

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Case No: Writ Petition No.879 of 2015

Abdul Qayyum

Vs.

Federation of Pakistan and 5 others

Petitioner by: Rana Kashif Saleem Arfaa, Advocate.
Respondents by: Mian Abdul Rauf, Advocate-General.

Date of Decision: 02.04.2015.

Aamer Farooq, J.- Through this consolidated judgment we intend to decide the instant writ petition as well as Criminal Miscellaneous No.93-M of 2015, as common question of law is involved.

Through this writ petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioner seeks setting aside of death warrant of Zulfiqar Ali Khan S/o Rashid Ali Khan issued by respondent No.4 on the ground that the same has been issued without jurisdiction and therefore, is illegal and inoperative. In Criminal Miscellaneous No.93-M/2015 the petitioner seeks suspension of death warrant so that compromise with legal heirs of the deceased persons can be effected.

2. In the instant writ petition the facts, in brief, are that Zulfiqar Ali Khan S/o Rashid Ali Khan alongwith others were tried in F.I.R. No.33/1998 dated 14.04.1998, under sections 302/324/397/411/34 P.P.C. read with section 7 of the Anti Terrorism Act, 1997, lodged with Police Station Barakahu, Islamabad. The referred Zulfiqar Ali Khan was tried by respondent No.3 and was sentenced to death vide judgment dated 04.09.1999. The appeal was filed (Criminal Appeal No.202-T/1999) before the Hon'ble Lahore High Court, Rawalpindi Bench, Rawalpindi which was dismissed by the learned Division Bench vide judgment dated 04.10.2001. Zulfiqar Ali Khan filed a Jail Petition No.200/2002 before the Hon'ble Supreme Court of Pakistan which was dismissed vide judgment dated 19.05.2004.

Review petition (Criminal S.M.R.P. No.9/2005) was also dismissed by the Hon'ble Supreme Court of Pakistan vide judgment dated 09.06.2008. All this time, after the dismissal of review petition by the Hon'ble Supreme Court of Pakistan, no death warrant was issued inasmuch as there was a moratorium on awarding capital punishment. However, in wake of the incident of 16th December 2014 the moratorium was lifted and a National Action Plan was prepared by the Government whereby it was decided that execution of all the prisoners in the Death Cell shall be carried out in accordance with law, therefore, the death warrant of Zulfiqar Ali Khan was issued by respondent No.4 for 24.03.2015.

3. In Criminal Miscellaneous No.93-M of 2015 the brother of the petitioner namely Raees Ahmed was tried by the Anti Terrorism Court with respect to offences under sections 148/149/460/302/109 P.P.C. booked through FIR No.175 dated 09.12.1997 at Police Station Barakahu, Islamabad. The death sentence awarded to Raees Ahmed was confirmed by the Hon'ble High Court and the sentence was maintained by the Hon'ble Supreme Court of Pakistan. Raees Ahmed through the referred petition seeks time to compromise with the legal heirs of the deceased persons.

4. Learned counsel for the petitioner in the writ petition *inter alia* submitted that respondent No.4 has no jurisdiction to issue the death warrant as the sentence was awarded by respondent No.3 and therefore, in light of section 389 of Criminal Procedure Code, 1898 (Cr.P.C.) the same should be executed/issued by respondent No.3 i.e. the same Judge/Court which passed the sentence.

5. Learned Advocate-General, Islamabad *inter alia* submitted that the death warrant has been rightly issued by respondent No.4 inasmuch as after the establishment of the Anti Terrorism Court at Islamabad the jurisdiction with respect to all the cases pertaining to Islamabad vested with it. It was further contended that section 389 Cr.P.C. is not applicable in the present case and the relevant provision of Criminal Procedure Code is section 381 Cr.P.C.

6. The learned counsel for the petitioner in Criminal Miscellaneous No.93-M of 2015 though had not raised the plea of jurisdiction in the application but adopted the arguments of the learned counsel for the petitioner in the instant writ petition (Writ Petition No.879/2015). Sardar Ishaq Khan, Senior ASC on behalf

Review petition (Criminal S.M.R.P. No.9/2005) was also dismissed by the Hon'ble Supreme Court of Pakistan vide judgment dated 09.06.2008. All this time, after the dismissal of review petition by the Hon'ble Supreme Court of Pakistan, no death warrant was issued inasmuch as there was a moratorium on awarding capital punishment. However, in wake of the incident of 16th December 2014 the moratorium was lifted and a National Action Plan was prepared by the Government whereby it was decided that execution of all the prisoners in the Death Cell shall be carried out in accordance with law, therefore, the death warrant of Zulfiqar Ali Khan was issued by respondent No.4 for 24.03.2015.

