

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT: Mr. Justice Qazi Faez Isa
Mr. Justice Yahya Afridi

Civil Petition No. 1564/2020

Akhtar Ali

Petitioner

Versus

Mst. Taj Mahal and another

Respondents

For the Petitioner:

Dr. Adnan Khan, ASC
Mr. M. S. Khattak, AOR (absent)

For Respondent No. 1:

Mr. Sher Muhammad Khan, ASC
Mr. M. Tariq Khan, AOR (absent)

On Court's Notice:

Mr. Shumail Ahmed Butt, Advocate
General, Khyber Pakhtunkhwa

Date of Hearing:

02.04.2021

ORDER

Qazi Faez Isa, J. The learned Dr. Adnan Khan, representing the petitioner, submitted that subsection (8) of section 10 of the Shariah Nizam-e-Adl Regulation, 2009 (**'the Regulation'**) specifically stipulated that when hearing an appeal or revision the court should not remand the case, but the impugned order, which was passed in a civil revision, remanded the case to the learned District Judge, Malakand. The said provision of the Regulation is reproduced hereunder:

(8) An appeal or revision under this Regulation shall be filed within thirty days from the date of the decision in the respective case, after sending its copies, through registered post with acknowledge due, to the opposite part, and the appellate or revisional court shall decide the same within thirty days, **without remanding it on any ground whatsoever**: [emphasis added]

Provided that such court shall have the power to rectify any illegality or irregularity of omission.

Since a decision in this case would affect other cases too and as it involved the interpretation of a provincial law Notice was also

issued to the learned Advocate General, Khyber Pakhtunkhwa ('AG') under Order XXVII-A of the Code of Civil Procedure ('the Code').

2. In response to the notice the learned AG filed CMA No. 1317/2021 through which he brought on record the Regulation, the decisions of different Courts and cases which were pending. He states that the said provision was challenged but it has been upheld, therefore, a remand order cannot be passed in an appeal or revision.

3. However, the learned Dr. Adnan Khan, states that the matter is not so simple because the Twenty-fifth Constitutional Amendment ('**25th Amendment**') enacted on 4 June 2018 deleted Article 247 of the Constitution of the Islamic Republic of Pakistan ('**the Constitution**') and brought to an end the executive's power to make laws for the erstwhile tribal areas, including the Regulation. However, he states that the people have been deprived of the benefit of the 25th Amendment, and, despite the fact that the Constitution no longer permitted separate treatment of the people living in tribal areas, the following '*laws*' in respect thereof were enacted:

- (1) Khyber Pakhtunkhwa Continuation of Laws in the Erstwhile Provincially Administered Tribal Areas Act, 2018 on 10 January 2019 (Khyber Pakhtunkhwa Act No. III of 2019),
- (2) Khyber Pakhtunkhwa Continuation of Laws in Erstwhile Federally Administered Tribal Areas Act, 2019 on 3 May 2019 (Khyber Pakhtunkhwa Act No. XXIV of 2019), and
- (3) Khyber Pakhtunkhwa Actions (In Aid of Civil Power) Ordinance, 2019 on 5 August 2019 (Khyber Pakhtunkhwa Ordinance No. V of 2019).

A large number of petitions were filed before the Peshawar High Court challenging the aforesaid *laws*, and these petitions were allowed on 17 October 2019. The aforesaid *laws* were struck down as they were held to be in violation of the Fundamental Rights enshrined in the Constitution.

4. The Federal government and the government of Khyber Pakhtunkhwa and others filed petitions against the judgment of the High Court. Leave was granted on 24 October 2019 *vide* the following order:

The questions and issues involved in these petitions are of far-reaching consequences and they require interpretation of the Constitution and various laws. Leave to appeal is, therefore, granted in all these petitions and the appeals arising therefrom are ordered to be fixed for hearing on **13.11.2019** before a Larger Bench of this Court to be constituted by the Chief Justice. Let notices be issued to the respondents and also to the learned Attorney-General for Pakistan under Order XXVII-A, Rule 1, C.P.C. These appeals may be prepared on the present record with permission to the parties to place on record any additional document, if deemed necessary.

