

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

MR. JUSTICE MUSHIR ALAM

MR. JUSTICE QAZI MUHAMMAD AMIN AHMED

*AFR D.J*

**CIVIL PETITION NO.3923 OF 2016**

(Against the judgment dated 10.11.2016 passed by Peshawar High Court, Mingora Bench (Darul-Qaza) Swat in C.R. No.33-M of 2014)

**AND C.M.A.8642/2016 in C.P.3923/2016**

(Stay application)

**And CIVIL PETITIONS NO.2875,4159-4161 OF 2019**

(Against the judgment dated 11.6.2019, passed by Peshawar High Court, Mingora Bench (Darul-Qaza) Swat in C.R.s No.535-M, 450-M, 491-M, 515 of 2011)

**And C.M.A.7510/2019 in C.P.2875/2019**

(Stay application)

Hazrat Bilal (decd.) through LRs & others

(in CP 3723/16)

Matin Malak (decd) thr. LRs & others

(in CPs 2875,  
4159-4161/19)  
...Petitioner(s)

**VERSUS**

Mst. Spogmai and others

(in CP 3723/16)

Abdur Rehman & others

(in CP 2875/19)

Jan Baz Khan and others

(in CP 4159/19)

Amir Gul and others

(in CP 4160/19)

Main Gul Jan and others

(in CP 4161/19)

...Respondent(s)

For the Petitioner(s):

Mr. Ghulam Mohyuddin Malik, ASC  
(in CP 3723/16)

Mr. Mazullah Barkandi, ASC  
Syed Rifaqat Hussain Shah, AOR  
(in CP 2875/19 & 4159-4161/19)

For the Respondent(s):

Mr. Muhammad Arif Khan, ASC  
Syed Rifaqat Hussain Shah, AOR  
(in CP 2875/19)

Mr. Ghulam Mohyuddin Malik, ASC  
(in CP 2875/19)

Syed Mastan Ali Shah Zaidi, ASC  
(in CPs 2875/19, 4159-4164/19)

On Court Notice:

Mr. Shumil Butt, AG, KP  
Mr. Sohail Mahmood, Addl. AGP  
Mr. Wallayat Khan, S.O, Home Deptt. KP

Date of Hearing:

15.10.2020

### JUDGMENT

**MUSHIR ALAM, J.**— All these Civil Petitions arise out of the different judgments (C.R No.33-M of 2014) dated 10.11.2016 and (C.Rs No.450-M, 491-M, 535-M, 515-M of 2011) dated 11.6.2019 rendered by the learned Peshawar High Court, Mingora Bench (Darul-Qaza), Swat against the judgment of the learned Civil Judge/Illaqa Qazi Kabal Swat, vide judgments dated 31.5.2013 and learned District Judge/Zilla Qazi, Dir Upper dated 18.8.2011. Relevant for the purposes of present controversy is the order dated 14.2.2017 passed in Civil Petition No.3923 of 2016 in the following terms:

*"The main contention of the learned ASC for the petitioner is that in view of Section 10(8) of Shariah Nizam-e-Adl Regulation, 2009, the appellate or revisional Court is bound to decide the appeal or revision as the case may be without remanding the case on any ground whatsoever, order remanding the case being against the provision of the Regulation cannot be maintained. Point raised merit consideration but at the same time we would like to examine where in a suit necessary party has not been impleaded, the evidence, which was necessary for just decision of the case, was not recorded or the judgment delivered by Court of appeal does not conform to the requirement of Rule 31 Order XLI of the CPC, what would be the way of open before such Court.*

2. *We have been told that in another petition bearing C.P.No.2185/2015, notice has been issued, therefore, it would be appropriate if this petition is clubbed with C.P.No.2185/2015. Order accordingly."*

The above mentioned legal position is invariably common in all the matters taken up today with minor variations in facts of each case. The facts may not be relevant to set at rest the controversy raised in all these petitions as noted in the order of this Court reproduced above. To put the facts into perspective a brief tabulated statement in each case may be relevant.

