in *Broom's Legal Maxims* under the law of contracts: it is never used by legal writers, so far as I am aware, as implying that the delegating person parts with his power in such a manner as to denude himself of his rights." F

The delegation of power is elemental in the creation of agency and is not exhausted by delegation, and in relation to the legislative power, delegation means:

"An attempt by Legislature to implicate its legislative power by delegating to another the power to enact a law, whether in form or effect, or to bestow upon another the power to determine the effectiveness of a specific act."

(16 Am J2nd Const. L S 240)

The American Constitution is an example of separation of powers. It vests the legislative power in the Congress, the executive power in the President, and the judicial power in the Supreme Court and such other Courts as might be established by the Congress. There is thus the exclusive character of the power conferred upon each of the three departments of the Government and no one department could exercise the power of the other. However, the rigidity of this rule inherent in the American Constitutional system came to be blended by the opinions of the Supreme Court so much so that the rule against delegation of functions by legislative bodies to other agencies which was regarded as an obstacle both to the exercise of rule-making powers of bodies other than Legislatures, and also to the exercise of adjudicatory powers by bodies other than Courts of law was mellowed down by Marshall, C.J., in *Wayman v. Southard*, 23 US 1 at p. 43, in which he said:

"That the rule was subject to limitation and asserted that Congress may certainly delegate to others power which the Legislature may rightly exercise itself."

Later in *Hampton Jr. & Company v. United States*, 276 US 394, it is said:

"The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

In *Lock's appeal* (1873) 72 PA 491, it was held:

"The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of Government."

Lastly, K.C. Davis, in his book on "Administrative Law Text", Third Edition at p.26 said:

"The non-delegation doctrine has failed." In fact, the Supreme Court of America has recognised that the constitutional power implies a power of delegation of authority under it sufficient to effect its purposes.

The crux of the matter is that in determining whether there has been an unconstitutional delegation of legislative power, the field in which the powers are granted is an important element of consideration, and in the final analysis the question is one of kind and degree and each case of questioned delegation of authority must depend upon the facts of that particular case.

Having seen the scope of legislative delegation under the American Constitution, I would now refer to the remarks of Hamoodur Rahman, J., as he then was, in the Province of East Pakistan v. *Sirajul Haq Patwari* (P L D 1966 Supreme Court 854) at p. 951:

"The principle, I venture to think, under our own Constitution is much the same. Even though our Constitution has a similar

division of powers, namely, legislative, executive and judicial, it does not necessarily follow that the doctrine of excessive and impermissible delegation which has been considered to be a special characteristic of the American constitutional system, must necessarily also be imported into our own constitutional system."

And further at p.952:

"I do not wish, however, to dispute that the Legislature cannot abdicate altogether from its legislative functions or totally efface itself but where the Legislature has sufficiently expressed its will and exercised its judgment as to the territorial extent, scope and subject-matter of the legislation, the provision of details, particularly when such details are by their very nature incapable of being laid down by the Legislature itself, can well be left to be done by another agency in whom the Legislature places confidence.

The line of separation between the powers that have to be exercised directly by the Legislature itself and those that may be delegated is incapable of clear definition. Difficulties, therefore, often arise not in determining the Governing principles but in the application of those principles to concrete cases. The tendency, as already indicated, even in the United States of America is towards the enlargement of the powers of delegation due to the growing complexity in the functions of the State. The powers of delegation have, therefore, been held to vary not only with the scope of the authority of the delegating body but also by the variety of the conditions and circumstances a particular law is intended to meet and the status and authority of the body to which the power is delegated. The nature of the law whether it is of a penal nature or merely of a regulatory character--has also been considered to be of importance in this connection. Where the provisions are not new and unknown to existing law or where it is a subject-matter in which "accumulated experience" has established well-defined practices or where the delegate is an expert in whom the Legislature has confidence, even the American jurists concede that a greater degree of latitude may be conferred upon the Legislature of delegating legislative powers for adequately and effectively carrying out the purpose of the legislation. In such circumstances, "to require more would", as suggested by Douglas, J, in the case of the *Sunshine Anthracite Coal Company*, "be to insist on a degree of exactitude which not only lacks legal necessity but which does not comport with the requirements of the administrative process."

What is prohibited by the Legislature is the delegation of its function to make the law but not the authority exercised under and in pursuance of the law itself to another agency in regard to the provision of details when by the very nature these are incapable of being laid down by the Legislature itself.

In *Rafiuddin v. Chief Settlement and Rehab. Commissioner* (PLD 1971 S C 252), it was contended that paragraph 15-A of the *Displaced Persons (Compensation and Rehabilitation) Act, 1958*, was invalid by reason of the excessive delegation of legislative power

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which it purported to make in favour of the executive, but this contention did not prevail as it was held:

"Having regard to the nature of the legislation itself it was impossible to expect the Legislature to provide for all possible eventualities which were likely to arise due to the complexities of the problems from day-to-day. This was a fit subject, therefore, in respect of which the power of making subsidiary provisions could be validly delegated to the executive or those responsible for administering the law."

