

Judgment Sheet
IN THE LAHORE HIGH COURT,
LAHORE
Judicial Department

W. P. No. 14226 / 2019

Farah Mazhar and three others

Versus

The Federation of Pakistan, through Secretary, Ministry of
Interior, Islamabad and two others

JUDGMENT

Date of hearing:	14 June 2021
Appellants By:	M/s Muhammad Amjad Pervaiz, Barrister Muhammad Momin Malik, Muhammad Aurangzaib, Muhammad Nawaz Ch., Anwar Hussain, Muhammad Adil Chattha and Mian Nasim Saqlain, Advocates
Respondents By:	Hafiz Tallal, Advocate / Legal Advisor for the SECP
	Mr. Azmat Ali Khanzada, Deputy Attorney General
Assisted By:	Ms. Uzma Zahoor, Research Officer, Lahore High Court, Lahore

ABID HUSSAIN CHATTHA, J: The Petitioners, through the titled Petition, have impugned the memorandum No. 12/16/2017-ECL dated 30 October 2017 (the “**Memorandum**”), issued by the Ministry of Interior, Government of Pakistan (Respondent No. 1), whereby, they were informed that their names were placed on the Exit Control List (the “**ECL**”) maintained under Exit from Pakistan (Control) Ordinance, 1981 (XLVI of 1981) (the “**Ordinance**”) read with Exit from Pakistan (Control) Rules, 2010 (the “**Rules**”) on the

recommendations of the Securities & Exchange Commission of Pakistan (the “**SECP**” / Respondent No. 3) through the Ministry of Finance (Respondent No. 2) and Order dated 12 April 2018 (the “**Order**”) passed by the Respondent No. 1, whereby, the representations of the Petitioners seeking exclusion of their names from the ECL were dismissed.

2. Petitioners No. 1 to 4 are the wife, sons and daughter, respectively, of one Mazhar Rafique who is the Chief Executive Officer / Director (the “**CEO**”) of M.R. Securities (SMC-Pvt) Limited (the “**Company**”) duly registered as single member company with the SECP and licensed as a stock brokerage house. As such, the Petitioners are neither the shareholders nor directors of the Company.

3. In the month of November, 2017, the Petitioners were served with the Memorandum and as such, informed that their names were placed on the ECL on the charges of holding properties in their names being family members of the CEO whose name had already been placed on the ECL on the charges of misappropriation of assets of the investors or clients of the Company. It was alleged that the CEO has embezzled the invested amount of the clients in the nature of cash and securities held in their accounts maintained with the Company. The CEO has neither transferred the shares nor paid cash in lieu thereof to the investors. The Petitioners feeling aggrieved of the Memorandum moved representations dated 13 November 2017 before the Respondent No. 1 seeking deletion of their names from the ECL which were not decided. Hence, the Petitioners were constrained to file Writ Petition No. 126284 / 2017 in this Court which was decided on 22 December 2017, wherein, this Court directed the Respondent No. 1 to decide the pending representations of the Petitioners strictly in accordance with law within 30 days. On 07 February 2018, the Petitioners appeared before the concerned officer of the SECP designated by the Respondent No. 1 in this behalf and explained that they had no

concern or nexus with the Company in any manner or capacity but SECP dismissed their representations vide order dated 12 April 2018 without any lawful justification. It is submitted that the Petitioner No. 4 was studying in England and on her arrival at Lahore she was informed that her name has been placed on the ECL vide the Memorandum. Since then her right to movement and study abroad has been impaired.

4. Learned counsel for the Petitioners submitted that the act of the Respondents to place the names of the Petitioners on the ECL is violative of their fundamental rights guaranteed under Article 15 read with Articles 4, 9, 10(A), 14 and 25 of the Constitution of Islamic Republic of Pakistan, 1973 (the “**Constitution**”). It was further submitted that the Company is a separate legal entity and mere fact that the husband / father of the Petitioners is accused of embezzlement of funds as CEO of the Company does not in any manner affect their definite fundamental rights guaranteed by the Constitution. It was argued that jurisdiction to place the names on the ECL is vested with the Federal Government and not with the Respondent No. 1, hence, the impugned Memorandum and Order are *corum non-judice* and liable to be struck down. The reasons mentioned in the Order which, *prima facie*, is passed in line with the recommendations of the SECP, are against the scheme of the Ordinance and the Rules. The recommendations of placement of the names of the Petitioners on the ECL by the SECP are illegal and alien to the jurisprudence developed in the world including Pakistan. As such, the fundamental rights of the Petitioners to life, liberty, freedom of movement and equal protection of law, have been infringed.

