

Ayesha A. Malik, J.- I have read the opinion of the majority as authored by Syed Mansoor Ali Shah, J. and while I agree with the conclusion on the issue of maintainability, being that these Petitions are maintainable, I do not agree with the reasons given therein. So far as the reasons and conclusions drawn on the merit of the case, I have no disagreement.

2. On the question of maintainability, the *Gomal* case¹ has been relied upon for its interpretation of Article 212 of the Constitution of the Islamic Republic of Pakistan, 1973 (**Constitution**). In the instant Petitions, the dispute emanates out of service appeals decided by the service tribunal for the Khyber Pakhtunkhwa against which Petitions under Article 212(3) of the Constitution have been filed before this Court. The relevant Provincial law is the Khyber Pakhtunkhwa Subordinate Judiciary Service Tribunal Act, 1991 (**SJST Act**) read with the Khyber Pakhtunkhwa Judicial Service Rules, 2001 (**JS Rules**), and the issue is whether leave to appeal can be filed before this Court in terms of Article 212(3) of the Constitution given the decision rendered in the *Gomal* case.

3. The *Gomal* judgment finds that where a Provincial law establishes Administrative Tribunals or Courts (herein after referred to as **the Tribunal**) under Article 212(1) of the Constitution, it must first, by way of a resolution followed by an Act of Parliament, oust the jurisdiction of all other courts to grant exclusive jurisdiction to the Provincial Tribunal, and only then can the remedy of appeal before this Court, as contained in Article 212(3) of the Constitution, be availed. The relevant law under consideration in the *Gomal* judgment was the Khyber Pakhtunkhwa Medical Teaching Institutions Reforms Act, 2015 (**Act**) which provided for a medical tribunal which heard appeals in service matters under the Act. The decision of the medical tribunal was challenged before this Court under Article 212(3) of the Constitution by way of a leave petition wherein the question of maintainability arose being whether a leave petition under Article 212(3) of the Constitution is maintainable. The *Gomal* judgment finds that where a Province establishes the Tribunal under Article 212(1) of the Constitution, then an appeal to the Supreme Court from a judgment, decree, order or sentence of the Tribunal shall lie to the

¹ Dean/Chief Executive, Gomal Medical College, Medical Teaching Institution, D.I. Khan v. Muhammad Armaghan Khan and others (PLD 2023 SC 190) (*Gomal*).

Supreme Court, subject to the fulfilment of the requirements contained in the *proviso* to Article 212(2) of the Constitution. The said judgment explains that the *proviso* must be *activated* for the remedy under Article 212(3) of the Constitution to be made available because the Provincial Legislature, on its own, cannot affect or act upon the jurisdiction of this Court without intervening Federal legislation. The *Gomal* judgment refers to the *proviso* to Article 212(2) as the *bridge* between Sub-Articles (1) and (3) of Article 212 for the purposes of availing the constitutional remedy of an appeal before this Court. It further explains that if the Provincial Assembly does not activate the *proviso* then the remedy of appeal before this Court is not available to such Provincial Tribunal.

4. Consequently, the question before us is whether these Leave to Appeal Petitions (**Petitions**) under Article 212(3) of the Constitution are maintainable given that these Petitions arise out of a judgment from a Provincial Tribunal, admittedly for which the requirements contained in the *proviso* to Article 212(2) have not been fulfilled.