In *Gujrat-Punjab Bus Ltd. v. The Province of the Punjab and others* (P L D 1957 Lah.345), B.Z. Kaikaus, J, as he then was, stated the principle as under:--

"The limitations on the delegation of legislative power to the executive are well known. If the policy and framework are provided in an Act by the Legislature and the details are to be filled in by the executive, there is no defect in the delegation of legislative power. It is only in a case where the Legislature abdicates or effaces itself that the delegation is ultra vires. The tendency of modern legislation is to leave more and more to the executive for the process of legislation by the Legislature is cumbersome. The rule-making power granted by the Motor Vehicles Act does not conflict with the principles of delegation of legislative powers."

In *Messrs East and West Steamship Company v. Pakistan and others* (P L D 1958 SC 41), it was held: "But...in this respect the generally accepted position... is that no provision of law can fall within the rule against delegated legislation if it is based on a policy, discovered from the provision itself, which has to be implemented by the person against whom the charge of unauthorised legislation is made." Lastly, in *Sobho Gyanchandani v. Crown* (P L D 1952 F C 29), Abdur Rashid, C.J., held as under:--

"A Legislature cannot delegate its powers of making, modifying, or repealing, any law to an external authority. If it does so, it would be creating a parallel Legislature. The power of extending the duration of an enactment, which would have terminated but for the interference of the external authority, is the exercise of legislative powers by an external authority and is invalid. Extension of the life of an Act is tantamount to re-enactment. It is open to the Legislature to delegate powers relating to the enforcement of the Act, or its application to particular areas if certain conditions prevail therein, as that merely amounts to conditional legislation....If any Legislature delegated legislative functions to an external authority, such delegation would be invalid...."

It is the nature of the power rather than the manner of exercising it which determines whether the delegation is proper or invalid. If the Legislature gives the power to extend the life of an enactment to the Central Government, the nature of the power which is to be exercised by such Government is legislative power, as without the exercise of the power the legislation would have a natural death and would no longer have remained on the statute book. If on the other hand, the

body on which the authority has been conferred by the legislature has discretion as to the manner of the execution of the powers to be exercised, and in pursuance of the law the external authority is not making or unmaking the law but is performing its administrative functions in respect of matters which have been finally determined by the Legislature itself, it is not exercising legislative functions."

There is, therefore, a line of decisions laying down the rule of delegation and it is to be examined in each case as to the power delegated.

By subsection (2) of section 18, the Legislature has delegated to the Federal Government the discretion to levy "regulatory duty" on all or any of the items specified in the First Schedule at a rate not exceeding fifty per cent of the rate, if any, specified therein or at a rate not exceeding hundred per cent of the value of such articles, as determined under section 25 and may, by a like notification, levy a regulatory duty on all or any of the articles exported from Pakistan in respect of the articles mentioned in the Second Schedule at a rate not exceeding thirty per cent of the rate specified in the Second Schedule or of the amount which would represent the value of such articles as determined under section 25; and in the case of articles not specified in the Second Schedule, at a rate not exceeding thirty per cent of the amount which represents the value of such articles as determined under section 25. Here what is to be noticed is the exercise of a discretion within a legislative framework, i.e., firstly, that the discretion to levy is subject to such conditions, limitations or restrictions as the Federal Government may deem fit to impose; secondly, the specification of the articles by reference to the Schedule and the maximum of the rate of duty to be imposed; and thirdly, that the imposition of the levy was for a limited period of a financial year unless the levy was earlier withdrawn.

The levy was described as "regulatory duty" as it was imposed to maintain a proper balance in a fluctuating market as a result of sharp fall in the international prices of iron and steel scrap and certain other iron and steel items with the result that the importers imported these materials at a much lower cost but regardless of it the prices did not fall to any substantial extent in the domestic market, and it were the importers only who were the beneficiaries and were earning windfall profits. Therefore, the discretion to levy "regulatory duty" was a device to enhance the rate of duty at any time during the course of the year so as to achieve a balance. The Legislature, in the circumstances could not know as to the details of the fluctuating international prices from time to time during the course of the year and for that matter could not also be in a position to enhance the levy to obtain a balance of the prices in the domestic market nor was it in a position to speculate the details of the conditions, limitations or restrictions which were necessary to be imposed for the levy of "regulatory duty". It was in these circumstances that it provided the framework for the levy of "regulatory duty" to be imposed and gave the discretion to the Federal Government to make a levy so as to achieve a balance in the price in the local market.

