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IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Sardar Tariq Masood
Mr. Justice Mazhar Alam Khan Miankhel

Jail Petition No.375 of 2019

[Against the judgment dated 17.05.2019, passed by the Peshawar High Court, Peshawar in Writ Petition No.6233-P of 2018]

Usman Ghani @ Ghani Mula Sangeen. ...Petitioner(s)
Versus
The State. ...Respondent(s)

For the Petitioner(s) : Syed B.H.Shah, ASC
Mr. Altaf Khan, Additional
Advocate General, Khyber
Pakhtunkhwa
Barrister Umar Aslam Khan,
(*amicus curiae*)
:
For the Respondent(s) : N.R.
Date of Hearing : 19.09.2024

ORDER

Mazhar Alam Khan Miankhel, J.— Through this jail petition the petitioner/convict has challenged the judgment dated 17.05.2019 of the Peshawar High Court, Peshawar (**the High Court**), whereby his writ petition against the orders of the FATA Tribunal, the Commissioner Kohat as well as the Assistant Political Agent (**APA**) convicting the petitioner were upheld and his writ petition was dismissed.

2. We have heard the learned counsel for the petitioner, the learned Additional Advocate General, Khyber Pakhtunkhwa as well as Mr. Umar Aslam Khan, learned ASC as *amicus curiae* and have also gone through the available record.

AFR
AD

3. The record of the case reveals that the petitioner was arrested on 17.01.2015 by the 111 Wing of the Kurram Militia at Durrani Internally Displaced Persons Camp (IDPS) on suspicion of having ties with *Tehreek-e-Taliban* Pakistan (**TTP**) and engaged in illegal activities against the security forces/agencies of Pakistan. Following the arrest, he was interrogated by the Kurram Militia and found involved in the alleged anti-state activities. He was categorized as 'Black' and recommendations were made, who punished him under the Regulation-40 of the Frontier Crimes Regulations, 1901 (**the FCR**). The petitioner along with interrogation report dated 27.03.2015 and all the relevant record was referred to the concerned Political Administration in Kurram for further proceedings under the law. He was subsequently, presented before the APA of the Kurram Sub-Division, who under Regulation-11 of the FCR appointed a council of elders and referred the following questions for determining the guilt or innocence of the petitioner, which is as under: -

- i. As the petitioner had any association with the terrorist organization.
- ii. As the petitioner being a combatant and directly involved in anti-state activities.
- iii. Is it correct that the petitioner took action against the security forces.
- iv. Is it correct that the petitioner was involved in kidnapping for ransom or similar activities.

4. The Council of elders unanimously committed its opinion by answering all the questions in affirmative. On this

opinion, the APA/Additional District Magistrate Kurram, Sadda Sub-Division framed charges against the petitioner under Sections 121-A and 122 of the Pakistan Penal Code, 1860 (**PPC**). Subsequently, the petitioner was sentenced to 14 years Rigorous Imprisonment under Sections 121-A, 122 PPC, Regulations-11 and 40 of the FCR *vide* order dated 28.08.2015.

5. The petitioner feeling himself aggrieved filed an appeal under Regulation-48 of the FCR before the Commissioner, Kohat Division, Kohat (*Being an appellate authority*). The appellate authority *vide* its order dated 26.02.2016 dismissed the appeal of the petitioner. The petitioner then approached the FATA Tribunal by filing a revision under Regulation 55-A of the FCR but this too was dismissed *vide* order dated 05.04.2017. The petitioner after exhausting all the available remedies under the FCR, approached the High Court by filing a writ petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (**the Constitution**), however, he could not succeed in his efforts and his writ petition was also dismissed by the High Court *vide* its judgment dated 17.05.2019. The petitioner being a convict has filed this jail petition before this Court. The entire proceedings against the petitioner were upheld under the FCR, which provides the procedure for resolving the disputes in the Tribal Areas with the council of elders (*Jirgah* System) the Political Agent (**PA**) under the FCR were functioning as both in the administrative and judicial authorities in the FATA regions. The FCR also provided guidelines for handling criminal and civil cases in a manner consistent with the Tribal traditions. In the case in hand, the

petitioner was tried and sentenced under the judicial framework provided by the FCR. After his conviction he exhausted all the available remedies but his conviction and sentence were upheld at all levels under the FCR. Despite exhausting all his remedies under the FCR, the petitioner approached the High Court under Article 199 of the Constitution but the High Court dismissed his writ petition by observing *"the petitioner has availed the remedies available to him under the law in field at that time and now the matter before this Court is past and closed transaction"*.

