2. Criminal Petition No. 299/L/92 is directed against the dismissal of the petitioner's Criminal Revision No.400/89 by a learned Single Judge of the High Court. In the criminal revision the petitioner had challenged the learned Sessions Judge's order allowing the respondent to produce Syed Fida Hussain as a witness, whose name was not included in the list of witnesses annexed to the plaint under section 241-A, Cr.P.C. It is discernible from the record that the learned Sessions Judge relying on some case-law on the subject maintained that section 241-A, Cr.P.C. enforced after the filing of the complaint, is not mandatory but directory in character. The High Court held that the respondent submitted the list of the witnesses on 25-1-1989, to which the petitioner did not raise any objection; although he was aware that who had to appear against him. A

3. After hearing the learned counsel we do not find that he has succeeded in creating any dent in the view taken by the Courts below to justify grant of leave prayed for. B

4. As regards Crl. P. No. 300/L/92, it relates to the dismissal of the petitioner's application under section 247, Cr.P.C. by the learned Sessions Judge. Under this application the petitioner had sought the dismissal of the complaint on account of the respondent's absence. The High Court vide order dated 9-6-1992, under challenge before us, had declined to interfere with the orders of the learned Sessions Judge.

5. We have heard the learned counsel. A reference to the second proviso to section 247, Cr.P.C. will provide that it does not apply where offence of which the accused is charged, is either cognizable or non-compoundable. There is no doubt that an offence under section 497 is a cognizable offence. When faced with this situation, the learned counsel did not have much to say in support of the petition. In any case, grant of leave in exercise of jurisdiction under Article 185(3) is essentially discretionary. Hollowness of the petitioner's contentions advanced in support of these petitions apart, keeping in view the facts and circumstances of the case, we do not consider these cases fit for grant of leave. Accordingly, both the petitions are dismissed and the leave prayed for refused. C D E

6. It is lamentable that the respondent's complaint has endured a period of more than 20 years and his evidence has not been completed so far; presumably because of his involvement in the litigation emanating from the orders passed in the course of hearing of the complaint. The case needs to be disposed of expeditiously. The parties are directed to appear before the learned trial Court on 13-5-1993, as agreed upon by their learned counsel.

N.H.Q./M-1781/S Leave refused.

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[Supreme Court of Pakistan]

Present: Nasim Hasan Shah, Zaffar Hussain Mirza, Saad Saood Jan, Naimuddin and Sajjad Ali Shah, JJ

MOLASSES TRADING & EXPORT (Pvt.) LIMITED---Appellant

versus

FEDERATION OF PAKISTAN and others---Respondents

Civil Appeals Nos. 915-K to 918-K of 1990, heard on 29th August, 1991.

(On appeal from the common judgment/order of High Court of Sindh at Karachi dated 5th December, 1989 in Constitution Petitions Nos. 1112, 1113, 16 of 1986 and 17 of 1987 respectively).

Per Zaffar Hussain Mirza, J.; Nasim Hasan Shah and Sajjad Ali Shah, JJ. agreeing---

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

---S. 31-A---Constitution of Pakistan (1973), Art.185(3)---Leave to appeal was granted to examine the vires of S.31-A of the Customs Act, 1969. [p. 1916] A

(b) Legislation---

---Taxation---Retrospective legislation to bind even past transactions--Ways that can be adopted by legislature to neutralise the effect of the earlier decision of the Court.

When a legislature intends to validate a tax declared by a Court to be illegally collected under an invalid law, the cause for ineffectiveness or invalidity must be removed before the validation can be said to take place effectively. It will not be sufficient merely to pronounce in the statute by means of a non obstante clause that the decision of the Court shall not bind the authorities, because that will amount to reversing a judicial decision rendered in exercise of the judicial power which is not within the domain of the legislature. It is therefore necessary that the conditions on which the decision of the Court intended to be avoided is based, must be altered so fundamentally, that the decision would not any longer be applicable to the altered circumstances. One of the accepted modes of achieving this object by the legislature is to re-enact retrospectively a valid and legal taxing provision, and adopting the fiction to make the tax already collected to stand under the re-enacted law. The legislature can even give its own meaning and interpretation of the law under which the tax was collected and by "legislative fiat" make the new meaning binding upon Courts. It is in one of these ways that the legislature can neutralise the effect of the earlier decision of the Court.

The legislature has within the bonds of the Constitutional limitations, the power to make such a law and give it retrospective effect so as to bind even pa: ransactions. In ultimate analysis therefore the primary test of validating piece of legislation is whether the new provision removes the defect which the Court had found in the existing law and whether adequate provisions in the validating law for a valid imposition of tax were made. [p. 1920] B

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

---S. 31-A---Analysis of S.31-A, Customs Act, 1969---Distinction between chargeability and payability of a duty under the Act has been effectively destroyed by S. 31-A because the rate would now include the quantified amount of duty that would be payable as a result of withdrawal of exemption from duty and direction in S.31-A that such will be the position whether the withdrawal is before or after the conclusion of a contract or opening of a letter of credit, has the effect of destroying the doctrine of vested rights---Mere fact that S. 19 of Customs Act, 1969 has not been mentioned in S.31-A, does not mean that legal effect of the exercise of power under S. 19 read with S. 21, General Clauses Act, 1897, is not within purview of S.31-A---Withdrawal of exemption or concession by S. 31-A has reference to the provision of S. 19---Non obstante clause in S. 31-A has the effect of setting at naught the effect of Supreme Court judgment in Al-Samraz Enterprise case reported as 1986 SCMR 1917---Consequences that flowed from the act of withdrawal or modification of an exemption notification under S.31-A, shall take effect with reference to the date of its issue, irrespective of the fact that the contract for the import of goods and the letter of credit, had come into existence prior to such date---Courts, would therefore, have to give effect to this withdrawal or modification of concession, notwithstanding the decision of Supreme Court in the case of Al-Samrez Enterprise 1986 SCMR 1917.

A plain reading of the section 31-A, Customs Act, 1969 would show that, it opens with non obstante clause excluding the application of any other law for the time being in force or any decision of any Court. It then lays down that for purposes of sections 30 and 31 the rate of duty applicable to any goods shipped is inclusive of two components, namely, any "amount" of duty imposed under section 18 and certain other specified taxing statutes and then comes the most relevant clause which comprises the second component included in the rate of duty, which reads as follows: "and the amount of duty that may have become payable in consequence of the withdrawal of the whole or any part of the exemption or concession from duty whether before or after the conclusion of a contract or agreement for the sale of such goods or opening of a letter of credit in respect thereof." In order to bring out the true import and the meaning of this part of the section Supreme Court arranged the various phrases thereof and added a few words thereto placed in the brackets the text of which would then read as follows:--

Notwithstanding anything contained in any other law for the time

being in force or any decision of any Court, for the purposes of sections 30 and 31, the rate of duty applicable to any goods shall include...the amount that may have become payable in consequence of withdrawal of exemption from duty, whether (the withdrawal is) before or after the conclusion of a contract or agreement for the sale of such goods or opening of a letter of credit thereof.

A plain reading of this text would show that by a mandate of law the rate of duty, which was a matter pertaining to the taxability or leviability of the duty, has now to include the amount not only of the duty imposed under section 18, but also the amount that would notionally become payable if the exemption is withdrawn, irrespective of whether the withdrawal takes place before or after the conclusion of a contract for the sale of goods or opening of a letter of credit. It is easy now to see that the distinction between chargeability and payability of a duty under the Act has been effectively destroyed because the rate would now include the quantified amount of duty that would be payable as a result of withdrawal of exemption from duty. The direction that this will be the position whether the withdrawal is before or after the conclusion of a contract or opening of a letter of credit, has the effect of destroying the doctrine of vested rights on the basis of which the decision in the case of Al-Samrez Enterprise was given. In ordinary concept the rate does not include the quantum or the total amount payable, but the legislature has mandated that it shall be included within the rate of duty by the fiction created in law. Therefore contention that the position has remained unchanged in spite of section 31-A, becuase its provisions have been confined to operate only for the purpose of sections 30 and 31, is not tenable, because under the changed law section 30 now not only deals with rate of duty, but the amount payable under section 18 of the Act as well as in consequence of withdrawal of exemption, destroying the vested rights that may have accrued on account of the conclusion of contract for the sale of goods or opening of a letter of credit.