Thereafter, a five-member Bench comprising of the Hon'ble Chief Justice and the next four senior Judges was constituted and the appeals were heard on 13, 14, 15, 20, 25, 26 November and 4 December 2019. Since then these part-heard appeals have not once been fixed for hearing.

5. We are informed that the Regulation was also challenged before the Peshawar High Court in a number of petitions and these petitions were partially allowed by striking down certain provisions of the Regulation *vide* judgment dated 29 April 2015 as they were found to be incompatible with the Constitution. The government of Khyber Pakhtunkhwa and others challenged the High Court's judgment and this Court *vide* order dated 7 October 2015 (passed in CP Nos. 1587 to 1590 of 2015) granted leave (and rendered into Civil Appeals 1185 to 1188 of 2015). Leave was granted and the judgment suspended because the learned Judges of the High Court had, '*completely lost sight of Article 247(4) of the Constitution*'. However, as noted above the entire Article 247 was deleted by the 25th Amendment on 4 June 2018. This should have been brought to the attention of this Court but apparently the learned law officers of the province and the Federation did not do so. Therefore,

the judgment of the Peshawar High Court remains suspended, and these seven year old appeals have still not been decided.

6. Dr. Adnan Khan also submits that the will of the people's representatives, expressed through Parliament which had enacted the 25th Amendment and deleted Article 247, is negated by executive measures, by promulgating ordinances by the Governor and by the Khyber Pakhtunkhwa legislature. He states that the clear objective of the 25th Amendment was to bring the tribal areas at par with other areas of Pakistan and make them subject to regular laws but this is being prevented by the said measures which are contrary to the Constitution.

7. Under the aforesaid circumstances it would not be appropriate to consider only one aspect of the Regulation (subsection (8) of section 10) because it is possible that the decision in the aforesaid cases may have an impact on a decision in this case.

8. What is of concern to us is that cases, including those mentioned above, and in particular those in which interim orders have suspended judgments of the High Court which had held that if some law was in conflict with the Constitution they are not fixed promptly. These cases determine the rights of a large number of parties and also the peoples' future rights. Therefore, they must be listed and decided as soon as is practicable. The people, including lawyers and judges, need to know what the law is.

9. The Supreme Court Rules, 1980 ('**the Rules**') set out the functions of the Registrar and Rule 9 of Order III attends to the manner of fixing cases, as under:

The Registrar shall keep a list of all cases pending before the Court and shall subject to these Rules and any directions given by the Chief Justice, **prepare the list of cases ready for hearing and shall cause notice to be given thereof** and of the day if any, assigned for the hearing of any case or cases in the list. [emphasis added]

And, Rule 10(b) of Order III of the Rules states:

In addition to any other powers under the Rules, and subject to any general or special orders of the Chief Justice, the Registrar shall have the following powers namely:

- (b) to **fix the dates of hearing** of appeals, petitions or other matters, and issue notices thereof; [emphasis added]

Needless to state that, the all power to be exercised by the Worthy Chief Justice or the Registrar must advance the cause of justice, not to defeat it or undermine it. Cases in which interim orders are passed suspending judgments of the High Court which had held a *law* to violate Fundamental Rights and/or the Constitution require to be decided as soon as is practicable, and this is only possible if they are fixed for hearing as early as possible.

10. This Court's independence, authority and public respect is undermined when such important cases are not fixed for hearing.

11. In the given circumstances it would be judicially appropriate if the abovementioned cases relating to erstwhile FATA and PATA are clubbed and decided together lest there be conflicting findings.

12. Therefore, we direct the Registrar to solicit the orders of the Hon'ble Chief Justice for the fixation of all the abovementioned appeals/petitions.

Judge

Judge

Bench-IV
ISLAMABAD
02.04.2021
(Farrukh)

Approved for reporting