

Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD  
(JUDICIAL DEPARTMENT)

W.P. No.3802/2019

M/s Tamour Ishraq & Company

Versus

Federation of Pakistan,  
through Secretary Ministry of Interior, Islamabad & 6 others

S. No. of order/ proceedings	Date of order/ proceedings	Order with signature of Judge and that of parties or counsel where necessary.
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31-10-2019	Mr Muhammad Safdar Janjua, Advocate for petitioner. Syed Muhammad Tayyab, Deputy Attorney General. Mr M. Atif Khokhar, State Counsel. Mr Naseem Ahmed Shah, Advocate for Islamabad Capital Territory. Mr Hamza Shafqat, Deputy Commissioner, Islamabad Capital Territory. Mr Farrukh Rasheed, SSP Traffic Police, Islamabad Capital Territory. Mr Azhar Shah, DSP (Legal) Islamabad Capital Territory Police.
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Through this petition, the petitioner company has invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (*hereinafter referred to as the '**Constitution**'*) seeking direction to the respondents to refrain from detaining its containers loaded with commercial goods and

has further prayed that the Federal Government be directed to compensate for the loss suffered.

2. The facts, in brief, are that the petitioner company asserts to be, inter alia, engaged in the business of import and export of fruits and vegetables. The petitioner company pursuant to its lawful business transports its goods across the country in containers. It is the case of the petitioner company that due to the current law and order situation due to the protest march held by a political party, the law enforcing agencies are illegally detaining its loaded containers. It has been further asserted that because of this apprehension its lawful transportation of commercial goods has come to a halt.

3. Pursuant to notices issued yesterday, *Mr Hamza Shafqat*, Deputy Commissioner, Islamabad Capital Territory and *Mr Farrukh Rasheed*, Senior Superintendent of Police (Traffic), Islamabad Capital Territory have appeared and they have stated that within the jurisdiction of the Islamabad Capital Territory no container used by a private citizen engaged in business has been detained or obstructed in any other manner. They have informed this Court that the containers being used to maintain public order have been obtained through

a transparent process and rent is being paid by the Government. However, they have stated that they cannot make any statement on behalf of the other respondents.

4. It is noted that freedom of trade, business or profession is a right guaranteed under Article 18 of the Constitution. The said constitutional provision provides that subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business. The three exceptions have been described in the proviso to Article 18. The august Supreme Court in the case titled '*Arshad Mehmood and others v. Government of Punjab through Secretary, Transport Civil Secretariat, Lahore and others*' [PLD 2005 SC 193] has quoted with approval a judgment of the Indian Supreme Court titled '*Saghir Ahmed v. The State of U.P. and others*' (AIR 1954 SC 728). The relevant portion of the judgment of the apex Court is reproduced as follows.-

*"In this behalf in the following para, Indian Supreme Court in Saghir Ahmed's case (ibid) has elaborately discussed this aspect of the case:-*

*"But the right of the public to use motor vehicles on the public road cannot, in any sense, be regarded as a right created by the Motor Vehicles Act. The right exists anterior to any legislation on this subject as an incident of public right over a highway. The State only controls and regulates it for the purpose of ensuring safety, peace, health and good morals of the public. Once the position is accepted that a member of the public is entitled to ply motor vehicles on the public road as an incident of his right of passage over a highway, the question is really immaterial whether he plies a vehicle for pleasure or pastime or for the, purpose of trade and business. The nature of the right in respect to the highway is not in any way affected thereby and we cannot agree with the learned Advocate General that the user of a public road for purposes of trade is an extra ordinary or special use of the highway which can be acquired only under special sanction from the State."*

*After having explained the public right to use a public road or highway their lordships proceeded to examine whether grant of franchise to a private person is permissible under the Indian Constitution or not and after taking into consideration the material available on record it was concluded as under:-*

*"We do not think that this is the law of India under our Constitution. The cases referred to above were noticed by the Allahabad High Court in the Full Bench decision of Motilal v. Uttar Pradesh Government, and two of the learned Judges constituting the Full Bench expressed their opinion that this 'doctrine of exceptional user' might have been evolved by the American Courts' in the same way as they evolved the, 'doctrine of police powers.' They both held that this American rule did not embody the English or the Indian law on the subject.*