CPLA No.	Suit No./date of filing	Appeal No./date filing	Civil Revision No.
3923/2016	Judicial Magistrate/ Illaqa Qazi, Kabal, Swat No.38/1 of 2012 filed on 24.1.2012, dismissed on 31.5.2013	ADJ/Izafi Zilla Qazi, Kabal Swat Appeal No.34 of 2013 Filed on 17.6.2013 dismissed on 14.12.2013	PHC, Mingora Bench 33- M of 2014 remanded on 10.11.2016
2875/2019, 4159-4161	Sr. Civil Judge/Ala Illaqa Qazi, Dir Upper Suit No.51/1 of 2010 filed on 13.10.2006 dismissed on 22.12.2010	DJ/Zilla Qazi, Dir Upper Appeal No.5/13, 4/13, 3/13, 2/13, 1/13 of 2011 Filed on 2.2.2011 dismissed on 18.8.2011	PHC, Mingora Bench 535-M, 450-M, 491-M and 515-M of 2011 remanded on 11.06.2016

2. As noted above, all the cases proceeded and culminated into the judgment of the learned High Court. It may be observed that both the learned trial Court (*Illaqa Qazi*) and 1<sup>st</sup> Appellate Court (*Izafi Zilla*) conclusively dismissed the suits and all the appeals arising therefrom. However, all the Revisions were accepted and the judgment of both, the trial and Appellate Court, were set aside. The case was remanded to the learned trial Court in one set of proceedings and the trial court was directed *"to determine the source of income of the respondents as majority of sale deeds were excluded, apparently since the respondents were minor. Learned trial Court is also directed to collect expert evidence in respect of Shejara-e-Nasab Ex-PW1/2 which is against the contention alleged in written statement"*. In another proceedings, the High Court, while setting aside concurrent judgment and decree, stated that *"the case is remanded back to the learned trial Court with direction to the plaintiffs to amend their plaint by impleading all the necessary parties i.e. the members of tribe/caste Ibrahim Kehl, Ali Dad either in the representative capacity or otherwise but in accordance with law"*. The trial Court was further directed to receive written statements and may appoint a Commission to determine the exact location and boundaries of the suit property during currency of the Shariah Nizam-e-Adl Regulation, 2009, N.W.F.P Reg.No.1 of 2009, (**"Regulation 2009"**) which was promulgated in exercise of the powers conferred under Clause (3), Article 247 of the Constitution of Islamic Republic of Pakistan, 1973,

which *inter alia*, extended to the Provincially Administered Tribal Areas ("PATA") of the North West Frontier Province ("N.W.F.P"), now Khyber Pakhtunkhwa ("KPK"), except the Tribal Area adjoining District, Mansehra and former State of Amb. Under the Regulation 2009, in terms of Paragraph 1 (2), read with para-6 (2), all powers, functions and duties conferred, assigned or imposed on Judicial Officers in the North-West Frontier Province, in relation to proceeding with and conducting the criminal or civil cases, under any law for the time being in force, shall, subject to application of such law in the said area and established principles of Shariah, be exercised, performed or discharged by them as designated in column 3 of Schedule II. New set of procedure for trial of civil and criminal disputes was laid down and exercise of civil and criminal jurisdiction laws, as detailed in column 2 of Schedule-I, were made applicable according to Paragraph 3 (1) of the Regulation 2009. It was also provided in terms of Paragraph 18 that the provisions of Regulation 2009 shall have overriding effect notwithstanding anything to the contrary contained in any other law for the time being in force in the said area.

3. In all these cases, as reflected in the above tabulated statement, disputes of civil nature were initiated during subsistence of the Regulation No.1 of 2009 and proceeded thereunder. The suits agitating rights and interests in the property were filed before the Illaqa Qazi/Civil Judge. On decision, judgments/decrees were rendered which were subject to appeal before Izafi Zilla Qazi (Additional District and Sessions Judge) and against the appellate judgment, an appeal or revision was provided in terms of Sub-paragraph 8 of Paragraph 10 of the Regulation 2009.



4. Invariably, in all the cases set up for consideration before this Court, all matters were remanded to the learned trial Court for de-novo trial and/or after recording the evidence to hand-down the judgment and decree, as the case may be, in all the cases. It is this provision that has been a matter of debate before this Court. By consent of the parties, all the Petitions in terms of the orders as noted above, were converted into appeals and have been decided accordingly.