5. Learned counsel for the Respondents primarily relied upon the recommendations prepared by the SECP according to which the Petitioners are direct descendants / spouse / sons / daughter and as such, family members of the CEO of the Company which is a defaulter brokerage house

regulated by the SECP which in turn has recommended the case to the National Accountability Bureau (the “**NAB**”) established under the National Accountability Ordinance, 1999 (the “**NAB Ordinance**”) to be proceeded in accordance with law. It was alleged that the Petitioners were maintaining trading accounts with the Company, wherein, they were actively involved in the trading of shares or securities of listed companies with the Pakistan Stock Exchange Limited. Therefore, the Petitioners are the *benamidars* of the CEO and hold several properties in their names which *prima facie* are proceeds of crime. The recommendations were made on the premise that the SECP had already requested the NAB to investigate the affairs of the Company through a joint investigation team and it is the duty of the SECP and the NAB to take all measures to protect and recover the valuable savings of the investors. The CEO fled the country and took refuge in the United Kingdom. All the Petitioners are dual nationals, therefore, if removed from ECL, they are likely to flee the country. Till 2017, the Pakistan Stock Exchange has received claims of Rs. 2.312 Billion from 1028 investors. The Petitioners instead of aiding the investigation are trying to create impediments in the way of just disposal of the investigation. The SECP identified multiple offences regarding non-transfer or non-delivery of securities and non-payment of cash to the clients of the Company, thereby, triggering default of the Company with respect to its financial obligations towards its clients. This act of the CEO amounted to cheating investors through fraudulent means. All the properties acquired in the names of the Petitioners were originally bought by the CEO from the embezzled finances of the general investors. From the above accusations, the SECP concluded that the Petitioners were also involved with the CEO in committing fraud with the investors as his aiders and abettors. It was specifically alleged that the CEO had opened several fictitious trading accounts of his family members, friends and driver in the Company,

wherein, number of entries of buying and sale of shares were made with funds which were actually placed by the clients of the Company. It was alleged that during the period from 01 January 2014 to 01 February 2017 in a fake trading account in the name of his wife (Petitioner No. 1) shares worth Rs. 22.34 million were bought and shares worth Rs. 25.34 million were sold. Similarly, the CEO of the Company had opened fictitious trading account in the name of his daughter (Petitioner No. 4) in which shares worth Rs. 217.67 million were bought and shares worth Rs. 211.72 million were sold. The CEO had opened trading account in the name of his son (Petitioner No. 3) in which shares valuing Rs. 325.686 million were bought and shares valuing Rs. 273.674 million were sold during the same period. The CEO of the Company after default with respect to his clients or investors fled the country, hence, he is guilty of defrauding public at large. In view of above backdrop, it was concluded in the investigation conducted by the SECP that the CEO, his employees and family members indulged in fraudulent and deceptive transactions through the family accounts; forged ledger statements were shown to the clients of the Company regarding their shares; and false statements were prepared to deceive the clients by showing movements and availability of their shares. The investigation was finalized on 24 May 2017 and the same was submitted to NAB on 05 June 2017. Latter is in the process of finalization of the Reference in the subject matter. Hence, the SECP recommended to place the names of the Petitioners on the ECL and the same are the reasons for turning down their representations with respect to removal of their names from the ECL.