In this view of the matter, what has to be seen is the nature

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X While upholding the
The validity of delegation
of authority under
sub-section (2) of 18 the
Supreme Court has
observed: Therefore

of the power delegated which determines whether the delegation is proper or invalid. If the Legislature delegates its power to make the law, that is, its own legislative function then it would be invalid but if what is delegated is the authority to exercise the discretion in respect of matters which had been finally determined by the Legislature itself, the delegated authority does not exercise a legislative function. In this context, the law itself provided the framework left it to the Federal Government to exercise the discretion in the manner laid down within the framework. It cannot, therefore, be regarded as an abdication of its function by the Legislature. The delegation of a discretion to achieve the purpose of the law. Accordingly, the judgment of the High Court is unexceptional.

In the result and for the reasons given above, the appeals are dismissed but with no order as to costs.

M.B.A./S-174/S

Appeals dismissed.

P L D 1988 Supreme Court 682

Before: *Basim Hasan Shah, Shafiur Rehman and
Javid Iqbal, JJ*

SAKHI MUHAMMAD and another--Appellants

versus

Mst. ALLAH BI and others--Respondents

Civil Appeal No.189 of 1988, heard on 3rd July, 1988.

(Appeal against the order/judgment dated 22-4-1987 of the Lahore High Court, Rawalpindi Bench, Rawalpindi, in Civil Revision No.241-D of 1985).

Evidence Act (I of 1872)--

---Ss.107 & 108--Words "when the question is" occurring in Ss.107 & 108 have reference only to question of burden of proof at the trial and not at any antecedent point of time--If a person has not been heard of for seven years there is presumption of law that he is dead but this presumption does not extend to the date of death.

Sections 107 and 108 of the Evidence Act, 1872 merely aim at regulating questions relating to the burden of proof and are not intended to fix the date of death, which fact must be established through positive evidence. The words "when the question is" occurring in both sections 107 and 108 have reference only to question of the burden of proof at the trial and not at any antecedent point of time. Thus, if a person has not been heard of for seven years there is a presumption of law that he is dead but this presumption does not extend to the date of death. Indeed there is no presumption that he died at the end of the first seven years, or at any particular date. This fact has necessarily to be proved as a fact because section 108 does not direct the Court to presume that the person who has not been heard of for the last seven years had, in fact, died at the expiry of seven years. It only provides that such a person is presumed to be dead without fixing the time of death. It is for this reason that where it is necessary to establish that a person died at any particular time, such a fact must be proved by positive evidence.

Thus, notwithstanding the presumption of death, it would be possible for the Court to give a finding that it occurred after the expiry of the period of seven years since the time when he was last heard of, if the evidence so warrants. Section 108 of the Evidence Act merely creates presumption that the person, who has not been heard for seven years, is dead, at the date of the suit, and does not refer in any way as to the date of his death, which has to be proved in the same way as any other relevant fact in the case. [p. 687] A

See Muhammad Sarwar and another v. Fazal Ahmad and another (1987 S C 1; Phene's Trusts v. Ch. A. 139; Lal Chand Marwari v. Mahant Ramrup Gir and another A I R 1926 P C 9 and Gurdit Singh and others etc. v. Munsha Singh and others etc. A I R 1977 S C 640 ref.

Muhammad Munir Peracha, Advocate Supreme Court and Manzoor Elahi, Advocate-on-Record for Appellants.

Sh. Zamir Hussain, Advocate Supreme Court and Ch. Akhtar Ali, Advocate-on-Record for Respondents.

Date of hearing: 3rd July, 1988.

JUDGMENT

SHAFIUR RAHMAN, J.--The plaintiffs/appellants were granted leave to appeal against the judgment dated 22-4-1987 whereby for the second time a Revision Petition filed by them was dismissed.

The appellants happened to be distant collaterals of one Sher Muhammad who was owner of agricultural land measuring 55 kanals 16 marlas in village Dhoke Boda, Tehsil Chakwal, District Jhelum. On the 21st of December, 1976 his mutation of inheritance No.254 was attested taking him to be dead as he had not been heard of by those concerned for the last over 26 years. The appellants were excluded from the inheritance and Lal the predecessor-in-interest of respondents who was nearer in degree was shown as his heir though it was admitted that Lal had also died on 6-10-1976. In this background of facts the Appellants as plaintiffs instituted a Civil Suit on 13-6-1977 claiming to be heirs of Sher Khan to the exclusion of Lal Khan who according to them had pre-deceased Sher Khan. They sought a declaration that Sher Khan having not been heard of for last 26 years should be presumed to be dead and that Lal Khan having died on 6-10-1976 i.e. before the presumed death of Sher Khan should be excluded from inheriting him and instead they should be declared the owners as heirs of the share possessed by Sher Khan. The suit was contested and the following issues were framed on the pleadings of the parties:-

- (1) Whether the plaintiffs are not in possession of the disputed property? OPD
- (2) Whether the suit is not maintainable in its present form? OPD
- (3) Whether the plaintiffs are the legal heirs of the deceased Sher Khan, if so what are their shares? OPP.
- (4) Whether the plaintiffs have got no cause of action? OPD.
- (5) Whether the present suit is false and vexatious and the defendants are entitled for the special costs under section 35-A of C.P.C. and to what amount? OPD