

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

W.P.No...252 of 2015

JUDGMENT

*Date of hearing*_____ *30.04.2015*_____

*Petitioner*_____ *Khalid Khan*_____

Respondent _____ *The State* _____

NISAR HUSSAIN KHAN, J.- *Petitioner seeks issuance*

*of an appropriate writ with direction to the respondents to act in
accordance with law and extend him benefit of Section 382-B
Cr.P.C.*

2. *Precisely stated facts leading to the filing of
instant petition are that petitioner was employed in Pakistan Air
Force where from he deserted and later on was arrested on
2.9.2014. He was charge sheeted by the District Court-Martial
(hereinafter referred to as DCM) and consequently convicted on
15.10.2014 and accordingly sentenced for one year and 10 months*

R.I and was also dismissed from service. His conviction and sentence was confirmed by the confirming Authority on 26.11.2014. Main grievance of the petitioner is that by awarding sentence, benefit of section 382-B Cr.P.C. has not been extended which, according to him, is his fundamental right but has been infringed by passing the impugned order.

3. *Learned counsel for petitioner vehemently contended that petitioner has been discriminated by not extending benefit of Section 382-B Cr.P.C. which is extended to other prisoners. In support of his arguments, he placed reliance on Dr. Muhammad Aslam Khaki Vs The State (P L D 2010 Federal Shariat Court - 1).*

4. *Learned Deputy Attorney General, while controverting the arguments of learned counsel for petitioner, contended that Rule 99 of Pakistan Air Force Act Rules 1957 provides similar benefit which has already been extended to the petitioner, hence he is not entitled for relief asked for.*

5. *We have gone through the record carefully and have also considered the submissions made by the learned counsel for the parties.*

6. *Respondents in their comments have elaborated the status of the petitioner, according to which, he was Junior Technician, Pak-484546 General Fitter as Airman of Pakistan Air Force and was subject to Pakistan Air Force Law under Section 2(b) of Pakistan Air Force Act, 1953. He was enrolled on 4.5.1992 and deserted on 1.10.1997. He was arrested on 2.9.2014 from Hayatabad Peshawar after desertion period of about 17 years. He was charged under Section 38(1) Pakistan Air Force Act, 1953 for deserting the service and 54(b) for loss of Kit items worth Rs.3434/-. The District Court Martial (hereinafter called DCM) was convened under the Pakistan Air Force Act, 1953, for his trial. Petitioner pleaded guilty to the charge. The DCM accepted his plea of guilt and convicted and sentenced him to suffer one year and 10 months R.I. alongwith dismissal from service. It is averred in their comments that DCM considered pre-trial custody of 44 days of the petitioner, and due to the same reason, he was not awarded full dose of two years punishment. He had challenged his conviction before court of appeal who further remitted two months R.I. The confirming authority too extended leniency and remitted 6 months R.I. Since pre-trial custody has already been considered, so it cannot be extended twice.*

7. *Pivotal questions in the case is: as to whether benefit of Section 382-B Cr.P.C. can be extended to the petitioner who has been convicted by the DCM under Pakistan Air Force Act, 1953? And whether he has been discriminated by not extending benefit of Section 382-B Cr.P.C.?*

8. *Pakistan Air Force, Pakistan Army and Pakistan Navy are the Armed Forces, assigned with special task of national security against internal or external threats/aggression. To maintain discipline and high standard of combating capacity and efficiency, they are governed by their respective Acts/Statutes. Pakistan Air Force is governed by the Pakistan Air Force Act, 1953 which has self contained penal and procedural provisions. To give them full effect, Pakistan Air Force Act Rules, 1957 have been framed. Chapter-VI of the Act defines offences and Chapter-VII deals with the punishment. Chapter-X of the Act provides constitution of the Courts-Martial while Chapter-XI supplies procedure for trial before the Courts-Martial. Subsequent Chapters-XII & XIII relate to confirmation of conviction, appeals and revision and execution of sentence respectively. It manifests that Courts-Martial have their own procedure of trial and*

provisions of Code of Criminal Procedure, 1898, are not applicable thereto. Similar provisions are embodied in Pakistan Army Act, 1952 and the Pakistan Navy Ordinance, 1961. All the armed forces have their independent procedure and forum of investigation, enquiry, trial and appeals. It is their internal mechanism of procedure of enquiry and trial which with the passage of time has proved successful for maintenance of order and discipline.

9. *Section 164 of the Pakistan Air Force Act, 1953 to some extent is analogous to section 382-B Cr.P.C. which provides that when a person is sentenced under the Act to imprisonment or detention, his sentence shall, whether it has been revised or not, be reckoned from the day on which the original proceedings were signed by the President. It clearly suggests that period of trial is to be computed toward served out sentence. Similarly, Rule 99 of Pakistan Air Force Act Rules, 1957 empowers the Courts-Martial to consider the period of confinement, pending trial, apart from other factors including general character, age, services, rank and any recognized act of gallantry or distinguished conduct of the accused while awarding the*

sentence. This rule empowers the Courts-Martial to reduce the sentence, proportionate to the period spent in confinement during trial. However, it is not obligatory in view of the tone, tenor and language employed in the Rule. Section 164 of the Pakistan Air Force Act, 1953 and Rule 99 of the Pakistan Air Force Act Rules, 1957 are pari-materia to Section 382-B Cr.P.C. with only distinction that in the former two, Court-Martial has been empowered to itself consider the period of confinement during the trial and accordingly remit the sentence, whereas in the latter, jail authorities are required to compute the sentence while reckoning the period of detention during trial, towards imprisonment.