5. During pendency of the present petitions, the Constitution was amended vide the Constitution (Twenty-fifth Amendment) Act, 2018 ("Act No. XXXVII of 2018") dated 4.6.2018, whereby, eight Articles and/or sub-Article/clauses were either amended or omitted which included Article, 247 of the Constitution, 1973. The fact of omission of Article 247 changed the very complexion of the Federally Administered Tribal Areas ("FATA"). Under the omitted Article 247 of the Constitution, 1973 such areas were kept beyond the pale of the legislative domain of Parliament as well as all the Provincial Assemblies; A unique executive and legislative regime controlled and regulated such areas. By virtue of Sub-article 7 of Article 247 of the Constitution, neither the Supreme Court nor a High Court could exercise any jurisdiction under the Constitution in relation to the tribal areas. By virtue of 25<sup>th</sup> Constitutional Amendment Act, 2018 in the Constitution as a result of omission of Article 247 of the Constitution, erstwhile FATA/PATA areas were merged in the Province of Khyber Pakhtunkhwa and settled areas were declared as Districts and Tehsils of the Province of KPK. It may be observed that while merging the FATA/PATA areas into settled areas as above, no measures were taken simultaneously for the continuation of the laws and legal regime as applicable in FATA/PATA areas which caused a legal vacuum. In order to fill up such vacuum, the KPK Assembly promulgated

"The Khyber Pakhtunkhwa Continuation of Laws in the Erstwhile Provincially Administered Tribal Areas Act, 2018" hereinafter referred as Act 2018.

6. We have been informed that the Act 2018 has since been struck down by the Peshawar High Court in Writ Petition No.3035-P of 2019 vide judgment dated 17.10.2019. However, in CPLA No.3867 of 2019, this Court vide order dated 24.10.2019 while granting leave (now C.A No.1675 of 2019) suspended the operation of the said judgment of the Peshawar High Court and a larger bench has been constituted. Irrespective whether the Act, 2018 is a valid piece of legislation and/or otherwise may not affect the merit of the controversy in hand.

7. The learned counsel for the Petitioners has vehemently argued that all the proceedings were initiated and carried out under the provisions of Regulation 1 of 2009. It was urged that since Article 247 of the Constitution was omitted under 25<sup>th</sup> Constitutional Amendment Act, 2018, all legal proceedings over area forming part of FATA/PATA were being conducted under the Regulation 1 of 2009. With the commission of Article 264 of the Constitution, 1973 such areas, having become part and parcel of Province of KP, would now be governed under regular laws of Pakistan. It is urged that all legal proceedings or remedy remains prescribed and unaffected law which, by virtue of Constitutional mandate, were repealed and/or omitted, is afforded protection under Article 264 of the Constitution, 1973. For the ease of reference Article 264 of the Constitution is reproduced as follows:

**Article, 264**

*Where a law is repealed, or is deemed to have been repealed, by, under, or by virtue of the Constitution, the repeal shall not, except as otherwise provided in the constitution, -*

*a. revive anything not in force or existing at the time at which the repeal takes effect;*

*b. affect the previous operation of the law or anything duly done or suffered under the law;*

*c. affect any right, privilege, obligation or liability acquired, accrued or incurred under the law;*

*d. affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the law; or*

*e. affect any investigation legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;*

*and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the law had not been repealed.*

8. Learned Additional Advocate General, KPK strenuously took us through the transition of the administrative and legislative regime prevailing in FATA/PATA areas which ultimately resulted in the omission of Article 247 of the Constitution, whereby, the special status of FATA/PATA areas were abolished and they were assimilated with Khyber Pakhtunkhwa. Such areas now rank at par with rest of Pakistan and all rights, privilege and obligations provided under the framework of the Constitution, 1973 are extended to their inhabitants.