5. The relevant Article of the Constitution (Article 212) provides that the appropriate legislature may by an Act establish the Tribunal having exclusive jurisdiction in respect of the subject-matters described in Sub-Articles (a), (b) and (c) of Article 212(1) of the Constitution. So, Article 212(1) allows the competent legislature, be it Federal or Provincial, as the case may be, to establish the Tribunal with exclusive jurisdiction for the given subject-matters. Article 212(1) starts with a *non-obstante* clause *notwithstanding anything hereinbefore contained* which addresses the constitutional authority with respect to legislative competence set out in Article 142 of the Constitution. It may be noted that Article 212(1) of the Constitution has an overriding effect on Article 142 of the Constitution which provides that it is *subject to the Constitution*. Therefore, the constitutional command is that while legislative competence is derived from Article 142 of the Constitution, the Constitution itself grants competence to the relevant legislature to establish the Tribunal on the given subject-matters under Article 212. Effectively, Article 212(1) of the Constitution gives competence to the Federal and Provincial Legislatures to establish the Tribunal on the given subject-matters such that the Tribunal has exclusive jurisdiction and Article

212(3) further provides that an appeal to the Supreme Court from the judgment, decree, order or sentence of the Tribunal shall lie to the Supreme Court. This appeal under Article 212(3) is not as of right but is subject to the satisfaction that *a substantial question of law of public importance* arises in the case.

6. Article 212(2), on the other hand, provides that *notwithstanding anything hereinbefore contained*, no other court can grant an injunction, or make any order, or entertain any proceeding in respect of any matter for which the Tribunal established under Article 212(1) has exclusive jurisdiction, and any pending matter before such other court shall abate. For the purposes of the Provincial Legislature, by way of a *proviso*, it states that the ouster of jurisdiction as explained in Article 212(2) of the Constitution shall not apply unless the Provincial Assembly, in the form of a resolution, requests for an Act of Parliament to extend the provisions of Article 212(2) to the Tribunal. Accordingly, Article 212(2) ousts the jurisdiction of all other courts for the purposes of the Tribunal under Article 212(1) established by Parliament and where the Provincial Assembly is concerned, it must by way of a resolution request for an Act of Parliament which will oust the jurisdiction of all other Provincial courts or tribunals. An example of this *proviso* being activated is the Provincial Service Tribunals (Extension of Provisions of the Constitution) Act, 1974 being a Federal law which extended the provisions of Article 212(2) of the Constitution to the Provincial Service Tribunals of Balochistan, Khyber Pakhtunkhwa, Punjab and Sindh resulting thereby in a direct leave to appeal petition before this Court under Article 212(3) of the Constitution.

7. Hence, the question is what is the effect of this ouster of jurisdiction under Article 212(2) and whether it is mandatory for the *proviso* contained therein to be activated in order for the leave to appeal to be filed before this Court. To my mind, Article 212(3) of the Constitution is the constitutional mandate which prescribes that leave to appeal before the Supreme Court for the Tribunal established under Article 212(1) of the Constitution can be filed directly, meaning thereby, the Constitution itself provides for the remedy of appeal before the Supreme Court. Both Sub-Articles (1) and (3) of Article 212 of the Constitution are exceptions to the legislative authority

contained in Article 142 of the Constitution as the Constitution *itself* authorizes and permits the Federal and Provincial Legislature, irrespective of the authority given in Article 142 of the Constitution read with the Federal Legislative List (**FLL**), to establish the Tribunal and to allow its leave to appeal directly before this Court. Article 212(2) merely ousts the jurisdiction of other courts or *fora*. Resultantly, even though the Tribunal is established under Article 212(1), the ouster of jurisdiction of other courts is automatically triggered by Article 212(2) of the Constitution and with respect to federal courts but for the provincial courts it is necessary that the Provincial Assembly activate the *proviso* to Article 212(2) of the Constitution. In such case, the Tribunal will be an exclusive forum, which totally and completely ousts the jurisdiction of all other courts or *fora* with respect to the special subject-matters contained in Sub-Articles (a), (b) and (c) of Article 212(1) of the Constitution. However, if the *proviso* is not activated, meaning there is no resolution by the Provincial Legislature (followed by an Act of Parliament) the ouster of jurisdiction will not be triggered. Consequently, a litigant will have the option to avail its remedy before any other forum including the remedy before the Supreme Court.