10. *Another aspect of the case is that Section 164 of the Act by insertion of word "shall" has made it mandatory to reckon the period of detention during trial in computing the sentence of imprisonment. While Rule 99 is discretionary. However, the spirit of Section 382-B Cr.P.C has been employed in Pakistan Air Force Act 1953 as well as Pakistan Air Force Act Rules, 1957. Whereas learned counsel for respondents, while referring to the different documents , has stated that the period of*

detention has already been considered and remitted by the Courts-Martial itself.

11. *Be that as it may, we while deciding writ petition are required to exercise Constitutional jurisdiction within the domain of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. Sub Article (3) of Article 199 of the Constitution envisages that no order shall be made under clause (1) of Article 199 in relation to a person who is member of the Armed Forces of Pakistan in respect of any matter arising out of his service or in respect of any action taken in relation to him as member of Armed Forces of Pakistan. Since in the case of petitioner, an action has been taken against him as member of Pakistan Air Force, so this Court cannot interfere with any order passed against him by the hierarchy of Pakistan Air Force. In case titled Ex. Lt. Col. Anwar Aziz (PA-7122) Vs Federation of Pakistan through Secretary Ministry of Defence, Rawalpindi and 2 others (P L D 2001 Supreme Court - 549), petitioner was convicted and sentenced to fine of Rs.3 lac and was also dismissed from service by the Field General Courts-Martial. Appeal was also dismissed. He invoked the Constitutional jurisdiction of High Court under Article 199 of Constitution of Islamic Republic of Pakistan, 1973 which too was*

dismissed by the Honourable Lahore High Court Rawalpindi Bench, vide judgment dated 8.6.1999. The august Supreme Court was pleased to dismiss the appeal in view of the bar contained in Article 199 (3) of the Constitution. In case title Muhammad Mushtaq Vs Federation of Pakistan (1994 S C M R - 2286) dismissal order of writ petition of this court was challenged before the august Supreme Court on the ground that the plea raised before the High Court was based on fundamental rights guaranteed by the constitution, so bar contained in Article 199(3) of the Constitution was not applicable to the matter of fundamental rights. The august Supreme Court dismissed the petition by holding that the relief regarding fundamental rights enshrined in sub-article (1) has clearly been barred by sub article (3) of Article 199 of the Constitution.

12. *Fundamental rights of a citizen of Pakistan have been recognized in Chapter-1 of Part-II of the Constitution of Islamic Republic of Pakistan, 1973. The safeguard of which has been guaranteed by vesting power in the High Court under Article 199(1) of the Constitution by invoking which, the High Court may pass an order as ordained in Sub Article (1). But at the same time*

by insertion of Sub Article (3), an embargo has been imposed in relation to the matters pertaining to the members of the Armed Forces. In view of such unqualified bar, this court in exercise of its Constitutional jurisdiction cannot interfere with any such order by abridging, rather transgressing the barring clause of same Article which vests the jurisdiction. This petition, as such, is not maintainable on this score alone.

13. *Arguments of learned counsel for petitioner regarding discrimination is also misconceived. No doubt, equality of citizens and their equal treatment and protection of law is a cherished goal of the Constitution but rule of classification is also an established principle of law as well as Islamic jurisprudence on the principle of intelligible differentia. The brief survey of different provisions of Pakistan Air Force Act 1953 and Pakistan Army Act, 1952, denotes that service structure of the armed forces provide strict rules of procedure for maintenance of discipline. The personnel of armed forces, in their matters of service and discipline are not treated at par with the civil servants or an ordinary citizen. They have been classified as members of a different institution, so are required to be treated differently. They*

have their independent rights and liabilities, according to their nature of services and duties. The personnel of the Armed Forces themselves opt for services in the said institutions, being well conversant with their strict rules of discipline. They cannot turn around in the matter of an action in their service matter and claim equality of treatment with the civilians. Hence this argument too is repelled.

14. *Learned counsel for petitioner has vehemently relied upon case titled Muhammad Aslam Khaki Vs The State (PLD 2010 FSC-1) for extension of benefit of section 382-B Cr.P.C. As it has earlier been observed that Section 164 of the Pakistan Air Force Act 1953 is self contained supplying the remedy to the convict that the period of detention shall be reckoned toward period of sentence. Rather section 164 appears to be more effective than section 382-B Cr.P.C. because in the latter, jail authorities are to compute the period of his detention during the trial for computing his total period of imprisonment whereas in the former, Courts-Martial while awarding sentence shall consider the period of detention towards the sentence and*

reduce the same accordingly. The jail authorities are not involved for extending relief to a convict.

15. For what has been discussed above, the propositions propounded at initial stage of judgment in para-7 are answered accordingly and as corollary thereof, this petition being meritless, stands dismissed.

J U D G E

***Announced on
30th Apr., 2015***

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