6. In rebuttal, the learned counsel of the Petitioners argued that there is a difference between the status of an 'accused' and '*benamidar*' as defined in Sections 5(a) & 5(da) of the NAB Ordinance. It is settled law that a *benamidar* is not an accused. He can defend his right and in case of failure, at the

most, his property may be forfeited after due process of law. Hence, the mere apprehension that the Petitioners may be ostensible owners of some properties which actually belonged to the CEO cannot be extended to infringe their fundamental right to movement guaranteed under the Constitution. Even if this argument is to be given any weight, the action, if any, would be limited to the properties of the Petitioners and in no way, their right to life and liberty could have been curtailed. The names of the Petitioners are placed on the ECL in exercise of jurisdiction under Section 2 of the Ordinance, whereas, Rule 2 of the Rules prescribes grounds which can be invoked to exercise such jurisdiction. A conceptually flawed and erroneous understanding of the applicable law was applied with reference to the criterion stipulated in the Rules 2(1)(b)(d)&(e) read with Rules 2(2)(a)&(d) of the Rules to place the names of the Petitioners on the ECL. The grounds relied upon by the SECP to make recommendations for placing the names of the Petitioners on the ECL were not based on any sound legal basis but were presumptive, superficial and imaginary. Instead of focusing on the properties and accounts, the entire focus was placed on the persons of the Petitioners.

7. Arguments heard and record perused.

8. It is established on record that the names of the Petitioners were placed on the ECL without notice of hearing. It was only on account of directions passed by this Court that the representations filed by the Petitioners for removal of their names from the ECL, were entertained and declined. The Petitioners were made scapegoat from the very beginning on account of failure of the authorities concerned to apprehend and investigate the CEO of the Company who was charged for embezzlement of funds invested by the clients in their trading accounts maintained with the Company which was licensed as a broker house by the SECP. It is surprising that the SECP which is the regulator of the stock exchanges and companies in

Pakistan did not examine the question that the legal entity of a company is separate, distinct and apart from the natural person. Notwithstanding the same, where there may be certain liabilities with respect to chief executing officer or director or officers of a company, the persons who have no nexus with the company or are not in any way associated with the company ought to have been treated separately, especially, in connection with their fundamental rights provided by the Constitution. It is also noted that the names of the Petitioners were put on the ECL through the Memorandum on the recommendations of the SECP on the charges of holding properties in their names being family members of the CEO of the Company whose name was already on the ECL when the Memorandum was issued. The names of the Petitioners were placed on the ECL without notice and hearing, in a mechanical manner, without application of judicious mind and without considering that the Petitioners were not associated with the Company in any capacity, such as director or shareholder or in any other capacity. The review Petitions filed by the Petitioners under Section 3 of the Ordinance were kept pending for no lawful reason and were dismissed after issuance of writ of this Court vide order dated 22 December 2017. The reasons advanced in the report of the SECP are vague, evasive, superficial and general. No specific role was attributed to the Petitioners regarding the Company. The opening and operation of a trading account in itself was not unlawful unless it could be established that the amount deposited therein was proceeds of a crime. Nothing was placed on record to establish any wrong doing on the part of the Petitioners who were apparently roped in the matter merely on account of their relationship with the CEO. Even if the allegation of acquiring movable or immovable properties as *benamidar* of the CEO is accepted, the Respondents could have invoked laws regarding attachment and protection of such properties instead of clogging their right to liberty by placing

them on the ECL. It is further observed that the SECP ordered an investigation against the Company on 02 February 2017 in exercise of its jurisdiction under the Companies Act, 2017 by sending a request to the NAB on 20 February 2017 for investigation through a joint investigation Team of the NAB and the officials of the SECP. The reason to decline the representations of the Petitioners was cited that the matter is pending investigation with the NAB. The Petitioners have brought on record that the NAB has completed its investigation vide investigation report dated 25 February 2019 which was placed on record through C. M. No. 3 of 2019. On the basis of above investigation report Accountability Reference No. 37-2019 was filed on 26 April 2019. It is importantly stated that none of the Petitioner has been arrayed in that Reference nor any role in the occurrence has been attributed to any of the Petitioners in any manner whatsoever. Accountability Reference had been filed only against the CEO of the Company who has since been declared proclaimed offender and case has been sent to record. It is also noted that on the specific direction of this Court, the Petitioners placed on record documents to the effect that the properties in the name of the Petitioners and other properties of the Company have already been frozen by the NAB vide order dated 07 June 2018 which order was confirmed by the Accountability Court vide order dated 15 August 2018. The above said orders and documents have been placed on record through C. M. No. 2 of 2021 in the titled Petition. It is further observed that Petitioner No. 3 has filed objections thereto which are pending before the Accountability Court.