8. *Gomal* appears to read *exclusivity* and *ouster* as synonymous, because it relies on the principle that the Provincial Legislature cannot act upon the jurisdiction of this Court without intervening Federal legislation, hence, in order for the Tribunal to have exclusive jurisdiction, the *proviso* must be activated. This in turn means that if the *proviso* is activated, then the exclusivity of the Tribunal will mean ouster of the jurisdiction as well. However, to my understanding, exclusivity will not *per se* oust the jurisdiction of other courts without an express provision stating so as exclusivity of jurisdiction does not imply the ouster of jurisdiction.

9. For ouster of jurisdiction to take effect an express provision is required which is precisely what Article 212(2) of the Constitution does. In other words, the *proviso* does not act as a bridge between Sub-Articles (1) and (3) of Article 212, rather it allows and empowers the Provincial Legislature to decide whether, for the purposes of the establishment of the Provincial Tribunal, remedy should lie

exclusively to the Supreme Court or, in the alternate, giving more options to the litigant.

10. As far as the discussion of the majority opinion in the instant matter on Entry 55 of the FLL², to my mind, and with great respect, is not relevant to the dispute at hand. The issue before us in this matter is simply whether the remedy of appeal as provided in Article 212(3) of the Constitution is available to the Petitioners. The answer to this question is in the affirmative as this remedy has been provided, specifically and categorically, by the Constitution itself, and not by way of any ordinary legislation. In my opinion, therefore, there is no issue pertaining to legislative competence under Entry 55 of the FLL. Consequently, the entire discussion as to Entry 55 of the FLL in the instant case, has no bearing or impact on the outcome of the issue of maintainability.

11. Furthermore, as to my understanding, even *Gomal* discusses Entry 55 of the FLL in its Paragraph No. 14 in a specific and limited context with reference to the Interim Constitution, 1972 (**1972 Constitution**) as an explanation to the point that competence to make law conferring additional jurisdiction on the Supreme Court lies only with Parliament, if at all, that too, to the extent and manner specified therein and further that the Provinces do not have legislative competence with regard to the jurisdiction of the Supreme Court. Thus with reference to this discussion, *Gomal* highlights that the 1972 Constitution did not have a provision equivalent to Article 212(3) of the existing Constitution and linked the legislative entry to Article 188 thereof. This provision of the 1972 Constitution has no equivalent in the present Constitution and it is for this reason that *Gomal* has expressed its reservations as to Entry 55 of the FLL by using the words 'if at all' in parentheses, the import of which may have escaped the attention of the majority's opinion. While discussing the present Constitution in Paragraph No. 15, *Gomal* stresses on the fact that the Provinces have no legislative competence to enact legislation that affects or acts upon the jurisdiction of this Court, and hence, in this context, *Gomal* considers the *proviso* to

² Entry 55 of the Part-I in Fourth Schedule:

'55. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List and, to such extent as is expressly authorized by or under the Constitution, the enlargement of the jurisdiction of the Supreme Court, and the conferring thereon of supplemental powers.'

Article 212(2) as a bridge between Article 212(1) and (3) of the Constitution, meaning thereby Article 212(3) cannot be regarded as an independent standalone provision as it needs the *proviso* to activate the exclusivity and ouster of jurisdiction. So the focus of *Gomal* in fact is the issue of legislative competence of the Provincial legislature with respect to the jurisdiction of this Court.

12. Accordingly, as Article 212(1) of the Constitution itself confers jurisdiction on the Provincial Legislature to establish the Provincial Tribunal under Article 212(1), the Constitution also confers appellate jurisdiction to the Supreme Court from a judgment, decree, order or sentence of the said Provincial Tribunal, the remedy of leave to appeal before the Supreme Court is available against the decision of the KPK Service Tribunal established under Article 212(1) since these Petitions are with reference to the appeal under Section 5 of the SJST Act from an order of the said Service Tribunal.

13. Accordingly, these Petitions under Article 212(3) of the Constitution are maintainable.

JUDGE