While section 30 was not relevant to resolve the question whether the withdrawal of exemption would relieve a party from the payment of duty under the existing law before the amendment, section 31-A has now raedically changed the effect of section 30 by including the quantified amount of duty which becomes payable by virtue of the withdrawal notification. Therefore, in the new dispensation section 30 has become relevant even for purposes of exemption. The mere fact that section 19 has not been mentioned in the new section, does not mean that the legal effect of the exercise of power under section 19 read with section 21 of the General Clauses Act, is not within the purview of sec-tion 31-A. The language employed clearly refers to the withdrawal of exemption or concession which evidently has reference to the provisions of section 19. Accordingly there is no substance in the contention that the newly-inserted section has restated in different words the position that already stood under the unamended law. For the same reasons it cannot be held that the non obstante clause does not have the effect of setting at naught the effect of the judgment of this Court in the case of Al-Samrez Enterprise

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because the new law is a departure from and is in conflict with position expounded in Al-Samrez Enterprise. For the same reasons the argument is without substance that section 31 has not achieved the object of defeating the consequences of exemption granted under section 19 beyond the date on which any notification of modification or withdrawal of exemption is issued, or to nullify the judgment in the case of Al-Samrez Enterprise. The language of section 31-A clearly envisages and stipulates that the consequences that flow from the act of withdrawal or modification of an exemption notification, shall take effect with reference to the date of its issue, irrespective of the fact that the contract for the import of goods and the L.C. had come into existence prior to such date. This effect has been now prescribed by a mandatory provision of law by legislative fiat. The Court would therefore have to give effect to it notwithstanding the decision in the case of Al-Samrez Enterprise. [p. 1920] C

The exposition of law made in the case of Al-Samrez Enterprise took into consideration the law as it stood on the date when that decision was rendered. The law has changed by the insertion of the section 31-A materially affecting the enunciation of the law made therein. Therefore the changed state of law that has come into effect was not contemplated in that decision and it cannot therefore be urged with any justification, that the principles laid down therein would still apply to the interpretation of the provisions of law discussed therein. In this view of the matter the contention that the deeming clause takes back the insertion of section 31-A to the time of enforcement of the Act in 1969 and therefore the non obstante clause will not eclipse the decision in the case of Al-Samrez Enterprise, loses all forces. [p. 1922] D

Al-Samrez Enterprise v. Federation of Pakistan 1986 SCMR 1917 **discussed.**

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

----S. 31-A---Section 31-A, Customs Act, 1969 is retrospective in its operation. [p. 1923] E

(e) Interpretation of statutes---

----Vested rights---Such rights cannot be taken away save by express words or necessary intendment in the statute. [p. 1923] F

(f) Legislature---

----Power of---Legislature, which is competent to make a law, has full plenary powers within its sphere of operation to legislate retrospectively or retroactively. [p. 1923] G

(g) Vested right---

----Such right can be taken away by a retrospective/retroactive legislation and such legislation cannot be struck down on that ground. [p. 1923] H

(h) Interpretation of statutes---

----Statute cannot be read in such a way as to change accrued rights, the title to which consists in transactions past and closed or any facts or events that have already occurred. [p. 1923] I

Province of East Pakistan v. Sharafatullah PLD 1970 SC 514 **ref.**

(i) Interpretation of statutes---

----Deeming clause---Effect---When a statute contemplates that a state of affairs should be deemed to have existed, it clearly proceeds on the assumption that in fact it did not exist at the relevant time but by a legal fiction Court has to assume as if it did exist. [pp. 1923, 1924] J & K

Mehreen Zaibun Nisa v. Land Commissioner, Multan PLD 1975 SC 397 and East End Dwelling Company Ltd v. Finsbury Borough Council 1952 AC 109 **ref.**

(j) Interpretation of statutes---

----Deeming clause---When a statute enacts that something shall be deemed to have been done which in fact and in truth was not done, the Court is entitled and bound to ascertain for what purpose and between what persons the statutory fiction is to be resorted to. [p. 1924] L

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

----S. 31-A---Provisions of S.31-A do not have the effect of destroying or re-opening the past and closed transactions---Where the Bills of Entry were presented prior to Ist July 1988 all such cases, held, were cases which were past and closed transactions and were not therefore affected by S.31-A.

Before the insertion of section 31-A the position was that upon the presentation of a bill of entry, by virtue of section 30 of the Act the levy of duty was crystallised. As explained in the case of Al-Samrez Enterprise, the liability to tax was created under section 18 with reference to this date, because it is the rate of duty by application of which the tax liability can be quantified or assessed. Simultaneously, any benefit of exemption also takes effect on the same date because in the very nature of things, the liability is wiped off by virtue of the exemption at the same time. Therefore, this is the crucial point of time at which, by operation of law the liability is discharged. In other words, the rights and liabilities of the importers attained fixity on the said crucial date. Inevitably therefore a vested right has been created and the transaction is closed by the quantification of the tax, if any, or by the discharge of liability on that date. The mere fact that any proceedings remained pending for assessment of the tax by a statutory functionary for the purpose of recovery of the dues, will not prevent the law from operating and producing the result of closing the transaction. This is on the simple principle that every functionary is bound by the provisions of law and has to pass a lawful order which alone is

protected. Besides on this date the liability to pay tax and the exemption from payment are matters of mere calculation in terms of section 30 read with sections 18 and 19 of the Act, because the rate and value of the goods become fixed with reference to this date. Indeed no adjudicative process is involved in such a matter. Viewed in this perspective, if effect is given to the provisions of section 31-A so as to undo the discharge of the liability which had already taken effect, it will amount to re-opening a past and closed transaction. The simple reason is that under the existing law there was no further liability to pay the tax and by giving retrospective operation to the new dispensation a liability is being created for the payment of the tax. There is nothing in the language of section 31-A, expressly or by necessary intendment, to that effect. Such result is therefore not a necessary corollary of the fiction created by the deeming provisions of section 5 of the Finance Act, 1988. Otherwise also it will be contrary to the principle, namely, that liabilities once fixed or rights created by operation of law upon facts or events, must not be disturbed by a general provision given retrospective effect unless such intention is clearly manifested by the language employed. [p. 1924] M

The insertion of section 31-A so as to operate retrospectively does not have the effect of destroying or reopening the past and closed transactions. As the bills of entry in all the cases were presented on dates prior to Ist July, 1988, all these cases are cases which were past and closed transactions and were not therefore affected by the provisions of section 31-A. The act of refusal on the part of the Customs Authorities to release the goods on the basis of the notification prior to the impugned notifications and the demand of duty in accordance with the said notifications was therefore without lawful authority and of no legal effect. [p. 1925] N

Al Samrez Enterprise v. Federation of Pakistan 1986 SCMR 1917; Gul Ahmad Textile Mills v. The Collector of Customs Constitutional Petition No.841 of 1986; Inland Revenue Comissioners v. Ayrshire Employees Mutual Insurance Association Limited 1946 All ER 637; Sultan Mawajee v. Federation of Pakistan, Chamber of Commerce and Industry PLD 1982 SC 174; Chief Land Commissioner, Sindh v. Ghulam Hyder Shah 1988 SCMR 715; Yousuf Re-Rolling Mills v. The Collector of Customs PLD 1989 SC 232; Nizam Impex v. Government of Pakistan 1990 SCMR 1187; Hajera Rashid Gardee v. The Deputy Collector, Customs, Lahore PLD 1989 Lah, 58; Nizam Impex v. Government of Pakistan PLD 1991 Kar. 208; Province of East Pakistan v. Sharafatullah PLD 1970 SC 514; Mehreen Zaibun Nisa v. Land Commissioner, Multan PLD 1975 SC 397; East End Dwelling Company Ltd. v. Finsbury Borough Council 1952 AC 109; Nizam Impex v. The Government of Pakistan PLD 1991 Kar. 208 and Yaseen Sons v. Federation of Pakistan PLD 1989 Kar. 361 ref.

Per Naimuddin, J. (Contra). ---[p. 1929] R

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

---S. 18(2) & First Sched.---Imposition of regulatory duty in excess of 50% of the duty specified in the First Sched. of the Act is void and without lawful authority. [p. 1926] O

Yousuf Re-Rolling Mills v. The Collector of Customs PLD 1989 SC 232 **ref.**

Per Naimuddin, J.---[p. 1929] S

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

---S. 18(2) & First Sched.---Palm oil---Duty in excess of 50% of the rate mentioned in the First Sched. on palm oil was ultra vires. [p. 1926] P

Yousuf Re-Rolling Mills v. The Collector of Customs PLD 1989 SC 232 and Federation of Pakistan v. M/s. Mahmood (Pvt.) Limited Civil Appeal No. 187-K of 1990 **ref.**

Per Naimuddin, J. agreeing with Zaffar Hussain Mirza, J.---

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

---S. 31-A---Effect of S.31-A.

Section 31-A in the Customs Act, 1969 has radically changed the effect of section 30 by including the quantified amount of duty which becomes payable by virtue of the withdrawal of notification. The language of section 31-A, clearly envisages and stipulates that the consequences that follow from the Act of withdrawal or modification of an exemption notification, shall take effect with reference to the date of its issue irrespective of the fact that the contract for the import of goods was entered into or the letter of credit was opened prior to the date of such withdrawal. The insertion of section 31-A materially affected the enunciation of law made in the case of Al-Samrez Enterprise and that the insertion takes back to the time of enforcement of the Customs Act in 1969. [p. 1927] Q

Al-Samrez Enterprise v. Federation of Pakistan 1986 SCMR 1907 **ref.**

Per Saad Saood Jan, J. agreeing with Zaffar Hussain Mirza, J.---

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

---S. 31-A---Provision of S.31-A has eclipsed the rule laid down by Supreme Court in Al-Samrez Enterprise 1986 SCMR 1917 so far as the effect of notification of withdrawal of exemptions is concerned. [p. 1929] T

Al-Samrez Enterprise v. Federation of Pakistan 1986 SCMR 1917 **ref.**

Interpretation of statutes---

----Retrospective legislation---Effect on past and closed transactions---Held, in the absence of express provisions or necessary intendment retrospective legislation will not be construed in a manner that will lead to re-opening of a past and closed transaction. [p. 1930] U

Khalid Anwar, Advocate Supreme Court and Mrs. Majida Razvi, Advocate-on-Record for Appellants.