9. The Petitioners case falls in none of the grounds listed in Rule 2(1) of the Rules. The dispute between the CEO and the clients of the Company was essentially a private dispute. The Petitioners were not the directors or shareholders of the Company. As such, the case of the Petitioners did not fall

under Rules 2(1)(b)(d)&(e) of the Rules. Further, Rule 2(a)&(d) states that nothing in sub-rule (1) shall apply to persons involved in private disputes where government interest is not at stake, except cases of fraud against foreign banks and reputable companies with significant foreign investments or women and children undergoing education who are appearing as directors merely due to their family relationship with major shareholders. The case of the Petitioners stands on even higher pedestal since none of the Petitioners are directors or shareholders in the Company. The SECP as well as the Respondent No. 1 while making recommendations and considering the representations of the Petitioners did not apply the provisions of the Ordinance and the Rules in its correct legal perspective. It is also regretted that the Petitioner No. 4 was already studying abroad and she came to know of placement of her name on the ECL when she visited Pakistan during routine visit. Therefore, it is quite apparent that Respondent No. 1 proceeded on the recommendations of Respondent No. 3 in a purely mechanical manner without application of judicious mind.

10. It is also established on record that none of the Petitioners have been nominated by the NAB in the Reference filed before the Accountability Court and no role whatsoever has been attributed to them. *Benamidar* accused as defined in the NAB Ordinance does not incur any penal liability who is entitled to show cause notice by the Accountability Court during trial to afford opportunity to explain sources of income. In case, the *benamidar* fails to satisfy the Court, the property is liable to be forfeited. Reliance in this behalf is placed on case titled, Mst. Zahida Sattar and others v. Federation of Pakistan and others, **PLD 2002 SC 408**. The properties in the names of Petitioners No. 2 & 3 have been frozen by the competent authority of the NAB vide order dated 07 June 2018 which was confirmed by the Administrative Judge, Accountability Court, Lahore vide order dated 15 August 2018. Petitioners No. 2 & 3

have filed objections against freezing order under Section 13 of the NAB Ordinance which are sub-judice. The presence of Petitioners is not required by law and there is no apprehension of any financial loss to the investors of the Company in term of freezing order in the field. It is observed that even this Petition was filed in the year 2019 and the Petitioners are on the ECL since 30 October 2017. The retention of the names of the Petitioners on the ECL just because of their relationship with the CEO of the Company, is violative of their fundamental right to life, liberty and movement. Article 15 of the Constitution in this regard guarantees as under:-

“Every citizen shall have the right to remain in, and, subject to any reasonable restriction imposed by law in the public interest, enter and move freely throughout Pakistan and to reside and settle in any part thereof.”

11. At this juncture, it will be relevant to analyze the law developed by the Superior Courts with respect to the placement and removal of names of the persons on the ECL. Reliance is placed on the following reported cases:-

- i. Dr. Joseph Wilson v. Federation of Pakistan through Secretary Ministry of Interior and others, 2017 P Cr. L J 1569:

“...To prevent a man from leaving the country or from entering it is to impose a physical restraint on his person. It is to deprive him of a personal liberty. Freedom to travel, both within and outside the confines of the territory of the State, raises important issues of personal freedom. The right of free movement whether within the country or across its frontiers, either in going out or coming in, is a personal liberty within the meaning of Article 9 of the Constitution, which says, “No person shall be deprived of life or liberty save in

accordance with law.” Further held that, “A citizen cannot be deprived of his right to travel abroad except according to the procedure established by law...”