3. In Criminal Miscellaneous No.93-M of 2015 the brother of the petitioner namely Raees Ahmed was tried by the Anti Terrorism Court with respect to offences under sections 148/149/460/302/109 P.P.C. booked through FIR No.175 dated 09.12.1997 at Police Station Barakahu, Islamabad. The death sentence awarded to Raees Ahmed was confirmed by the Hon'ble High Court and the sentence was maintained by the Hon'ble Supreme Court of Pakistan. Raees Ahmed through the referred petition seeks time to compromise with the legal heirs of the deceased persons.

4. Learned counsel for the petitioner in the writ petition *inter alia* submitted that respondent No.4 has no jurisdiction to issue the death warrant as the sentence was awarded by respondent No.3 and therefore, in light of section 389 of Criminal Procedure Code, 1898 (Cr.P.C.) the same should be executed/issued by respondent No.3 i.e. the same Judge/Court which passed the sentence.

5. Learned Advocate-General, Islamabad *inter alia* submitted that the death warrant has been rightly issued by respondent No.4 inasmuch as after the establishment of the Anti Terrorism Court at Islamabad the jurisdiction with respect to all the cases pertaining to Islamabad vested with it. It was further contended that section 389 Cr.P.C. is not applicable in the present case and the relevant provision of Criminal Procedure Code is section 381 Cr.P.C.

6. The learned counsel for the petitioner in Criminal Miscellaneous No.93-M of 2015 though had not raised the plea of jurisdiction in the application but adopted the arguments of the learned counsel for the petitioner in the instant writ petition (Writ Petition No.879/2015). Sardar Ishaq Khan, Senior ASC on behalf

of the legal heirs made a categorical statement that there is no compromise with Raees Ahmed, the condemned prisoner.

7. Since one of the charges against Zulfiqar Ali Khan was under Anti Terrorism Act, 1997 (the Act), therefore, his case was tried by the Anti Terrorism Court, Rawalpindi which had the jurisdiction in the matter at the relevant time. In 1998/1999 when the trial of Zulfiqar Ali Khan was being conducted respondent No.3 had the jurisdiction to try the cases under the Act pertaining to the territories of Rawalpindi and Islamabad. This jurisdiction was vested to the referred Court vide notification dated 30.08.1997 issued by the Ministry of Law, Justice, Human Rights and Parliamentary Affairs, Government of Pakistan. Anti Terrorism Courts, under the Act, are created under section 13 of the same and the Presiding Officers are appointed under section 14 *ibid*. The provisions of the Act take effect notwithstanding anything contained in Criminal Procedure Code, by virtue of section 32 of the Act. However, the procedure not provided in the Act is borrowed from the Criminal Procedure Code and for the said purpose the Anti Terrorism Court is deemed to be a Court of Sessions. There is no mechanism provided in the Act for carrying out the sentence/issuance of death warrant and therefore, the relevant provision provided in Criminal Procedure Code is applicable. In this regard the relevant provision in the Code is section 381 which, for the sake of brevity, is reproduced below and is as follows:

“When a sentence of death passed by a Court of Sessions is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.”

8. There is no concept of confirmation of death sentence awarded by the Anti Terrorism Court by the High Court as is provided in Criminal Procedure Code. The plain reading of section 381 Cr.P.C. provides that the Court of Sessions on receiving the order of confirmation from the High Court shall cause such order to be carried into effect by issuing a warrant or such other steps as may be necessary. By virtue of section 32 of the Act the Anti Terrorism Court is a Court of Sessions for the purposes of