Ch. Ijaz Ahmad, D.A.G. and Ikram Ahmad Ansari, Advocate-on-Record for Respondent.

Date of hearing: 29th August, 1991.

JUDGMENT

ZAFFAR HUSSAIN MIRZA, J.---These are four appeals by leave from a common judgment of a Division Bench of the Sindh High Court, dated 5th December, 1989, whereby four separate Constitutional petitions filed by the appellant were dismissed.

It will be convenient to refer to the facts in Civil Appeal No. 915-K of 1990, in order to bring out the controversy bewcen the parties, because except for minor details the facts of all the four aforesaid appeals are identical. The first mentioned two appeals relate to the import of two separate consignments of Palm Oil and the last mentioned two appeals relate to the import of two consignments of Soyabean Oil by the appellant. The appellant M/s. Molasses Trading and Export Company Limited in Civil Appeal No. 915-K of 1990 obtained an import licence on 28th July, 1986 for the purpose of importing 500 mertric tons of RBD Palm Oil. It opened a letter of Credit on 29th July, 1986. The consignment was imported under different bills of lading on board the same vessel which reached Karachi on 10th August, 1986.

The case of the appellant is that originally duty on Palm Oil was leviable at the rate of Rs.3,000 per metric ton, but by means of Notification dated 17th April, 1986 issued under section 19 of the Customs Act, 1969 (hereinafter referred to as the Act) the Federal Government mofified the previous relevant notification on the subject dated 25th June, 1981, whereby the amount of exemption was further increased so that the duty was payable only at the rate of Rs.2,350 per metric ton. However, on 29th May, 1986 the same rate of exemption was maintained by the notification of the said date issued under section 19 of the Act.

In the events that happened, however, after opening of the Letter of Credit by the appellant, by means of notification dated 22nd August, 1986 issued under section 19 of the Act, the exemption earlier granted under the last mentioned two notifications was modified with the result that the duty was

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increased from Rs.2,350 to Rs.5,350 per metric ton, with the result that under the said notification the appellant would be required to pay Rs.3,000 per metric ton towards duty over the earlier rate of duty payable. The last-mentioned notification may with advantage be reproduced as under:--

"NOTIFICATION

(Customs)

S.R.O. .....(86). In exercise of the power conferred by section 19 of the Customs Act (IV of 1969), the Federal Government is pleased to direct that the goods specified in column 2 of the Table below and falling within the heading number of the First Schedule to the said Act specified in column 1 of the said Table shall be exempt from so much of the customs duties chargeable thereon as are in excess of the rates of duty specified in column 3 of the Table with dates and duties specified in column 4 of the Tables against each.

TABLE

Heading No. In the First Schedule to the Customs Act, 1969 (IV of 1969)	Description of goods	Rate of duty	Date
1	2	3	4
	(1) Soyabean oil, cottonseed oil, ground-nut oil, sunflower seed oil, rape, colza or mustard oil.	(a) Rs.2,350 metric ton (b) Rs.3,000 metric ton	22nd August, 1986 20th September, 1986.
	(2) Palm Oil.	(c) Rs.5,350 metric ton (d) Rs.6,000 metric ton	22nd August, 1986 20th September, 1986.

2. This notification shall take effect on the 22nd August, 1986."

The appellant presented the bill of entry on 26th August, 1986 claiming that the duty was leviable at the rate of Rs.2,350, but the Customs Authorities rejected the claim of the appellant and insisted on payment of duty at the rate of Rs.5,350 per metric ton, as leviable by virtue of the last mentioned notification dated 22nd August, 1986 and refused to release the

goods. The appellant therefore filed Constitution petition in the High Court of Sindh challenging the validity of the notification dated 22nd August, 1986 and seeking a direction to the Customs Authorities to release the Consignment on payment of the Customs Duty prevalent previously.

The plea taken by the appellant in their Constitutional petition was that although the impugned notification purported to have been issued under section 19 of the Act relating to the grant of exemption, in substance the said notification levied higher Customs Duty. In reply, the respondents, without controverting the facts pleaded by the appellant, submitted that the rate of duty on Palm Oil with effect from 17th April, 1986 to 21st August, 1986 was 70% ad valorem. However, the Federal Government in exercise of its power under section 19 of the Act exempted the duty in excess of Rs.2,350 per mertic ton. Further with effect from 22nd August, 1986 a regulatory duty of hundred per cent. ad valorem was levied on Palm Oil under section 18(2) of the Act. However, simultaneously exemption under section 19 was granted with effect from 22nd August, 1986 by exempting the payment of Custom Duties chargeable thereon, as are in excess of Rs.5,350 the net effect of which was that a duty at the said rate was payable with effect from that date and with effect from 20th September, 1986, the duty in excess of Rs.6,000 was exempted, with the result that duty at the said rate was payable with effect from the said date.

In Civil Appeal No. 916-K of 1990, the contract was entered into on 23rd July, 1986, the import licence was obtained on 27th July, 1986, shipment was made on 15th August, 1986 and the bill of entry was presented at Karachi Port on 7th September, 1986.

In Civil Appeal No.917-K of 1990, the contract entered into and the L.C. opened were on or about 5th August, 1986, shipment of the goods was made on 4th September, 1986, the goods arrived at Karachi on 6th October, 1986 and the impugned notification was issued on 24th September, 1986 under section 19 of the Act whereby exemption was modified and duty payable on Soyabean Oil was increased to Rs.3,000 per metric ton. The bill of entry in this case was presented on 7th October, 1986, whereas the import licence and the Letter of Credit were opened prior to 24th September, 1986, the date of the impugned notification.

In Civil Appeal No. 918-K of 1990 the Letter of Credit was established on 5th August, 1986, goods were shipped on 4th September, 1986 and arrived at Karachi on 6th October, 1986, whereafter the bill of entry was presented on 9th October, 1986. The impugned notification in this case is also dated 24th September, 1986, the same as was challenged in the abovementioned Civil Appeal No.917-K of 1990.

So far as the modification of the notification under section 19 of the Act resulting in reducing the quantum of exemption per metric ton and

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proportionate increase of the Customs Duty by the impugned notification, are concerned the appellant relied upon the decision of this Court in Al-Samrez Enterprise v. Federation of Pakistan (1986 SCMR 1917), in which it was held that where the contract between the importer of goods and the foreign supplier had been concluded and all other steps for the import of goods had been taken before the modification in the exemption notification, so that vested right to the then existing notification granting exemption was created, the modified notification cannot be given retrospective effect and enhanced Customs Duty could not be legally demanded, even if the goods reached the country after the date of such modified notification under section 19 of the Act and the Bill of Entry is submitted thereafter. In resisting this contention it was urged on behalf of the Government that by insertion of the new section 31-A in the Act by the Finance Act of 1988, the effect of the said decision was nullified retrospectively in view of the non obstane clause in the opening part of the said section. The learned Judges repelled the contention of the appellant and held that section 31-A did nullify the effect of the decision of this Court in the case of Al-Samrez Enterprise and the principles enunciated therein, in view of the clear intention expressed in section 31-A, with the result that duties and charges leviable under section 18 can be legally recovered even if the contract was concluded and other steps were taken for the import of goods before the modification or amendment of the exemption notification and even the duties chargeable under section 18(2) have become recoverable by virtue of the said section having retrospective effect. In taking this view the learned Judges of the Division Bench relied upon an earlier decision of the Sindh High Court in Constitutional Petition No. 841/1986 (Gul Ahmed Textile Mills v. The Collector of Customs), in which the relevant reasoning with regard to the effect of section 31-A was as under:--

> "The main intention of section 31-A is to provide a legal cover for recovery of duty at the specified rate including the amount of duty imposed under section 18 of Customs Ordinance, section 2 of the Finance Ordinance, 1982 and section 5 of the Finance Act, 1985 and the anti-dumping or countervailing duty imposed under Ordinance III of 1983 and such amount of duty which may have become payable due to withdrawal of exemption notification. The closing part of section 31-A, subsection (1) clearly indicates that if any body claims any vested right by virtue of any agreement for sale or opening of letter of credit then it shall not prevail over this provision of law. Protection to vested right is claimed on general principle of law as enunciated in Al-Samrez's case. Section 31-A specifically refers to this decision without mentioning it and also covers rights arising from the contract, agreement of sale or opening of letter of credit. This clearly indicates that the Legislature intended to completely obliterate such rights."

appeals the learned Judges of the Division Bench dismissed the Constitutional petitions.

Leave to appeal was granted in order to examine the vires of section 31-A of the Act raised in other petitions in which leave had already been granted. A

It may be observed that all the connected appeals numbering 88 were heard together because some points of law and fact were common in several sets of appeals.

Mr. Khalid Anwar, Advocate addressed the leading argument on the side of the importers and the other learned counsel appearing in some appeals for the importers added to his argument or adopted the same. In the present four appeals, Mr. Khalid Anwar is the learned counsel for the appellant.

It will now be convenient to set out the provisions of section 31-A which was inserted in the Act by subsection (2) of section 5 of the Finance Act VI of 1988 which reads as under:

"5. Amendment of Act IV of 1969.--The following amendments shall be made in Customs Act, 1969 (IV of 1969), namely:-

(1) ... ...