6. The only legal question before this Court is whether the petitioner could approach the High Court to challenge his conviction after exhausting all the remedies available under the FCR. In this context, it is relevant to note that Article 199 of the Constitution empowers the High Court to issue writs in various forms under their original constitutional jurisdiction. The said Article opens with words *"subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law"*. The expression subject to the Constitution for the present purposes would mean subject to the ouster Clause (7) of Article 247 of the Constitution, which reads as under:-

- "(1)
- (2)
- (3)
- (4)
- (5)
- (6)

(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."

Similarly Article 175 of the Constitution by its Clause (1) provides that there shall be a Supreme Court of Pakistan and a High Court of each province (and a High Court for the Islamabad Capital Territory) and such other Courts as may be established by law. Clause (2) of the said article provides that "*no Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law*", the combined effect of the above provisions of the Constitution is that in relating to the matters through Tribal Areas, the jurisdiction of both the High Court and this Court is excluded, regardless of the fact that, whether the grievance brought before this Court pertains to violation of the fundamental rights or any other law.

7. In the past, the jurisdiction of this Court in matters pertaining to FATA has been a subject of numerous cases. It has categorically been held that the bar on the jurisdiction of the Superior Courts under Article 247(7) applies when the cause of action and the subject matter in dispute are in the Tribal Areas,

and the parties to the dispute are also residents of the Tribal Areas. For instance, a three-member bench of this Court in Mst. Rohaifa through her sons and another vs. Federation of Pakistan through Secretary, Ministry of Defence and 2 others (PLD 2014 SC 174), after thoroughly analysing the reported judgments of this Court from 1975 to date, reached the following conclusion:-

'31. So far as the application of the jurisdiction of this Court in terms of Article 247(7) of the Constitution is concerned, it may be noted that as per the consensus of the Judgments of this Court, the bar of jurisdiction of this Court in terms of Article 247(7) of the Constitution will be applicable where cause of action and subject matter of dispute is in the Tribal Area and the parties to the dispute are also resident of Tribal Area and in terms of the Judgment in the case of Ch. Manzoor Elahi, supra, that if a person voluntary goes to a Tribal Area and commits offence there he on general principle of law is liable to be tried and punished according to law, custom and usage which prevails there.'

In this case, the Court also outlined certain circumstances under which the jurisdiction of this Court and that of the High Court would not be barred under Article 247(7) of the Constitution. The circumstances are as follows:

'22. From the above law, as laid down by this Court, inter alia, the following are the circumstances under which the jurisdiction of this Court and that of the High Court will not be barred under Article 247(7) of the Constitution rather the same will be available to be exercised under Article 184 and Article 199 of the Constitution: --

- (i) Where location of the corpus in dispute is situated in the territory outside the Tribal Area;
- (ii) Where parties to the dispute have their residence outside the Tribal Area;
- (iii) Where cause of action has arisen outside the Tribal Area;
- (iv) Where the offence has taken place outside the Tribal Area;
- (v) Where the arrest is made or sought to be made which is outside the Tribal Area;
- (vi) Where effective action or step is taken or performed outside the Tribal Area;

In support of the above legal position, reference further may be made to the cases of Abdul Rahim and others vs. Home Secretary, Government of West Pakistan and another (PLD 1974 SC 109); Manzoor Elahi vs. Federation of Pakistan and others (PLD 1975 SC 66); Muhammad Siddiq and others vs. Government of Pakistan and others (1981 SCMR 1022); Saum Bangash and others

vs. Qaum Turi and others (1991 SCMR 2400); Malik Taj Muhammad and another vs. Bibi Jano and 25 others (1992 SCMR 1431); Shaukat Khan vs. Assistant political Agent, Landi Kotal, Khyber Agency and others (PLD 2002 SC 526) and Hidayat Ullah vs. Mohammad Younas and others (PLD 2020 SC 362).

8. After going through the record of the case, we find that the alleged occurrence took place and the petitioner was arrested on 17.01.2015 in central Kurram Agency, which was classified as a Federal Administered Tribal Area provided under Article 246(c) of the Constitution. The petitioner after his conviction exhausted all the available remedies provided under the FCR from the APA to the Highest Forum i.e. FATA Tribunal. At the relevant time there was no further remedy provided under the law, as such the petition under Article 199 of the Constitution filed by the petitioner before the High Court was not maintainable in terms of Article 247(7) of the Constitution being expressly barred. For that reason, the High Court rightly dismissed the writ petition of the petitioner. Consequently, this petition being meritless is dismissed.