*This identical, point was investigated with considerable thoroughness in a recent decision of the Madras High Court in C. S. S. Motor Service v. State of Madras, and it was pointed out by Venkatarama Ayyar J. who delivered the judgment of the Court, that the rule of special or extraordinary use of highways in America had its roots in the doctrine of 'franchise', which is still a recognized institution in that country. The doctrine of 'franchise' or 'privilege' has its origin in English Common Law and was bound up with the old prerogative of the Crown. This doctrine continued to live in the American legal world as a survival of the pre-independence days, though in an altered form. The place of the royal grants under the English Common Law was taken by the legislative*

*grants in America and the grant of special rights by legislation to particular individuals or companies is regarded there as a 'franchise' or privilege differing from the ordinary -liberties of a citizen. The carrying on of transport buses by common carriers on the public road in America is a 'franchise' and not a common law right, which could be claimed by all citizens and a distinction is made, as the cases cited above will show, between contract carriers who carry passengers or goods under particular contracts and common carriers whose business is affected with public interest. Over the latter the State claims and exercises a plenary power of control.*

*Ayyar J. has, in our opinion, rightly pointed out that this doctrine of 'franchise' has no place in our Constitution. Under the Indian Constitution the contract carriers as well as the common carriers would occupy the same position so far as the guaranteed right under Article 19(1) (g) is concerned and both are liable to be controlled by appropriate regulations under clause (6) of that article. The law on the point, as it stands at present, has been thus summed up by the learned Judge:--*

*"The true position then is, that all public streets and roads vest in the State, but that the State holds them as trustees on behalf of the public. The members of the public are*

*entitled as beneficiaries to use them as a matter of right and this right is limited only by the similar rights possessed by every other citizen to use the pathways. The State as trustees on behalf of the public is entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally; but subject to such limitations the right of a citizen to carry on business in transport vehicles on public pathways cannot be denied to him on the ground that the State owns the highways."*

*We are in entire agreement with the statement of law made in these passages. Within the limits imposed by State regulations any member of the public can ply motor vehicles on a public road. To that extent he can also carry on the business of transporting passengers with the aid of the vehicles. It is to this carrying, on of the trade or business that the guarantee in Article 19(1)(g) is attracted and a citizen can legitimately complain if any legislation takes away or curtails that right any more than is permissible under clause (6) of that article".*"

5. It is, therefore, obvious from the above, that the State can only control and regulate trade for the purpose and object of ensuring safety, peace, health and good morals of public. There is no regulation nor any

restriction imposed by law that citizens who are engaged in lawful business can be obstructed to carry on their business or empowers the authorities to detain their containers in which commercial goods are being transported for the purposes of maintaining public order. The use of public roads by citizens engaged in trade is a guaranteed constitutional right which cannot be interfered with or obstructed otherwise than as provided under the law. The detention of containers loaded with commercial goods without the consent of the owners for the purposes of being used to maintain public order is in violation of the fundamental right guaranteed under Article 18 of the Constitution. Any such interference or obstruction besides being in violation of the constitutionally guaranteed right definitely exposes the public authorities to claims of damages. In case such containers have been detained or obstructed illegally, then it is the duty of the State to compensate the affectees. The Federal Government is expected to ensure that there is no obstruction or interference with transportation of loaded containers otherwise than as provided under the law.

6. The Federal Government is directed to ensure that the lawful transportation of containers loaded with



commercial goods owned by the traders are not interfered with or obstructed for extraneous reasons. In case the transportation of goods in containers by the petitioner company or any other trader have been obstructed or interfered with, they would be at liberty to approach the competent authorities for seeking compensation. This Court expects that the Federal Government, to the extent of the public roads under its control, will nominate an authorized officer to receive complaints from traders who may have been affected on account of their fundamental right guaranteed under Article 18 of the Constitution having been violated. The Deputy Commissioner, Islamabad Capital Territory, who has appeared today, has stated that no container loaded with commercial goods owned by a trader has been detained or obstructed within the Islamabad Capital Territory. The instant petition, therefore, stands disposed-of with the expectation that public authorities acting on behalf of the State will ensure that the fundamental rights of the public are safeguarded.

(CHIEF JUSTICE)

Approved for reporting.

Luqman Khan/\*