(2) after section 31, the following new section shall be inserted and shall be deemed always to have been so inserted, namely:--

"31-A. Effective rate of duty.--(1) Notwithstanding anything contained in any other law for the time being in force or any decision of any Court, for the purposes of sections 30 and 31, the rate of duty applicable to any goods shall include any amount of duty imposed under section 18, section 2 of the Finance Ordinance, 1982 (XII of 1982), and section 5 of the Finance Act, 1985 (I of 1985), and the anti-dumping or countervailing duty imposed under the Import of Goods (Anti-Dumping and Countervailing Duties) Ordinance, 1983 (III of 1983), and the amount of duty that may have become payable in consequnce of the withdrawal of the whole or any part of the exemption or concession from duty whether before or after the conclusion of a contract or agreement for the sale of such goods or opening of a letter of credit in respect thereof.

(2) ....

(3) ....

(4) ....'."

On section 31-A, Mr. Khalid Anwar, learned counsel, submitted that a careful reading of the provisions of the said section would reveal that the

purpose of the Legislature was to include certain duties and the amount of duty which may have become payable in consequence of withdrawal of the whole or any part of the exemption from duty, within the rate of duty applicable to any goods under section 18. He put a great deal of emphasis upon the words "for the purposes of section 30 and section 31" and vehemently contended that whatever be the effect achieved by section 31-A, the same was expressly confined to the purposes of sections 30 and 31 of the Customs Act. Proceeding on this premise, learned counsel strongly urged that therefore the legal position enunciated in Al-Samrez Enterprise v. Federation of Pakistan (1986 SCMR 1917) has not been in any way affected, because in the final analysis the effort of the draftsman of section 31-A is reduced to a redundancy. In this connection, learned counsel referred to para. 5 of the judgment in the case of Al-Samrez which has discussed the significance and scope of section 30, in so far as it gives fixity and crystallises the liability created by section 18, which is the charging section, as regards the rate of duty by providing that the duty shall be paid at the rate applicable to the imported goods on the date when the bill of entry is presented for clearance of the goods. It was pointed out that in the aforesaid judgment this Court has also dealt with the scope of section 19 of the Customs Act, under which the Federal Government possesses the general power to exempt from customs duty any goods, which are otherwise charged to duty at the rates prescribed in the First and the Second Schedules to the Act or any other law for the time being in force. Therefore, it was held that any exercise of power under section 19 does not indeed have the effect of changing the rates chargeable but only exempts the payment thereof, although the charge is created by virtue of the material acts creating charge, namely, import of goods. Learned counsel then referred to the following passage from the judgment comparing sections 18 and 19 of the Customs Act:

> "The two sections, therefore, clearly operate independently and the exercise of power under section 19, is distinct in character and scope, so that it cannot have the effect of nullifying the statutory provisions contained in section 18 whereby the charge is created by the statute itself. In this context it is not difficult to understand that section 30 has no material bearing on the controversy before us and its provisions would not be violated either way on the determination of question whether the exemption from the payment of duty earlier granted was applicable to the case of the appellants or not."

(Emphasis provided).

Referring to the underlined portion from the extract reproduced above from the judgments, learned counsel elaborated his submission that according to the pronouncement of the Supreme Court, section 30 is not relevant to the question as to the quantification of the duty payable on a certain consignment of the imported goods, in relation to the question whether exemption from the payment of duty was available or not. That being so,

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learned counsel urged, if the effect of section 31-A is confined to section 30, without touching the provisions of section 19, then as held in the case of Al-Samrez, the amount of duty exempted, in any case even before the amendment ... law, was that the exempted duty or any portion thereof in fact formed part of the duty leviable under section 18 by virtue of section 30. Therefore, the Legislature was re-stating in other words the position that already stood, under the unamended law as explained in the said judgment. In the light of these submissions, learned counsel argued that the non obstante clause with regard to any decision of any Court, does not really change the legal position as propounded and interpreted in the aforesaid judgment of Al-Samrez. In other words, if there was nothing repugnant between the enunciation of law in the aforesaid judgment and the provisions of section 31-A, then the non obstante clause does not advance any intended object sought to be achieved.

Learned counsel submitted that the two obvious intentions which were sought to be achieved by the enactment of section 31-A were: (1) to defeat the consequence of exemption granted under section 19, beyond the date on which any notification of modification or withdrawal of exemption is issued and (2) to override the judgment in the case of Al-Samrez. But according to the learned counsel both these objects are not achievable by the language employed is section 31-A.

The next argument of learned counsel was that as retrospective effect has been given to section 31 from the date of enforcement of the Customs Act, 1969, by necessary implication, the said section has to be treated by fiction of law to be a part and parcel of the Act in 1969. It is not difficult to see therefore that, the non obstante clause exempting the section from the operation of any decision of any Court, relates to decisions prior in time to 1969. It therefore follows that since the judgment in the case of Al-Samrez came in 1986. It is not within the ambit or purview of the non obstante clause and would therefore rule the field. It is, of course, obvious that no statute can nullify the effect of judgments to be rendered by the superior Courts in the furture.

Finally, learned counsel submitted that in any event at the highest section 31-A having been enacted on 1st July, 1988, by virtue of section 30 of the Customs Act, the crucial date for crystallising the duty payable on goods imported in Pakistan would be the date of the presentation of the bill of entry. According to the learned counsel since in all his cases the bill of entry was presented before 1st July, 1988, the Customs Officers were bound under the law to give effect to the existing law for assessment of duty in terms of Al-Samrez's case and cannot justify any higher amount of duty on the basis of non-existing law on that date.

Learned counsel additionally submitted that section 31-A does not contain validation clause and in any case does not have the effect of re-opening past and closed transactions in which the liability stood crystallised and

quantified already, because there is no express provision to that effect or a provision creating that effect by necessary intendment in the language of the said section.

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Mr. Fakhruddin G. Ebrahim, learned counsel who also appeared for the importes in connected appeals also urged that a general retrospective provision will not have the effect of valaditing an illegal act, unless validation is conferred expressly.

Mr. Khalid Anwar further urged that where vested rights are affected by any retrospective provision of law, the rule of strict construction of the statute is to be adopted. Likewise, this being a fiscal statute, the provisions in question have to be given a strict construction. In support of the last-mentioned argument, learned counsel relied on Inland Revenue Commissioners v. Ayrshire Employees Mutual Insurance Association Limited (1946 All England Reports 637), Sultan Mawajee v. Federation of Pakistan, Chamber of Commerce and Industry (PLD 1982 SC 174) and Chief Land Commissioner, Sindh v. Ghulam Hyder Shah (1988 SCMR 715).

On the question of regulatory duty imposed under section 18 (2) of the Act, learned counsel submitted that it was obviously illegal in view of the clear provisions of that section, which provides that regulatory duty can be imposed at a rate not exceeding 50% of the rate, if any, specified in the First Schedule to the Act. Reliance, in this behalf, was placed on Yousuf Re-Rolling Mills v. The Collector of Customs (PLD 1989 SC 232).

On behalf of the respondent-Government, Mr. Ijaz Ahmad, learned Deputy Attorney-General argued that section 31-A has effectively taken away even the vested rights which may have accrued to the appellant and the legislature was competent to do so, as it is well-settled that under our Constitution Parliament is competent to frame law with retrospective effect, as well as to remove the effect of the judgment of a Court of law. He has brought to our notice judgment reported as Nizam Impex v. Government of Pakistan (1990 SCMR 1187) holding that the effect of the law laid down in the case of Al-Samrez Enterprise has been undone by the enactment of section 31-A. He also relied on the view taken in Hajera Rashid Gardee v. The Deputy Collector, Customs, Lahore (PLD 1989 Lahore 58) and Nizam Impex v. Government of Pakistan (PLD 1991 Karachi 208).

So far as the first limb of the argument advanced by Mr. Khalid Anwar is concerned, it may be pointed out that the fundamental basis of the case of Al-Samrez Enterprise was the concept of exemption as applied to taxation, which presupposes a liability, and is applicable to the grant of immunity from the liability to be assessed to the tax imposed by the statute. This is expounded as the distinction between the leviability or taxability and the payability in regard to a tax. The grant of exemption, it was explained, only wipes out the liability for payment of the tax which is presupposed to exist by

virtue of charging section. Therefore, the exemption or immunity from payment of a tax is distinguishable from immunity from taxation. It was in this context that reference was made to section 18, which is a charging section, section 19 which relates to grant of exemption and section 30 which fixes the point of time with reference to which the rate payable has to be applied to the quantification of the liability for the payment of tax. Under the then existing law which was construed in the case of Al-Samrez Enterprise. Section 30 was indeed designed to achieve the result that the rate of duty payable on the date of presentation of the bill of entry was made applicable, with reference to which the duty payable had to be assessed. At that time section 19 dealt with the question of payability, so that if any exemption was granted the tax to that extent was not payable, although the charging section did create the liability to pay. However, the question is whether the provisions of section 31-A have changed this concept separating the leviability or chargeability and payability of the tax, and destroyed the basis on which the aforesaid judgment in Al-Sarmrez Enterprise preceded.