- ii. Federation of Pakistan through Secretary, M/O Interior v. General (R) Pervez Musharraf and others, PLD 2016 SC 570:

“12. ...considering the question of inclusion or retaining the name of respondent No. 1 in the ECL, thereby, restricting his freedom of movement, we also cannot lose sight of the fact that under Article 15 of the Constitution freedom of movement is one of the fundamental rights guaranteed to every citizen of the Country, which cannot be abridged or denied arbitrarily on mere liking or disliking, without any lawful justification for this purpose. More so, when Article 4 of the Constitution further guarantees right to every individual, to be dealt with in accordance with law...”

- iii. Pakistan Muslim League (N) through Khawaja Muhammad Asif, M.N.A. and others v. Federation of Pakistan through Secretary, Ministry of Interior and others, PLD 2007 SC 642:

“... Every citizen has undeniable right vested in him as conferred under Article 15 of the Constitution to go abroad and return back to Pakistan without any hindrance and restraint but it must be kept in view that it is neither absolute nor unqualified as is indicative from the language employed in Article 15 of the Constitution as a specific mention has been made "subject to any reasonable restriction imposed by law in the public interest", meaning thereby that such right is subject to the relevant law which is in existence at

relevant time but "an action which is mala fide or colourable is not regarded as action in accordance with law. Similarly, action taken upon extraneous or irrelevant considerations is also not action in accordance with law. Therefore, action taken upon no ground at all or without proper application of the mind of an authority would also not qualify as an action in accordance with law and would, therefore, have to be struck down as being taken in an unlawful manner..."

iv. Riaz Ahmed v. Government of Pakistan and others, PLD 2014 Islamabad 29:

"....Right to movement/travel is a fundamental right of every citizen guaranteed under Articles 4, 9 and 15 of the Constitution. It is universally recognized right enshrined in Article 12(4) "Everyone shall be free to leave any country, including his own" of the Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16th December, 1966 and enforced with effect from 23rd March, 1976. Therefore, no one could be allowed to deprive a citizen from his/her fundamental rights, save in accordance with due process of law..." It was further held that "none can be kept in lurch for an indefinite period... The authorities are under obligation to solve the problems of the general public in a fair and just manner and to decide their applications within a reasonable time..."

v Wajid Shams-ul-Hassan v. Federation of Pakistan through Secretary, Ministry of Interior, Islamabad PLD 1997 Lahore 617:

“...In view of the above discussion, I have no doubt in my mind that the right of citizen to travel abroad is a fundamental right guaranteed by Articles 2A, 4, 9, 15 and 25 of the Constitution of Islamic Republic of Pakistan, 1973. Abridgment of this fundamental right by the State through the legislative or an executive measure has to be tested on the touchstone of the Constitutional provisions. The life, liberty or property of a citizen cannot be taken away or adversely affected except in accordance with law. However, the "law", I mean, a valid law which does not come in conflict with any of the provisions of the Constitution and should not be a law which is ex facie discriminatory. Section 2 of the Exit from Pakistan (Control) Ordinance, 1981, does not provide any guidelines or reasonable classification for taking the action against a person prohibiting him from travelling abroad. Even the valuable rights of citizens of being heard and of knowing the reasons for such an action have been denied. The provisions of the law are, therefore, ex facie discriminatory as also capable of being administered in a discriminatory manner. If no reasons are assigned to an aggrieved person, the remedy of review under Section 3 of the Ordinance by making a representation becomes redundant. A citizen would not be in a position to make any effective representation in the absence of any reason or a speaking order. Prima facie, it may be difficult to sustain the validity of the Ordinance on the touchstone of Articles 2A, 4, 9 and 25 of the Constitution of Islamic Republic of Pakistan, 1973. Under this law, there is a scope for the executive

to adopt a policy of pick and choose in any case without there being any justifiable grounds. I, however, refrain from expressing any final opinion in this regard for the reason that the vires of the Ordinance has not been specifically challenged in the writ petition. The same would be examined in some other appropriate case where a specific challenge to the validity of the said Ordinance is made. However, in the present case, the impugned order dated 14-11-1996 does not contain any reasons in support thereof. It is an arbitrary and a mala fide order. The same is a nullity in the eyes of the Constitution and the law. In the absence of any valid reasons, the validity of the impugned order dated 14-11-1996 cannot be adjudged and the same has, therefore, to be struck down as without lawful authority. Similar is the position of impugned order dated 19-1-1997 whereby the representation of the Petitioner was rejected without informing him of any grounds or reasons for its rejection...”