Criminal Procedure Code, therefore, the warrant is to be issued by it. The sole controversy before us is whether the death warrant is to be issued by respondent No.3, which passed the sentence, or respondent No.4 which now has the territorial jurisdiction to try cases under the Act pertaining to the territory of Islamabad. After the enactment of Islamabad High Court Act, 2010 all the Special courts functioning in Islamabad Capital Territory came under the administrative control of Islamabad High Court. Sections 6 & 9 of the Islamabad High Court Act, 2010 read as follows:

“6. OTHER COURTS:-

- (i) *Subject to the provisions of this Act and any order of the competent authority, all Civil, Criminal and Revenue Courts, and all Tribunals and Special Courts established under any law which were exercising jurisdiction and functions in the Islamabad Capital Territory immediately before the commencement of this Act shall continue to exercise their respective jurisdiction and functions and all persons holding office in such Courts or Tribunals or Special Courts shall continue to hold their respective offices on the same terms and conditions as were applicable to them immediately before the commencement of this Act, unless otherwise determined by the competent authority.*
- (ii) *Notwithstanding anything contained in any other law for the time being enforce, all civil, criminal and Revenue Court and all Tribunals and Special Court functioning in Islamabad Capital Territory which were within jurisdiction and under the Superintendence and control of the Lahore High Court before the commencement of this Act shall, as from the appointed date, falls within the jurisdiction and under the supervision and control of the Islamabad High Court.*
- (iii) *The Islamabad High Court shall take necessary steps for establishing sub ordinate judiciary for the Islamabad Capital Territory within six months of the commencement of this Act. The Judges of the subordinate judiciary working on deputation shall be sent back to the respective High Courts after establishment of the subordinate judiciary for the Islamabad Capital Territory.*

9. TRANSFER OF PROCEEDINGS:-

All appeals, petitions and other proceedings pending in the Lahore High Court or in any other High Court in relation to Islamabad Capital Territory immediately before the appointed dated shall stand transferred to the Islamabad High Court.

EXPLANATION: *For the purposes of this section or any other provision of this Act where subject so requires, the expression “Lahore High Court” includes Rawalpindi Bench of the Lahore High Court.”*

Respondent No.4 was established by notifications dated 25.02.2013 as well as 25.04.2014 issued by the Ministry of Law, Justice and Human Rights, Government of Pakistan, under section 13 of the Act. The said notifications are reproduced verbatim hereunder:

TO BE PUBLISHED IN THE NEXT ISSUE OF GAZETTE OF PAKISTAN

GOVERNMENT OF PAKISTAN
MINISTRY OF LAW AND JUSTICE

Islamabad, the 25th March, 2013

NOTIFICATION

No.F.31(1)/2010-Admn-III(Vol-III)(C). In pursuance of the approval of the Prime Minister's Secretariat, Islamabad, the competent authority has been pleased to establish one Special Court (Anti-Terrorism) for Islamabad Capital Territory (ICT) under section 13(1) of the Anti-terrorism Act, 1997.

2. The jurisdiction of the above Special Court (Anti-Terrorism) shall comprise of Islamabad Capital Territory and shall function at premises designated by the Government of Pakistan Ministry of Law and Justice, Islamabad.

(Nashad Khan)
Section Officer

The Manager,
Printing Corporation of Pakistan Press,
Karachi.
Copy to:-

1. The Principal Secretary to the Prime Minister, Prime Minister's Secretariat (Public), Islamabad.
2. The Secretary, Establishment Division, Islamabad.
3. The Secretary, Ministry of Finance, Islamabad.
4. The Secretary, Ministry of Interior, Islamabad.
5. The Secretary, Capital Administration Development Division, Islamabad.
6. The Chief Secretary, Government of Punjab, Lahore.
7. The Chief Secretary, Government of Sindh, Karachi.
8. The Chief Secretary, Government of Baluchistan, Quetta.
9. The Chief Secretary, Government of Khyber Pukhtunkhwa, Peshawar.
10. The Registrar, Supreme Court of Pakistan, Islamabad.
11. The Registrar, Islamabad High Court, Islamabad.
12. The Chief Commissioner, Islamabad Capital Territory, Islamabad with reference to their Notification No.2(81)-Law/2011-796 dated 06.03.2013.
13. The Inspector General of Police, Islamabad.
14. The AGPR, Islamabad.
15. PS to Secretary, Ministry of Law and Justice, Islamabad.
16. SO(B&A), Law, Justice and Parliamentary Affairs, Islamabad.
17. Office Record.