Before considering this question it would be appropriate to make certain general observations with regard to the power of validation possessed by the legislature in the domain of taxaing statutes. It has been held that when a legislature intends to validate a tax declared by a Court to be illegally collected under an invalid law, the cause for ineffectiveness or invalidity must be removed before the validation can be said to take place effectively. It will not be sufficient merely to pronounce in the statute by means of a non obstante clause that the decision of the Court shall not bind the authorities, because that will amount to reversing a judicial decision rendered in exercise of the judicial power which is not within the domain of the legislature. It is therefore necessary that the conditions on which the decision of the Court intended to be avoided is based, must be altered so fundamentally, that the decison would not any longer be applicable to the altered circumstances. One of the accepted modes of achieving this object by the legislature is to re-enact retrospectively a valid and legal taxing provision, and adopting the fiction to make the tax already collected to stand under the re-enacted law. The legislature can even give its own meaning and interpretation of the law under which the tax was collected and by "legislative fiat" make the new meaning binding upon Courts. It is in one of these ways that the legislature can neutralise the effect of the earlier decision of the Court. The legislature has within the bounds of the Constitutional limitations, the power to make such a law and give it retrospective effect so as to bind even past transactions. In ultimate analysis therefore the primary test of validating piece of legislation is whether the new provision removes the defect which the Court had found in the existing law and whether adequate provisions in the validating law for a valid imposition of tax were made.

With these preliminary observations I would now analyse the provisions of section 31-A. A plain reading of the said section would show that

it opens with non obstante clause excluding the application of any other law for the time being in force or any decision of any Court. It then lays down that for purposes of sections 30 and 31 (the last-mentioned section is not relevant here), the rate of duty applicable to any goods shipped is inclusive of two components, namely, any "amount" of duty imposed under section 18 and certain other specified taxing statutes and then comes the most relevant clause which comprises the second component included in the rate of duty, which reads as follows: "and the amount of duty that may have become payable in consequence of the withdrawal of the whole or any part of the exemption or concession from duty whether before or after the conclusion of a contract or agreement for the sale of such goods or opening of a letter of credit in respect thereof". In order to bring out the true import and meaning of this part of the section I have rearranged the various phrases thereof and added a few words thereto placed in the brackets the text of which would then read as follows:

(1) Notwithstanding anything contained in any other law for the time being in force or any decision of any Court, for the purposes of sections 30 and 31, the rate of duty applicable to any goods shall include...the amount that may have become payable in consequence of withdrawal of exemption from duty, whether (the withdrawal is) before or after the coclusion of a contract or agreement for the sale of such goods or opening of a letter of credit thereof.

A plain reading of this text would show that by a mandate of law the rate of duty, which was a matter pertaining to the taxability or leviability of the duty, has now to include the amount not only of the duty imposed under section 18, but also the amount that would notionally become payable if the exemption is withdrawn, irrespective of whether the withdrawal takes place before or after the conclusion of a contract for the sale of goods or opening of a letter of credit. it is easy now to see that the distinction between chargeability and payability of a duty under the Act has been effectively destroyed because the rate would now include the quantified amount of duty that would be payable as a result of withdrawal of exemption from duty. The direction that this will be the position whether the withdrawal is before or after the conclusion of a contract or opening of a letter of credit, has the effect of destroying the doctrine of vested rights on the basis of which the decision in the case of Al-Samrez Enterprise was given. In ordinary concept the rate does not include the quantum or the total amount payable, but the legislature has mandated that it shall be included within the rate of duty by the fiction created in law. Therefore the argument of the learned counsel that the position has remained unchanged in spite of section 31-A, because its provisions have been confined to operate only for the purposes of sections 30 and 31, is not tenable, because under the changed law section 30 now not only deals with rate of duty, but the amount payable under section 18 of the Act as well as in consequence of withdrawal of exemption, destroying the vested rights that may have accrued

on account of the conclusion of contract for the sale of goods or opening of a letter of credit.

In the light of the foregoing it would appear that while section 30 was not relevant to resolve the question whether the withdrawal of exemption would relieve a party from the payment of duty under the existing law before the amendment, section 31-A has now radically changed the effect of section 30 by including the quantified amount of duty which becomes payable by virtue of the withdrawal notification. Therefore, in the new dispensation section 30 has become relevant even for purposes of exemption. The mere fact that section 19 has not been mentioned in the new section, does not mean that the legal effect of the exercise of power under section 19 read with section 21 of the General Clauses Act, is not within the purview of section 31-A. The language employed clearly refers to the withdrawal of exemption or concession which evidently has reference to the provisions of section 19. Accordingly there is no substance in the contention of the learned counsel that the newly-inserted section has restated in different words the position that already stood under the unamended law. For the same reasons it cannot be held that the non obstante clause does not have the effect of setting at naught the effect of the judgment of this Court in the case of Al-Samrez Enterprise, because as discussed above the new law is a departure from and is in conflict with the position expounded in Al-Samrez Enterprise. For the same reasons the argument of the learned counsel for the appellants is without substance that section 31 has not achieved the obsecct of defeating the consequences of exemption granted under section 19 beyond the date on which any notification of modification of withdrawal of exemption is issued, or to nullify the judgment in the case of Al-Samrez Enterprise. The language of section 31-A, as discussed above, clearly envisages and stipulates that the consequences that flow from the act of withdrawal or modification of an exemption notification, shall take effect with reference to the date of its issue, irrespective of the fact that the contract for the import of goods and the L.C. had come into existence prior to such date. This effect has been now prescribed by a mandatory provision of law by legislative fiat, to use the phrase earlier mentioned. The Courts would therefore have to give effect to it notwithstanding the decision in the case of Al-Samrez Enterprise.

There is another aspect of the matter which may also be mentioned. The exposition of law made in the case of Al-Samrez Enterprise took into consideration the law as it stood on the date when that decision was rendered. ... hereinabove, the law has changed by the insertion of the new sec... ...ly affecting the enunciation of the law made therein ...nged state of law that has come into effect was not ...hat decision and it cannot therefore be urged with any ... the principles laid down therein would still apply to the ... the provisions of law discussed therein. In this view of the ...nent that the deeming clause takes back the insertion of

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provisions

section 31-A to the time of enforcement of the Act in 1969 and therefore the non obstante clause will not eclipse the decision in the case of Al-Samrez Enterprise, loses all force. D

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My conclusion therefore is that section 31-A has effectively achieved the purposes for which it was enacted as explained above. The only other question that remains to be considered is, that notwithstanding the altered position produced by section 31-A depriving an importer of the right to be protected against any change in the quantum of exemption, on the basis of which he has entered into a contract for the sale of goods to be imported and opened a letter of credit or performed other acts, to what extent this section can be given retrospective effect and whether such retrospective effect can be given so as to affect past and closed transactions.

E It is clear from the provisions of section 5 of the Finance Act, 1988 that by the device of the deeming clause the newly-inserted section 31-A is to be treated as part and parcel of the Act since its enforcement in 1969. Undoubtedly, therefore, the section is retrospective in operation. It is agreed on all hands that the well-settled principles of interpretation of statutes are that F vested rights cannot be taken away save by express words or necessary intendment. It also cannot be disputed that the legislature, which is competent to make a law, has full plenary powers within its sphere of operation to G legislate retrospectively or retroactively. Therefore vested rights can be taken away by such a legislation and it cannot be struck down on that ground. H However, it has also been laid down (Province of East Pakistan v. Sharafatullah PLD 1970 SC 514) that a statute cannot be read in such a way as to change accrued rights, the title to whch consists in transactions past and I closed or any facts or events that have already occurred. In that case the following postulation has been made:

> "In other words liabilities that are fixed or rights that have been obtained by the operation of law upon facts or events for or perhaps it should be said against which the existing law provided are not to be disturbed by a general law governing future rights and liabilities unless the law so intends."

This is an important principle which has to be kept in mind in the context of the present cases. Reference may also be made to another principle which has been followed in several decisions but to quote from Mehreen Zaibun Nisa v. Land Commissioner, Multan (PLD 1975 SC 397) where it was observed:

> "When a statute contemplates that a state of affairs should be deemed to have existed, it clearly proceeds on the assumption that in fact it did not exist at the relevant time but by a legal fiction we are to assume as if it did exist. The classic statement as to the effect of a deeming clause is to be found in the observations of Lord Asquith in East End J

Dwelling Company Ltd. v. Finsbury Borough Council (1952) AC 109) namely:

'Where the statute says that you must imagine the state of affairs, it does not say that having done so you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs'."

However, in that case the aforesaid principle was subjected in its application to a given case to a condition that the Court has to determine the limits within which and the purposes for which the legislature has created the fiction. It has been quoted from an English decision that "when a statute enacts that something shall be deemed to have been done which in fact and in truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to".

In the light of the aforesaid principles it cannot straightaway be held that the mere fact that section 31-A has been given retrospective effect, it will affect even the past and closed transactions or all the vested rights that have accrued. It is in this context that the remaining contentions of the learned counsel for the appellants are to be examined.

It has been urged on behalf of the appellants that as the bill of entry was presented in all these cases before 1st July, 1988, when section 31-A was enacted and enforced, their cases are past and closed transactions.