vi. Ali Muhammad Turab v. Federation of Pakistan and 2 others, PLD 2020 Islamabad 454:

“...The right of free movement whether within the country or across its frontiers, either in going out or in coming in, is a personal liberty within the meaning of Article 9 of the Constitution, which says that, "No person shall be deprived of life or liberty save in accordance with law." Freedom of movement is stated to be the essence of personal liberty. A citizen cannot be deprived of his fundamental right to travel abroad except according to the procedure established by law...”

- vii. Tanveer Hussain Manji and 3 others v. Federation of Pakistan through Secretary Interior and 3 others, 2016 CLC 1534:

“...There is no doubt that freedom of movement or right to travel is fundamental right of a citizen as enshrined under Articles 4 and 9 of Constitution of Islamic Republic of Pakistan, 1973. Every citizen of Pakistan has the liberty to go abroad and return to Pakistan unless precluded from doing so, in the public interest...”

12. None of the Petitioners are accused in any criminal case. It is trite law that even registration of a case or pendency of a criminal case is not sufficient to include or place one’s name on the Exit Control List.

- i. Sohail Latif and 2 others v. Federation of Pakistan through Secretary, Ministry of Interior, Government of Pakistan, Islamabad and 2 others, PLD 2008 Lahore 341:

“...In view of the above discussion, I have no doubt in my mind that the right of a citizen to travel abroad is a fundamental right guaranteed by Articles 2-A, 4, 9, 15 and 25 of the Constitution of Islamic Republic of Pakistan, 1973. Abridgement of this fundamental right by the State through the legislative or an executive measure has to be tested on the touchstone of the constitutional provisions. The life, liberty or property of a citizen cannot be taken away or adversely affected except in accordance with law. However, the “law”, I mean, a valid law which does not come in conflict with any of the provisions of the Constitution and should not be a law which is ex facie discriminatory...”

ii. Hashmat Ali Chawla v. Federation of Pakistan and others, PLD 2003 Karachi 705:

“...It is now well settled that every citizen shall have the right to remain in, enter and move freely throughout Pakistan and to reside and settle in any part thereof but this is subject to any reasonable restriction. Indeed, the power purportedly vested in the Federal Government is apparently unfettered and unrestricted, it is well-settled that the discretion vested in Executive must be exercised fairly, reasonably, justly and in accordance with law and the Constitution. In absence of any incriminating material available with the Respondent-Government against the Petitioner tending to show that he was involved in any serious kind of nefarious activities or acting prejudicial to the security and solidarity of the State, impugned order cannot be sustained in law in as much as not a single instance of involvement of the Petitioner in any serious crime is shown to exist...”

iii. Yusuf J. Ansari v. Government of Pakistan through Secretary Ministry of Interior, Islamabad and another, PLD 2016 Sindh 388:

“...Mr. Naek has rightly referred to the case-law developed by the superior Courts whereby a consistent view is taken that right of free movement which indeed includes the right of traveling abroad subject to reasonable restriction has been guaranteed under Article 15 of the Constitution of Islamic Republic of Pakistan and in case such right is to be curtailed by applying reasonable restriction then such power must be exercised fairly, reasonably and in good faith and the order whereby such restriction is imposed should not be

passed mechanically on the request of any ministry or department and unless against the public interest such order must detail reason and should reflect application of mind...”

- iv. Gen. (Retd.) Pervez Musharraf through Attorney v. Pakistan through Secretary Interior and others, PLD 2014 Sindh 389:

“...It is quite clear that registration of a criminal case or institution of criminal proceedings does not automatically imply that the accused should be disallowed to move outside Pakistan and or to put his name on ECL. Had it been the intention of legislature then it would have made the corresponding provisions in the Cr.P.C. or any other special enactments made for the trial of offences...”