9. Legal regimes available in Article 264 of the Constitution, as reproduced above, unequivocally provide that repeal shall not affect the previous operation of the law or anything duly done or suffered under the law or affect any right, privilege, obligation or liability acquired, accrued or incurred under the law. Sub-article (e) of the Article 264 mandates that repeal shall not affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment and any such investigation, legal proceeding or

remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the law had not been repealed. Article, 264 of the Constitution, 1973 has received judicial interpretation in a large number of cases right from the cases of Saeed Ahmed v. The State<sup>1</sup>, Muhammad Arif v. The State<sup>2</sup>, Sona v. The State<sup>3</sup>, Government of Punjab v. Zia Ullah Khan<sup>4</sup>, Muhammad Tariq Badr v. National Bank of Pakistan<sup>5</sup>, Manzoor Ali v. United Bank Limited<sup>6</sup>, Dr. Mukhtar Hamid Shah v. Government of the Punjab<sup>7</sup> and Dad Muhammad v. Additional District Judge-1<sup>8</sup>.

10. When the learned counsel was confronted that Article 264 of the Constitution, 1973 protects and preserve the legal regime where any Act of the Parliament stands repealed under the Constitution, they pointed out that the effect of repeal and/or omission of any Act was considered synonymous by this Court in Muhammad Tariq Bashir v. NAB<sup>9</sup>. In this case, the omission of Article 245 would have the same effect as that of repeal and legal proceedings or remedy will continue as if the law has not been repealed.

11. When examining sub-clause 8 of Paragraph 10 of the Regulation 2009, as reproduced above, it transpires that neither the Appellate nor the Revisional Court has any jurisdiction to remand the matter. Both the appellate and the revisional Courts are mandated under the Act to decide the matter before them. A question was framed by this Court while issuing notice to the respondents in CP. No.2875 of 2019 as assistance of the counsels was required in cases where evidence is to be

<sup>1</sup> PLD 1964 Supreme Court 266

<sup>2</sup> 1993 SCMR 1589

<sup>3</sup> PLD 1970 Supreme Court 264

<sup>4</sup> 1992 SCMR 602

<sup>5</sup> 2013 SCMR 314

<sup>6</sup> 2005 SCMR 1785

<sup>7</sup> PLD 2002 Supreme Court 757

<sup>8</sup> 1996 SCMR 1688

<sup>9</sup> 2013 SCMR 314



recorded in cases under the Regulation of 2009. The answer to such query is found under Order XLI, Rule 27 of the CPC which empowers the Appellate Court to record and take such evidence. The Appellate Court is empowered in terms of Rule 20 of Order XLI that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future date and direct that such person shall be made as respondent in the proceedings.

12. Even otherwise, the Appellate Court in terms of Rule 33 of Order XLI of the CPC enjoys all the powers as may be possessed or exercised by the Court from which the appeal has originated except for imposing cost. In view of such enabling provision and jurisdiction of the appellate Court, such jurisdiction and powers may also be exercised, within the bounds prescribed by law, by the Revisional Court i.e. the High Court in the matter in hand. Invariably, the remand order should not have been made by the revisional Court in all the cases.

13. Therefore, in view of the above, High Court was entrusted with the power and authority to take evidence itself instead of remanding the matter either to the appellate Court or the trial Court and/or where it is deemed appropriate, could add or join any party where it might considered it expedient to do so.

14. The learned counsel for the respondents in view of the legal position, as stated above, does not seriously oppose the appeals. Therefore, the impugned judgment rendered by the learned High Court and all the matters are hereby set aside and remitted to the High Court to decide the same in accordance with Sub-paragraph 8 of Paragraph 10

of the Shariah Nizam-e-Adl Regulation, 2009 ("N.W.F.P Reg.No.1 of 2009") and all the listed application are disposed of accordingly. The above are the reasons for our short order dated 15.10.2020, which reads as follow:

*"After hearing the arguments of the learned counsels for the parties. For the reasons to follow, all the petitions are converted into appeals are allowed.*

2. On 11.12.2019 cost of Rs.10,000/- was imposed to the learned AG, K.P. Learned AG states that the reason for non-appearance was genuine and on account of bereavement in the family, the Law Officer was not prepared. Looking at such ground state that they do not wish to claim cost which is accordingly remitted."

Sd/- J  
Sd/- J

ISLAMABAD  
15<sup>th</sup> October, 2020  
off:shd

Approved for Reporting