There seems to be a great deal of force in this submission. Before the insertion of section 31-A the position was that upon the presentation of a bill of entry, by virtue of section 30 of the Act the levy of duty was crystallised. As explained in the case of Al-Samrez Enterprise, the liability to tax was created under section 18 with reference to this date, because it is the rate of duty by application of which the tax liability can be quantified or assessed. Simultaneously, any benefit of exemption also takes effect on the same date because in the very nature of things, the liability is wiped off by virtue of the exemption at the same time. Therefore, this is the crucial point of time at which, by operation of law the liability is discharged. In other words, the rights and liabilities of the importers attained fixity on the said crucial date. Inevitably therefore a vested right has been created and the transaction is closed by the quantification of the tax, if any, or by the discharge of liability on that date. The mere fact that any proceedings remained pending for assessment of the tax by a statutory functionary for the purpose of recovery of the dues, will not prevent the law from operating and producing the result of closing the transaction. This is on the simple principle that every functionary is bound by the provisions of law and has to pass a lawful order which alone is protected. Besides on this date the liability to pay tax and the exemption from payment are matters of mere calculation in terms of section 30 read with sections 18 and 19 of the Act, because the rate and value of the goods become fixed with reference to this date. Indeed no adjudicative process is involved in such a matter. Viewed in this perspective, if effect is given to the provisions of section 31-A so as to undo the discharge of the liability which had already taken effect, it will amount to re-opening a past and closed transaction. The simple reason is that under the existing law there was no further liability to pay the tax and by giving retrospective operation to the new dispensation a liabiity is being created for the payment of the tax. I cannot see anything in the language of section 31-A, expressly or by necessary intendment, to that effect. Such result is therefore not a necessary corollary of the fiction created by the deeming provisions of section 5 of the Finance Act, 1988. Otherwise also it will be contrary to the principle, mentioned above, namely, that liabilities once fixed or rights created by operation of law upon facts or events, must not be disturbed by a general provision given retrospective effect unless such intention is clearly manifested by the language employed. In the case of Mehreen Zaibun Nisa (supra) retrospective effect was not given to the changed law so as to invalidate certain acts of legislature, although the entry in the relevant legislative list had been changed with retrospective effect.

Learned Deputy Attorney-General has referred us to Nizam Impex v. Government of Pakistan (1990 SCMR 1187) which is the judgment of this Court in appeal from a judgment of the Sindh High Court reported in Nizam Impex v. The Government of Pakistan (PLD 1991 Karachi 208). These judgments are of no assistance because before the High Court the point with regard to non-applicability of section 31-A to consignments in respect of which contracts were entered into or letters of credit were opened prior to the enactment of the said section was not pressed, in view of the fact that in an earlier decision reported in Yaseen Sons v. Fedaration of Pakistan (PLD 1989 Karachi 361) this point had been decided. This Court also did not go into the question of the retrospectivity of section 31-A so as to re-open past and closed transactions in the case of Nizam Impex v. Government of Pakistan. I have also perused the case of Yaseen Sons (supra) but in view of the foregoing discussion, it is not possible for me to hold that the insertion of section 31-A retroactively would destroy rights flowing from past and closed transactions.

In this view of the matter I have reached the conclusion that the insertion of section 31-A so as to operate retroactively does not have the effect of destroying or re-opening the past and closed transactions in the manner discussed above. As the bills of entry in all these cases were presented on dates prior to 1st July, 1988, all these cases are cases which were past and closed transactions and were not therefore affected by the provisions of section 31-A. The act of refusal on the part of the Customs Authorities to release the goods on the basis of the notifications prior to the impugned notifications and the demand of duty in accordance with the said notifications in the Constitutional petitions was therefore without lawful authority and of no legal effect.

So far as the regulatory duty is concerned nothing was argued on

behalf of the Government to justify 100% duty contrary to the provisiosn of se on 18 (2) of the Act, which as submitted on behalf of the appellants authorised only the imposition of the said duty to the extent of 50% and not 100% as was done in the impugned notifications. This matter is now concluded by the decision of this Court in Yousuf Re-Rolling Mills v. The Collector of Customs (PLD 1989 SC 232). Therefore, imposition of regulatory duty in excess of 50% of the duty specified in the First Schedule of the Act is void and without lawful authority.

At this stage, it may be clarified that the vires of imposing regulatory duty at the rate of 100% of the one prescribed in Schedule I to the Act, has been considered, because arguments were addressed at the Bar on this point and while narrating the facts the learned Judges of the Division Bench in the judgments under appeal before us had mentioned the imposition of regulartory duty on Palm Oil with effect from 22nd August, 1986 at the rate of 100% ad valorem. Learned counsel for the appellants has submitted before us that due to certain confusion the matter could not be raised in the Constitutional petitions but it was argued before the High Court. As no objection was specifically taken on behalf of the respondents to the raising of the question of the vires of imposition of the regulatory duty, the question has been considered and decided. However, since no relief was specifically claimed and the final assessment of the duty or at any rate recovery thereof is still to take place, we leave the matter by declaring that the duty in excess of 50% of the rate mentioned in the First Schedule on this product is ultra vires as held in the case of Yousuf Re-Rolling Mills (supra) and re-affirmed in an unreported judgment in Civil Appeal No. 187-K/1990 (Federation of Pakistan v. M/s. Mahmood (Pvt.) Limited and connected appeals dated 7th February, 1991.

The Constitutional petitions filed by the appellants are, therefore, allowed in the manner and to the extent mentioned above. All the appeals are accordingly allowed with no order as to costs.

(Sd.)

Nasim Hasan Shah, J

(Sd.)

Zaffar Hussain Mirza, J

(Sd.)

Sajjad Ali Shah, J

NAIMUDDIN, J.---I have written separate opinion and passed separate order whereby I have dismissed all these four appeals.

(Sd.)

Naimuddin, J

NAIMUDDIN, J---I have had the advantage of reading the draft opinion and the judgment of my learned brother, Zaffar Hussain Mirza, J.

2. I agree with my learned brother that the newly-inserted section 31-A in the Customs Act, 1969 has now radically changed the effect of section 30 by including the quantified amount of duty which becomes payable by virtue of the withdrawal of notification. I further agree that the language of section 31-A, for the reasons discussed by my learned brother, clearly envisages and stipulates that the consequences that follow from the Act of withdrawal or modification of an exemption notification, shall take effect with reference to the date of its issue irrespective of the fact that the contract for the import of goods was entered into or the Letter of Credit was opened prior to the date of such withdrawal. I also agree that the insertion of section 31-A materially affected the enunciation of law made in the case of Al-Samrez Enterprises and that the insertion takes back to the time of enforcement of the Customs Act, 1969. However, with utmost respect and humility, I do not agree to the answer proposed to be given in the judgment to the questions as to what extent this section can be given retrospective effect and whether such retrospective effect can be given so as to affect past and closed transaction.

3. Now, so far as the first question is concerned, the answer is given by my learned brother himself in these words:--

> "It is clear from the provisions of section 5 of the Finance Act, 1988 that by the devise of the deeming clause the newly-inserted section 31-A is to be treated as part and parcel of the Act since its enforcement in 1969."

3. As to the question whether the four transactions involved in the four appeals were past and closed, it may be stated that by the notification dated 22nd August, 1986 issued under section 19 of the Act, the exemption earlier granted under the two earlier notifications was modified with the result that the duty was increased from Rs.2,350 to Rs.5,350 per metric ton.

4. It may be of advantageous if this notification is reproduced in its entirety which mentioned various dates on which the duty was increased in respect of various commodities:--

"NOTIFICATION

(Customs)

S.R.O....(86)---In exercise of the power conferred by section 19 of the Customs Act (IV of 1969), the Federal Government is pleased to direct that the goods specified in column 2 of the Table below and falling within the heading number of the First Schedule to the said Act specified in column 1 of the said Table shall be exempt from so much of the customs duties chargeable thereon as are in excess of the rates

of duty specified in column 3 of the Table with dates and duties specified in column 4 of the Tables against each.

TABLE

Heading No. In the First Schedule to the Customs Act, 1969 (IV of 1969)	Description of goods	Rate of duty	Date
15.07	(1) Soyabean oil, cotton seed oil, groundnut oil, sunflower seed oil, rape, colza or mustard oil.	(a) Rs.2,350 metric ton	22nd August, 1986
		(b) Rs.3,000 metric ton	20th September, 1986.
		(c) Rs.5,350 metric ton	22nd August, 1986
	(2) Palm oil.	(d) Rs.6,000 metric ton	20th September, 1986.

2. This notification shall take effect on the 22nd August, 1986."

5. In Civil Appeal No.915-K, the appellant presented the Bill of Entry on 26th August, 1986 while it may be noticed that the notification enhancing the duty is dated 22nd August, 1986. Therefore, the Customs Authorities were within their right to demand duty at the rate of Rs.5,350 prevailing on the date when the bill of entry was presented in accordance with the provisions of section 30 read with section 79 of Customs Act. The appellant questioned the validity of the notification in Constitution petition filed in the High Court seeking a direction to the Customs Authorities to release the consignment on payment of the customs duty prevalent previously. Therefore, it cannot be said that the transaction in this case was past and closed.

6. In Civil Appeal No.916-K of 1990, the bill of entry was presented at Karachi Port on 7th December, 1986.

7. In Civil Appeal No.917-K of 1990, the impugned notification was issued on 24th September, 1986 whereby exemption was modified and duty payable on Soyabean Oil was increased to Rs.3,000 per metric ton. The bill of entry was presented on 7th October, 1986.

8. In Civil Appeal No.918-K of 1990, the bill of entry was presented on 9th October, 1986 while the notification which was challenged is dated 24th September, 1986.

9. I understand that the goods were released under the orders of the

High Court on furnishing bank/insurance guarantees. Therefore, it cannot be said that in any of these cases the transctions were past and closed.