And Sh. Muhammad Mansoor v. Government of Pakistan through Secretary, Ministry of Interior and 3 others, 2008 MLD 955; Munir Ahmad Bhatti v. Government of Pakistan, Ministry of Interior through Secretary and others, PLD 2010 Lahore 697; Masood Ahmed v. Federation of Pakistan through Secretary, Ministry of Interior Islamabad and another, 2010 YLR 28; Mian Munir Ahmed v. Federation of Pakistan and others, 2008 YLR 1508; Syed Masood Hussain Shah v. Federation of Pakistan through Secretary, Ministry, 2015 MLD 124; Muhammad Sadiq v. Federation of Pakistan through Secretary Interior and 2 others, PLD 2016 Sindh 263; Miss Ayyan Ali v. Federation of Pakistan and others, 2017 P Cr. L J 920; The Federal Government through Secretary Interior, Government of Pakistan v. Ms. Ayyan Ali and others, 2017 SCMR 1179; Mian Muhammad Shahbaz Sharif v. Federation of Pakistan and 4 others, 2019 P Cr. L J 1123 and Chairman NAB through P.G., NAB, Islamabad v. Mian Muhammad

Shahbaz Sharif & others, Order dated 27.10.2020 in C. P. No. 2082 / 2019.

13. The **right to movement is a universally recognized and accepted right.** It is acknowledged and enforced in all important jurisdictions of the world and is the subject matter of important conventions and treaties between nation states. Pakistan is also a signatory of many of such conventions. **Clause 42 of Magna Carta Libertatum** emphasizing the right of movement states that *‘in future it shall be lawful for any man to leave and return to our Kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm. People that have been imprisoned or outlawed in accordance with the law of the land, people from a country that is at war with us, and merchants who shall be dealt with as stated above are excepted from this provision.’*

14. Freedom of movement under the laws of the United States of America law is regarded as the most esteemed and uncompromising right. The right falls under **Privileges and Immunities Clause of the United States Constitution** which states that *‘the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.’* The 5th Amendment of the Constitution of the United States of America considers the right of movement as part of personal liberty and necessary ingredient of right of life. The Fifth Amendment guarantees that no person shall be *‘deprived of life, liberty or property without due process of law’*. There can be no doubt that in the United States the right of exit and entry is regarded as a personal liberty. It has consistently been held that the right to travel or exit the country was a personal right included within the word, *‘Liberty’* as used in the Fifth Amendment and that a citizen could not be deprived from the exercise of this right without due process of law. Reference in

this regard may be made to the Judgment of the U.S. Supreme Court in the case of Kent v. Dulles, **357 U.S. 116 (1958)**.

15. In another landmark case titled, Paul v. Virginia, **75 U.S. 168 (1869)**, the United States Supreme Court held that *'it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.'*

16. Recognizing the right of freedom of movement, the Circuit Court of the United States in case titled, Corfoeld v. Coryell, **6 Fed. Cas 546 (1823)** importantly stated that *'the right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.'*

17. The right of movement is the focus of every Convention between the nation states on civil or political rights. Article 3 of the **Universal Declaration of Human Rights** in unequivocal terms declares that *'everyone has right to life, liberty and security of person'*. Article 13 of the **Universal Declaration of Human Rights** further elaborates the concept

of freedom to movement in specific terms and states that *‘everyone has the right to freedom of movement and residence within the borders of each state and everyone has the right to leave any country, including his own, and to return to his country.’* Under Article 12 of **International Covenant on Civil and Political Rights**, the limitations to the right to freedom ever elaborated to ensure that the enjoyment of the right may not be diluted by nation states. *‘Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Everyone shall be free to leave any country, including his own. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. No one shall be arbitrarily deprived of the right to enter his own country.’*

18. Under Article 18(1) of the **Convention on Rights of Person with Disability** specifically provided for right of movement and nationality by declaring that *‘States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities; (a) have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability; (b) are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement; (c) are free to leave any country, including their own; and (d) are not*

deprived, arbitrarily or on the basis of disability, of the right to enter their own country.'

