

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial

Mr. Justice Faisal Arab

Mr. Justice Qazi Muhammad Amin Ahmed

Civil Petition No. 4635 of 2018

(On appeal from the judgment/order dated 14.11.2018 of the Peshawar High Court, Peshawar passed in W.P. No. 2688-P/2018).

Hidayat Ullah

Petitioner(s)

Versus

Mohammad Younas and others

Respondent(s)

For the Petitioner(s) : Dr. Babar Awan, Sr. ASC

For the Respondents 1-4 : Syed Ishtiaq Haider, ASC
Govt. of KPK Mr. Shumail Butt, AG KPK
For Federation Mr. Aamir Rehman, Addl. AG

Date of Hearing : 17.03.2020

ORDER

UMAR ATA BANDIAL, J.— One Muhammad

Shafique, Chairman of Coal Company Qasim Khel Zarghum Khel was murdered on 02.07.2014 in the jurisdiction of Police Station MRS Kohat which is a settled area. FIR No. 426 dated 02.07.2014 under Sections 302/324/392/427/34 PPC was registered at the aforesaid police station. The challan was put up before the learned ASJ-III Kohat who, after conducting Trial vide judgment dated 07.7.2018, convicted four accused persons and sentenced them to life imprisonment; one accused person was convicted and sentenced to four years imprisonment and proceedings under Section 512 Cr.P.C was undertaken against two accused persons and five accused

were acquitted. Appeals against the said conviction and sentence are pending before learned Appellate Court.

2. There was a civil controversy from the same occurrence but the cause of action in respect thereof arose in the tribal area of Frontier Region, Kohat. This dispute is between the Qasim Khel tribe from whose territory coal was being excavated by the company of which the deceased Muhammad Shafique was Chairman.

3. Compensation for the coal extracted from the tribal area was paid under the local nomenclature of *Sersaya*. Consequent upon the murder of its Chairman, the Coal Company stopped the payment of *Sersaya* to the Qasim Khel tribal whose members were accused of having committed the murder. In the said background, Qasim Khel tribal heads applied to the Assistant Political Agent, Kohat (**"APA"**) under Section 8 of the Frontier Crimes Regulation, 1901 (**"FCR"**). The complaint pertains to the cessation of payments of *Sersaya* to the tribe. On this issue the matter was referred by the APA to the Council of Elders which affirmed the entitlement of the tribe to the claimed payment of *Sersaya*. In addition, as a passing reference the Council of Elders also granted what appears to be a license to the Coal Company to avenge the killing of Muhammad Shafique against one of the accused persons. Under Section 8 of the FCR only civil disputes can be referred to the Council of Elders whose findings dated 16.12.2015 is a recommendation for the APA to pass a decree in accordance therewith. Accordingly, such a

decree was passed by the APA on 30.12.2015. The members of the Coal Company filed multiple appeals under Section 48 of the FCR against the decree issued by the APA. After hearing the appeals, the Commissioner passed a number of orders all dated 06.05.2016 disposing of the appeals but in one respect, it interfered with and impliedly set aside the decision of the APA. In the appeal bearing No. 181 of 2016 titled Fazal Raheem and others versus Hidayat Ullah and others, the Commissioner Kohat Division noted that the murder of Muhammad Shafique had taken place in a settled area in respect of which trial before the competent Court at Kohat was underway and, therefore, there was no need for further trial simultaneously before the APA.

4. Consequently, it was determined by the Commissioner that the obligation of the Coal Company to pay *Sersaya* was intact and enforceable. The members of the Coal Company went in revision petition before the FATA Appellate Tribunal under Section 55A of the FCR. That appeal was also dismissed on 02.10.2017. Their review petition was also dismissed on 24.4.2018. Thereafter, the members of the Coal Company who are respondents before us filed a writ petition in the High Court praying for the setting aside of all the decisions given by the different fora below under the FCR. A perusal of the writ petition reveals that the principal ground of challenge was against the criminal verdict/opinion expressed by the *Jirga* which was disputed as being outside the purview of law. The learned High Court has given the

impugned judgment dated 14.11.2018 which sets aside all the judgments of the FCR fora to hold that the criminal penalty of wreaking revenge upon the Qasim Khel tribesmen was set aside as being unlawful. Before us, the petitioner who is the member of the Qasim Khel tribe has urged that their right to *Sersaya* confirmed by all the fora under the FCR has been set aside by the impugned judgment without even discussing the entitlement to and necessity of such relief. Moreover, the writ petition filed by the respondents failed to challenge or give any grounds to interfere with the findings of all the FCR fora on *Sersaya*.

5. Learned Advocate General has supported those submissions with the added ground that the orders passed by the relevant fora under the FCR are all dated prior to the 25th Constitutional Amendment which came into effect on 31.5.2018. Thus, the recommendations of the Council of Elders dated 16.12.2015 until the decision of the review by the FATA Appellate Tribunal on 24.4.2018 predate the said Constitutional Amendment. Consequently, at the relevant time when the judgment was delivered the provisions of Article 247 (7) of the Constitution were in force. These constitutional provisions are to the following effect:

“247 Administration of Tribal Areas.- (7) Neither the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to a Tribal Area, unless [Majlis-e-Shoora (Parliament)] by law otherwise provides:

Provided that nothing in this clause shall affect the jurisdiction which the Supreme Court or a High Court exercised in relation to a Tribal Area immediately before the commencing day.”

6. The ouster of jurisdiction of the High Court under Article 199 of the Constitution is specific for the reason that cause of action for the civil relief of such *Sersaya* as well as the residence of the parties and the locus of the corpus of the dispute, namely, the Coal mines are located within the Kohat Frontier Region. Consequently, the High Court had no jurisdiction to entertain the writ petition. Indeed this aspect of the case has not been considered by the impugned judgment at all. Moreover, insofar as the criminal laws advice suggested in the recommendations of the *Jirga* is concerned, the same has been disapproved and thereby excluded by the order of the Commissioner Kohat under Section 48 of the FCR vide his order dated 06.05.2016. Therefore, any reinforcement of that view was not necessary. In any case, the trial of the accused persons has been concluded on 07.7.2018 resulting in conviction and punishment to several accused. There was no reason for the learned High Court to resurrect the recommendation by the Council of Elders for fresh adjudication.

7. Learned counsel for the respondents is not in a position to dispute the applicability of Article 247 (7) of the Constitution to the facts of the case. Insofar as the civil relief of *Sersaya* is concerned, the respondents' writ petition before the High Court in fact makes no specific grievance regarding *Sersaya* and only generally seeks to avoid the same through the prayer clause. Notwithstanding the fact that the impugned judgment fails to decide that issue, we consider

that consequent upon the conclusion of the proceedings before the FATA Appellate Tribunal the bar under Article 247 (7) is complete. No *mala fide* is urged by the respondents for the High Court to disregard the ouster directed in the aforementioned Constitutional provisions.

8. Furthermore, insofar as the criminal law advice recommended by the Council of Elders is concerned, the same is without jurisdiction under Section 8 read with Section 9 of the FCR. In any event, it has been impliedly set aside by the order of the Commissioner Kohat vide his order dated 06.05.2016. More importantly, once the matter has been dealt with and decided on merits by a competent Court of law, Article 13 of the Constitution does not allow the recommendation, even if, it has any validity to remain in existence.

9. In the circumstances, the impugned judgment of the High Court is set aside and this petition is converted into appeal and allowed.

Judge

Judge

Judge

Islamabad
17.03.2020
Naseer

Approved for reporting