(Nashad Khan)
Section Officer

TO BE PUBLISHED IN THE NEXT ISSUE OF GAZETTE OF PAKISTAN**GOVERNMENT OF PAKISTAN
MINISTRY OF LAW, JUSTICE AND HUMAN RIGHTS**

Islamabad, the 25th April, 2014**NOTIFICATION**

No.F.31(1)/2010-Admn-III(Vol-III). The Federal Government is pleased to designate
Anti Terrorism Courts of Islamabad as under:-

- i) Anti Terrorism Court established vide notification of even number dated 25.03.2013 as Anti Terrorism Court No.I, Islamabad.
- ii) Anti Terrorism Court established vide notification of even number dated 25.02.2014 as Anti Terrorism Court No.II, Islamabad.

(Tauqir Mehmood Wattoo)
Section Officer

**The Manager,
Printing Corporation of Pakistan Press,
Karachi.**

Copy to:-

- 1. The Secretary to the Prime Minister, Islamabad.
- 2. The Secretary, Establishment Division, Islamabad.
- 3. The Secretary, Ministry of Finance, Islamabad.
- 4. The Secretary, Ministry of Interior, Islamabad.
- 5. The Secretary, Capital Administration Development Division, Islamabad.
- 6. The Chief Secretary, Government of Punjab, Lahore.
- 7. The Chief Secretary, Government of Sindh, Karachi.
- 8. The Chief Secretary, Government of Baluchistan, Quetta.
- 9. The Chief Secretary, Government of Khyber Pukhtunkhwa, Peshawar.
- 10. The Registrar, Supreme Court of Pakistan, Islamabad.
- 11. The Registrar, Islamabad High Court, Islamabad with reference to his letter No.10151/Admn/IHC/14 dated 11.04.2014.
- 12. The Chief Commissioner, Islamabad Capital Territory, Islamabad.
- 13. The Inspector General of Police, Islamabad.
- 14. The AGPR, Islamabad.
- 15. PS to Secretary, Ministry of Law, Justice and Human Rights, Islamabad.
- 16. SO(B&A), Law, Justice and Human Rights, Islamabad.
- 17. Office Record.

(Tauqir Mehmood Wattoo)
Section Officer

9. The perusal of the above notifications shows that for the territory of Islamabad, Anti Terrorism Courts under the Act, have been established and have the jurisdiction to try all cases falling under the Act and to pass sentences and execute the same. Since at the time of awarding of sentence, in the instant cases, respondent No.4 did not exist and respondent No.3 had the jurisdiction over the matter, therefore, it awarded the sentence. However, now respondent No.4 is Court of competent jurisdiction with respect to all the matters falling under the Act within the territory of Islamabad, therefore, is competent to pass all orders that are necessary to execute the sentence awarded with respect to cases, under the Act within the territory of Islamabad. The argument of the learned counsel for the petitioner that respondent No.3 has the jurisdiction since he passed the sentence and is competent to execute the same under section 389 Cr.P.C., is not tenable as the relevant provision of law in the Criminal Procedure Code is 381 Cr.P.C. In section 389 Cr.P.C. the word used has been Judge or his successor in interest however, no such words exist in section 381 Cr.P.C. and because of the difference in the words used in both the sections it can be safely concluded that respondent No.4 namely Anti Terrorism Court, Islamabad is competent to issue death warrants. There is no vested right available to the petitioner or condemned prisoner to have the death warrant set aside on the basis of aforementioned technicality.

10. In Criminal Miscellaneous No.93-M of 2015 since there is no compromise, therefore, the Death Warrant cannot be suspended or set aside.

11. Even otherwise the present writ petition as well as Criminal Miscellaneous No.93-M/2015 are not maintainable as the petitions have been filed by the brothers of condemned prisoners who have no *locus standi* to do the same.

12. In view of foregoing discussion, the instant writ petition as well as Criminal Miscellaneous No.93-M of 2015 are dismissed.

(ATHAR MINALLAH)
JUDGE

(AAMER FAROOQ)
JUDGE

Announced in open Court on the 8th day of April 2015.

JUDGE

JUDGE

*M. Naveed

Blue slip added

Approved for reporting.