10. It will be seen for the above that in all these cases the notifications are of earlier dates and the bills of entry were filed later on. If we take the date of insertion of section 31-A in the Act as the date on which the liability to pay the import duty matured then we will be doing violence to the provisions of the Finance Act, 1988 whereby this section has been inserted with retrospective effect from the date of enforcement of Customs Act, 1969.

11. I may add that a mere grant of licence or entering into a contract prior or after the grant of licence or opening of a Letter of Credit pursuant to that, would not create any vested right in a party to pay the duty at the rate prevalent on the date of import licence or on the date of the contract or on the date of the opening of a Letter of Credit. Relevant date in such a case would be the date when the bill of entry was presented under section 79 of the Act if the goods are not warehoused. Further, in all these cases, the exemptions granted by the notifications in question were not for any fixed time or period and as such exemptions could be withdrawn or could be varied at any time and there is no representation by the Government or any authority under them that the notifications and exemptions would not be withdrawn or varied for certain time. On the contrary, all the parties importing goods have notice that they would be liable to pay duty as leviable on the date of presentation of bill of entry in accordance with section 30 read with section 79 of the Customs Act, 1969. Further, in such a case, no one has any vested right in a concession granted by way of exemption in exercise of delegated powers unless such an exemption is coupled with a representation by the Government that such an exemption or reducation in duty will not be withdrawn or varied for a certain time or period. No such representation has been pleaded in these cases."

12. As regards the point of regulatory duty, it may be stated that this point was not taken at all before the High Court nor has it been taken in the petition for leave to appeal nor it was urged at the time of granting leave to appeal. Moreover, the respondents had no opportunity to meet this point. However, I would leave it to be determined by the Customs Authorities in accordance with law. Subject to above remarks I would dismiss these appeals with no order as to costs.

SAAD SAOD JAN, J---I am in respectful agreement with my learned brother that section 31-A as inserted in the Customs Act, 1969, by the Finance Act No.VI of 1988 has eclipsed the rule laid down by this Court in the case of Al-Samrez Enterprise so far as the effect of notification of withdrawal of exemptions is concerned. I am also of the view that in the absence of express provisions or necessary intendment retrospective legislativon will not be construed in a manner that will lead to reopening of a past and closed transaction. However, on facts I regret I am unable to agree that the matters before us fall in that exceptional category.

2. Admittedly, in the appeals before us the bills of entry were presented by the appellants after the Federal Government had, by another notification, hereinafter referred to as notification of modification, had modified the earlier notification of exemption to the disadvantage of the importers. Now, under section 30, Customs Act, the customs duty is regulated by the rate which is in force on the date when the bill of entry is presented by the importer. In accordance with the provisions of this section, the Customs Authorities required the appellants to pay the customs duty at the rate mentioned in the notification of modification. The appellants declined to do so on the ground that the notification of exemption had created vested rights in their favour. The dispute was taken to the High Court which, on the basis of the judgment of this Court in the case of Al-Samraz Enterprise (1986 SCMR 1917), upheld the position adopted by the appellants. Being dissatisfied with the judgments of the High Court the Federal Government came in appeal to this Court. In all these appeals the main question for consideration related to the quantum of customs duty payable by the importers. During the pendency of the appeals, the Federal Legislature intervened and inserted section 31-A in the Customs Act. The new section was to operate retrospectively with the consequence that it applied also to the pending disputes and the vested right which the appellants claimed on the basis of the earlier notification of exemption stood destroyed completely. In the circumstances I find it difficult to hold that the matters relating to the customs duty payable by the importers were past and closed transaction by mere reason of the fact that the liability of the appellants stood crystalized on the day they presented the bills of entry. It is not in dipute that the legislature can give retrospective effect to the laws its makes even though they may impair vested rights. This is exactly what section 31-A has done in this case. As the parties are still engaged in litigation on the question of customs duty payable by the appellants it would be defeating the legislative intent by declaring to apply the provisions of this section to the present cases, particularly when we consider the circusmtances in which it has been enacted. I should, therefore, think that the new section governs the case of the appellants as well and they are liable to pay duty at the rate prescribed in the notification of modication even though it was issued after they had entered into contract for the import of the goods. V

3. As regards the question of regulatory duty I am in respectful agreement with the judgment proposed to be delivered by my learned brother.

ORDER OF THE COURT

In view of the opinion of the majority all these appeals are allowed in the manner and to the extent mentioned in the opinion of the majority with no order as to costs.

M.B.A./M-1782/S Appeals allowed.

1993 S C M R 1931

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[Supreme Court of Pakistan]

Present: Saad Saood Jan and Muhammad Rafiq Tarar, JJ

AURANGZEB---Petitioner

versus

THE STATE---Respondent

Criminal Petition for Leave to Appeal No. 251-L of 1992, decided on 22nd June, 1993.

(On appeal from the order dated 21-6-1992 passed by the Lahore High Court, Lahore in Cr. Misc. No. 57/Q/1992).

Criminal Procedure Code (V of 1898)---

---S. 195 (a)---Penal Code (XLV of 1860), S. 182---Constitution of Pakistan (1973), Art. 185 (3)---Leave to appeal was granted to consider whether in view of the provisions of S. 195 (a) of the Cr.P.C. a complaint under S. 182 of the P.P.C. made under the order of the District Magistrate would be competent when the application containing alleged false information forming basis of the said complaint under S. 182 of the P.P.C. was made to the Divisional Commissioner. [p. 1931] A

S.M. Tayyab, Advocate Supreme Court instructed by Ch. Mehdi Khan Mehtab, Advocate-on-Record for Petitioner.

A.-G. Punjab for the State.
Ghulam Rasool (husband) for the Complainant.
C.M. Latif, Advocate Supreme Court for Respondent.

Date of hearing: 22nd June, 1993.

ORDER

MUHAMMAD RAFIQ TARAR, J.---Leave to appeal is granted to consider whether in view of the provisions of section 195 (a) of the Cr.P.C. a complaint under section 182 of the P.P.C. made under the order of the District Magistrate would be competent when the application containing alleged false information forming basis of the said complaint under section 182 of the P.P.C. was made to the Divisional Commissioner. A

M.B.A./A-1026/S Leave granted.

1993 S C M R 1932

[Supreme Court of Pakistan]

Present: Nasim Hasan Shah, Actg. C.J., Muhammad Afazal Lone and Sajjad Ali Shah, JJ

Haji MUHAMMAD IBRAHIM HINGORJO---Appellant

versus

YOUSSOUF SHAHEEN and 2 others---Respondents

Civil Appeals Nos. K-160 and K-163 of 1989, decided on 29th June, 1993.

(On appeal from the judgment dated 16-10-1989 of the Election Tribunal in Election Petition No.1 of 1988).

Constitution of Pakistan (1973)---

----Arts. 59 (d) & 185---Two appeals against the same order of Election Tribunal whereby both the appellants were found to be ineligible to contest elections from the seats reserved for technocrats---Returned member of Senate was declared not to be duly elected member of the Senate on the ground that he was neither a technocrat nor professional---Order of Election Tribunal was maintained and returned member's appeal dismissed---On the evidence and material produced by the other appellant in his separate appeal, he was found to be a professional and a technocrat---Such appellant being the only other contesting candidate eligible to contest the election, he was declared as the duly elected candidate against the said seat of Senate, which had become vacant on account of other appellant/returned member being found disqualified to contest election and be elected thereto. [p. 1933] A

A.A. Fazeel, Senior Advocate, Supreme Court instructed by Mrs. Majida Rizvi, Advocate-on-Record for Appellant (in C.A. No.K-160 of 1989).

Raja Muhammad Akram, Senior Advocate Supreme Court instructed by Ejaz Muhammad Khan, Advocate-on-Record for Respondent No.1 (in C.A. No.K-160 of 1989).

Respondents Nos. 2 and 3: Ex parte (in C.A. No. K-160 of 1989).

Raja Muhammad Akram, Senior Advocate Supreme Court instructed by Ejaz Muhammad Khan, Advocate-on-Record for Appellant (in C.A. No. K-163 of 1989).

Nemo for Respondents Nos.1 and 2 (in C.A. No. K-163 of 1989).

A Representative from Chief Election Commissioner's Office for Respondent No. 3 (in C.A. K-163 of 1989).

Date of hearing: 26th April, 1993.

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JUDGMENT

NASIM HASAN SHAH, ACTG.C.J.---This judgment will dispose of the abovementioned two appeals as both of them are directed against one and the same order namely the order dated 16-10-1989 passed by the Election Tribunal (Mr. Justice Salim Akhtar, Judge, Sindh High Court) in Election Petition No.1 of 1988).

For reasons to be recorded later, Civil Appeal No. K-160 of 1989 filed by Haji Muhammad Ibrahim Hingorjo is dismissed and the impugned judgment of the Election Tribunal is upheld declaring him not to be the duly elected member to the Senate on the ground that he is neither a technorcrat nor professional.

A

However, the connected appeal filed by Youssouf Shaheen (Civil Appeal No.K-163 of 1989) directed against the order of the Election Tribunal dated 16-10-1989 holding him also to be ineligible to contest elections from the seats reserved for technocrats is accepted. On the evidence and material produced by him, it is found that he is a "professional" and a "technocrat". Since Youssouf Shaheen is the only other contesting candidate eligible to contest election, he is declared as the duly elected candidate against the said seat, which has become vacant on account of Haji Muhammad Ibrahim Hingorjo being found disqualified to contest election and be elected thereto.