19. Articles 5(d)(i)&(ii) of the **International Convention on the Elimination of all Forms of Racial Discrimination**, granted and promised the right of movement in compliance and furtherance with the fundamental obligations of States Parties under Article 2 of this Convention and obligated to prohibit and to eliminate racial discrimination in all its forms and guaranteed the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the rights including '*other civil rights, in particular, the right to freedom of movement and residence within the border of the State; and the right to leave any country, including one's own, and to return to one's country.*'

20. Article 15(4) of the **Convention on the Elimination of all Forms of Discrimination Against Women**, extends the right of movement to women by holding that '*States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile*'.

21. The right of movement has a special character and is emphatically encapsulated in Article 12(1)&(2) of the **African Charter on Human and Peoples' Rights** which stipulates that '*every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law; and every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality*'.

22. Article 10(1)&(2) of the **Convention on the Rights of the Child** proclaims and accords the right to movement to the children by declaring in unambiguous terms

that ‘in accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family; and a child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.’

23. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families lays primary focus on the right of movement. Article 5 postulates that ‘for the purposes of the present Convention, migrant workers and members of their families: (a) are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party; and (b) are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article’. Article 8(1)&(2) affirming the right of movement states that ‘migrant workers and members of their families

shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention; and migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin'. Further, Articles 39(1)&(2) importantly provide that 'migrant workers and members of their families shall have the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there; and the rights mentioned in paragraph 1 of the present article shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals, or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention'.

24. The analysis of the facts of the instant case, the law of Pakistan developed and interpreted by the superior Courts of Pakistan and the international jurisprudence evolved on the subject leaves no doubt that the freedom and liberty are basic instinct of a human being. The very essence and existence of life is felt, acknowledged, recognized and endured with the act of movement. The act of movement starts in the womb of mother and ends with pronouncement of death. It is movement that distinguishes life from death and as such, the right to movement is cherished, protected and guarded from times immemorial. World history is replete with examples that sons of the soil have defended the right to liberty and movement by sacrificing their blood and lives. Unreasonable restrictions have led to revolutions and rebellions and given rise to movements for freedom and independence. The liberal grant of the right promotes peace and progress of a state. Its curtailment

germinates suffocation and suppression of human abilities. Its anti-thesis is confinement. The importance of this right can be gauged from the fact that confinement is equally recognized as a legitimate punishment in all jurisdictions. Curbs and restrictions on movement have serious psychological and physical repercussion and effects. Accordingly, the right to movement has always been regulated by the state and is used as a double edged weapon. In the modern world, there is consensus that right ought to be liberally construed and granted subject to reasonable restrictions imposed by law. The discretion exercised by the executive is subject to judicial review. Article 15 of the Constitution is no exception. It recognizes the right to movement as a fundamental right subject to restrictions imposed by law in the public interest. This right is not limited to movement within Pakistan but extends and includes the right to leave and enter Pakistan. Right to movement is an inseparable part of right to life. The exercise of executive authority is subject to judicial review. The state must come forward with legitimate and lawful cogent, reasonable, justifiable and substantive reasons to clog the right to movement of a citizen. Conversely, if the impugned action speaks of malice or is based on *mala fide* or is otherwise taken arbitrarily and capriciously or without hearing or is unreasonable or without any substantive reason or is based on irrelevant, extraneous and presumptive considerations, the same is liable to be struck down.

25. The upshot of the above discussion is that the Respondents have failed to advance any cogent or substantive reason, whereby, the names of the Petitioners were placed on the ECL under the Ordinance and the Rules. The mere relationship of the Petitioners with the CEO of the Company was not a valid legal basis. Accordingly, this Petition is **allowed** and the impugned Memorandum and the Order are set aside and declared as unconstitutional, illegal and unlawful. The

observations made herein shall not influence any other proceedings that may be pending or initiated subsequently before any Authority or Agency or Court which shall be decided on its own merits.

(ABID HUSSAIN CHATTHA)
JUDGE

Approved for reporting.

JUDGE

Waqar

Announced in open Court on _____.

JUDGE