Order accordingly.

A.A./M-1790/S

1993 S C M R 1933

[Supreme Court of Pakistan]

Present: Saad Saood Jan and Muhammad Rafiq Tarar, JJ

REHMAN---Petitioner

versus

NOORA---Respondent

C.P.S.L.A. No. 1024 of 1992, decided on 8th June, 1993.

(From the judgment/order of Lahore High Court Lahore, dated 27-9-1992 in C.R. No. 792-D of 1983)

Punjab Pre-emption Act (I of 1913)---

---S.15---Constitution of Pakistan (1973), Art. 185 (3)---Pre-emption suit---Petitioner contended that respondent who was the pre-emptor had failed to prove that he was related to the vendors---Supreme Court after going through

the pedigree tables upon which the respondent had relied considered that the question of relationship between the vendors and the respondent needed further examination and granted leave to appeal. [p. 1934] A

S.M. Tayyab, Advocate Supreme Court and Ch. Mehdi Khan Mehtab, Advocate-on-Record for Petitioner.

Nemo for Respondent.

Date of hearing: 8th June, 1993.

ORDER

SAAD SAOOD JAN, J---The only contention raised in support of this petition which arises out of a pre-emption suit is that the respondent who is the pre-emptor has failed to prove that he is related to the vendors. After going through the pedigree tables upon which the respondent has relied we consider that the question of relationship between the vendors and the respondent needs further examination. Leave to appeal is granted. A

M.B.A./R-218/S Leave granted.

1993 S C M R 1934

[Supreme Court of Pakistan]

Present Muhammad Afzal Zullah, C.J. and Muhammd Rafiq Tarar, JJ

PIRAN DITTA---Appellant

versus

THE STATE---Respondent

Criminal Appeal No. 136 of 1991, decided on 6th December, 1992.

(On appeal for the judgment of the Lahore High Court, Multan Bench, dated 22-12-1990 passed in Crl. Appeal No. 41/1987).

Penal Code (XLV of 1860)---

----Ss. 302 & 304, Part II---Appraisal of evidence---No intention to kill on the part of accused could be inferred from the evidence who had disassociated himself after giving one blow to the deceased---Accused, however, could safely be burdened with the knowledge that a violent blow on the head was likely to cause the death of the deceased and as such the offence committed by him fell within the ambit of S. 304, Part II, P.P.C.---Conviction of accused under S.302, P.P.C. was altered to S. 304, Part II, P.P.C. accordingly and his sentence of life imprisonment was reduced to ten years' R.I. with fine. [p. 1937] A

M. Bilal, Advocate Supreme Court for Appellant.

Ch. M. Akram, Advocate Supreme Court for the State.

Date of hearing: 6th December, 1992.

JUDGMENT

MUHAMMAD RAFIQ TARAR, J---This appeal by Piran Ditta appellant is directed against the judgment dated 22-12-1990 of a learned Single Judge of the Lahore High Court whereby his Criminal Appeal No. 41/1987 against his conviction and sentence under sections 148 and 302, P.P.C. was dismissed.

2. The appellant and his co-accused Allah Ditta, Allah Diwaya, Allah Bachaya sons of Jalal and Sohanra son of Jiyan were tried by learned Additional Sessions Judge on the allegation that on 4-1-1983 at 3-00 p.m. they formed themselves into an unlawful assembly and committed rioting and in prosecution of the common object of the said unlawful assembly committed the murder of Khan Muhammad deceased. By judgment dated 24-8-1988 the Additional Sessions Judge convicted all of them under section 148, P.P.C. and sentenced them to R.I. for two years each. The appellant was convicted under section 302, P.P.C. and sentenced to imprisonment for life and fine of Rs.15,000 or in default of payment of fine to undergo further R.I. for three years. Allah Ditta, Allah Bachaya and Sohanra were convicted under section 325, P.P.C. and sentenced to R.I. for three years and fine of Rs.2,000 each. It appears that the convicts other than the present appellant had not challenged their conviction and sentence before the High Court.

3. The brief facts of the prosecution case are that on 14-1-1988 at about 3-00 p.m. Muhammad Ramzan complainant, his father Khan Muhamad and his mother Mst. Wasso were going to Tibbi Lundan in order to make some purchases. On their way all the five accused armed with Sotas confronted them near the protection Bund of Dhukkar. Piran Dittan appellant gave a sota blow to Khan Muhammad on his head as a result of which he fell to the ground. Thereafter Allah Diwaya and Allah Ditta gave one sota blow each to him hitting his nose and left side of chin respectively. Then Allah Bachaya gave him two blows causing injury on both his lips. Sohanra accused gave him three sota blows hitting his left thigh, left leg and chest. Muhammad Ramzan complainant and Mst. Wasso raised alarm attracting Jivan and Hazoor Bakhsh P.Ws. who also saw the occurrence. After the occurrence the accused persons went away taking their Sotas with them. Khan Muhammad succumbed to his injuries at the spot.

The motive for the offence was that a year prior to the occurrence Muhammad Ramzan complainant had insulted Allah Ditta accused on which he got annoyed

Leaving the dead body in the custody of Mst. Wasso, Jivan and Hazoor Bakhsh P.Ws., the complainant went to Police Station Harrand and reported the occurrence to Zulfiqar Ahmed Sub-Inspector/SHO at 12-05 a.m. vide F.I.R. Exh. PJ.

4. After recording the F.I.R. the S.H.O. reached the spot and secured some blood-stained earth vide memo. Exh. PE. After preparing the injury statement and inquest report he despatched the dead body to the mortuary for post-mortem examination. He arrested the appellant and his co-accused Allah Ditta, Allah Bachaya and Sohanra on 6-3-1983. At the time of arrest the appellant produced Sota P1 vide memo. Exh. PF. After the usual investigation the appellant and his co-accused were challaned.

5. On 16-1-1983 at 10-00 a.m. Dr. Hasnain, S.M.O. T.H.Q. Hospital, Jampur conducted the autopsy on the dead body of Khan Muhammad deceased and found following injuries on it:--

"(1) A lecarated wound 2" x 1" brain injured with pieces of bones pressing into brain matter on anterior side of left head just at the upper part of forehead.

(2) A lacerated wound 1/1-4 x 1/4" x going through and through fracturing the opposite tooth and lacerating the gum of left upper lip. Its upper end extended on to left side of nose.

(3) A lacerated wound 1/2" x 1/4 " on left lower lip.

(4) A lacerated wound 2" x 1/2" x fracturing the underlying bone and teeth on left side of chin.

(5) A contusion 2" x 1" on middle of left thigh.

(6) A lacerated wound 1-1/2" x 1/2" x bone deep on chin of left leg.

(7) A contusion 3" x 1" x fracturing the underlying rib on upper part of anterior side of chest slightly towards left side."

In the opinion of the doctor death was due to shock and haemorrhage resulting from injury No.1 which was sufficient to cause death in the ordinary course of nature. Injuries Nos.3, 5 and 6 were simple and the remaining were grievous.

6. In support of its case the prosecution examined two eye-witnesses namely Muhammad Ramzan and Mst. Wasso, the son and the widow of the deceased. The prosecution also relied on the evidence relating to motive and recoveries.

7. After examining the evidence on the record the learned trial Judge came to the conclusion that the motive alleged by the prosecution was not "so grave that the aggrieved would think of committing the murder to avenge

himself....". He further observed that it was simply a chance that the accused persons met the complainant party and there was no premeditation on the part of the accused persons. He also took notice of the fact that the appellant had given only one Sota blow and did not repeat.

8. After hearing the learned counsel and keeping in view the above referred observations of the trial Court which are well-reasoned and based on evidence, no intention to kill on the part of the appellant can be inferred. From the evidence it appears that after giving one blow he disassociated himself. He can, however, safely be burdened with the knowledge that a violent blow on the head was likely to cause the death of the deceased and in that view of the matter the offence committed by him falls within the ambit of section 304, Part II of the P.P.C. A

Accordingly we alter his conviction under section 302, P.P.C. to one under section 304, Part II of the P.P.C. and reduce his sentence to R.I. for 10 years. The sentence of fine is, however, maintained. He will also be given benefit of section 382-B of the Cr.P.C. With the above modification in the conviction and sentence the appeal is dismissed.

N.H.Q/P-211/S Oarder accordingly.

1993 S C M R 1937

[Supreme Court of Pakistan]

Present: Nasim Hasan Shah, C.J., Abdul Qadeer Chaudhry and Saeeduzzaman Siddiqui, JJ

ALI BAHADUR SHAH---Appellant

versus

THE STATE---Respondent

Criminal Appeal No. 282 of 1992, decided on 5th June, 1993.

(On appeal from the judgment of Lahore High Court, Bahawalpur Bench, dated 18-7-1992, passed in Cr.A. 28-89/BWP).

(a) Penal Code (XLV of 1860)---

---S. 302---Constitution of Pakistan (1973), Art.185(3)---Leave to appeal was granted on the jail petition of the accused for reappraisal of evidence in the case. [p. 1938] A

(b) Penal Code (XLV of 1860)---

---S. 302---Appraisal of evidence---Neither any infirmity in the findings of