

P L D 2012 Lahore 7

Before Sagheer Ahmad Qadri, J

Group Captain Syed MUHAMMAD FAZAL---Petitioner

Versus

**FEDERATION OF PAKISTAN through Secretary, Ministry of Defence,
Rawalpindi Cantt.---Respondent**

Writ Petition No.1072 of 2011, decided on 16th June, 2011.

Muhammad Akram for Petitioner.

Azhar Naveed, Standing Counsel for Federation.

ORDER

SAGHEER AHMAD QADRI, J.---Petitioner Group Captain Syed Muhammad Fazal of Pakistan Air Force was charged under sections 41(1), 71 & 60 of Pakistan Air Force Act, 1953 by the Field General Court Martial (FGCM) vide charge sheet dated 27-9-2010 and at the end of the trial on 28-3-2011 adjudged the petitioner as guilty and handed him down the sentence to undergo one year R.I. coupled with dismissal from service. The sentence was further confirmed by the Confirming Authority vide Promulgation Certificate dated 15-4-2011.

2. The petitioner has challenged his above mentioned conviction and sentence through this writ petition on the grounds that at the time of his trial by the FGCM the petitioner was not subject of Pakistan Air Force Act, 1953 as provided under section 3 ibid; that under Rule 14 of the Pakistan Air Force Rules, 1957 the petitioner has already been retired from service w.e.f. 5-7-2009; that as the petitioner has already been retired, therefore; he was not liable to be tried by FGCM. Hence, the writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 was maintainable as bar under clause (3) of the said Article is not absolute as the Tribunal/FGCM did not have the jurisdiction to try the alleged offences against the petitioner, therefore, this writ petition was maintainable.

3. Learned counsel for the petitioner during arguments reiterated the stand as mentioned in the writ petition. He argued that under Article 4 of the Constitution it was a right of an individual that he be dealt with in accordance with law and as the petitioner was not subject of Pakistan Air Force, therefore, his trial and subsequent conviction was liable to be set aside as the same was passed without any lawful justification by a Tribunal having no jurisdiction. In support of his contentions reliance has been placed on Muhammad Akram Khan v. Islamic Republic of Pakistan through Secretary to the Government of Pakistan, Ministry of Law and Parliamentary Affairs, Islamabad and another (PLD 1969 SC 174), The State v. Zia-ur-Rehman and

others (PLD 1973 SC 49), Federation of Pakistan through Secretary, Establishment Division, Government of Pakistan v. Saeed Ahmad Khan and others (PLD 1960 SC 266), Brig. Retd. F.B.Ali and another v. The State (PLD 1975 SC 506), Federation of Pakistan and another v. Malik Ghulam Mustafa Khar (PLD 1989 SC 26), Saifuddin Saif v. Federation of Pakistan and 3 others (PLD 1977 Lahore 1174), Syed Muhammad Anwar Shohrat Bokhari v. Federation of Pakistan and 3 others (PLD 1981 Lahore 742), Utility Stores Corporation of Pakistan Limited v. Punjab Labour Appellate Tribunal and others (PLD 1987 SC 447), Pir Sabir Shah v. Federation of Pakistan and others (PLD 1994 SC 738), Wukala Mahaz Barai Tahafaz Dastoor and another v. Federation of Pakistan and others (PLD 1998 SC 1263), Dilawar Jan v. Gul Rehman and 5 others (PLD 2001 SC 149), Federation of Pakistan and others v. Raja Muhammad Ishaque Qamar and another (PLD 2007 SC 498), Capt. Syed Jameel Ali Shah v. Federal Government, Ministry of Defence through Chief of the Army Staff G.H.Q, Rawalpindi (2004 PCr.LJ 560), Ghulam Abbas Niazi v. Federation of Pakistan and others (PLD 2009 SC 866) and Muhammad Azhar Siddique and another v. Government of Punjab through Chief Secretary, Lahore and 18 others (PLD 2010 Lahore 138).

4. Contrary to this, learned standing counsel opposed this writ petition on the grounds that this writ petition was not maintainable under Article 199(3) of the Constitution of Islamic Republic of Pakistan. It was further agitated that appeal under section 162(13) of Pakistan Air Force Act, 1953 was available with the petitioner which remedy he did not avail, hence, this Constitutional petition is not maintainable. On factual side it was agitated that a fair trial was conducted and as the petitioner was found guilty, therefore, he was rightly convicted and sentenced by FGCM. While relying on Mushtaq Ahmed and others v. Secretary, Ministry of Defence through Chief of Air and Army Staff and others (PLD 2007 SC 405) prayed that this writ petition be dismissed on the point of maintainability.

5. I have heard the learned counsel for the parties and perused the record.

6. The main stance of the learned counsel for the petitioner right from the beginning was that petitioner had already been retired from service with effect from 5-7-2009, therefore, he was not subject of Pakistan Air Force and he could have not been charged and tried by the FGCM. In order to appreciate the arguments advanced by learned counsel for the petitioner it is appropriate to reproduce section 2 of Pakistan Air Force Act, 1953 which provides---

"2. Persons subject to this Act.-The following persons shall be subject to this Act wherever they may be, namely:--

- (a) officers and warrant officers of the Air Force;
- (b) persons enrolled under the Indian Air Force Act, 1932 before the date notified in pursuance of subsection (2) of section 1 and serving in the Air Force on that date, and persons enrolled under this Act;
- (c) persons belonging to the Pakistan Air Force Reserves in the circumstances prescribed by rules made under section 6 of the Pakistan (Army and Air Force) Reserves Act, 1950 (XLVII of 1950);

- (d) persons not otherwise subject to Air Force law who on active service, in camp, on the march, or at any frontier post specified by the Federal Government, by notification in this behalf are employed by, or are in the service of or, are followers of or accompany any portion of the Air Force."

7. Section 3 provides the termination of application of the Act which reads as under:--

"3. Termination of application of the Act.--Every person subject to this Act under clauses (a) to (c) of section 2 shall remain so subject until duly retired, discharged, released, removed or dismissed from service and every persons subject to this Act under clause (e) of section 2 shall remain so subject during the period of his secondment to the Air Force.

8. According to the learned counsel the petitioner was retired from Pakistan Air Force Service with effect from 5-7-2009 which was the date of strike of duty (SOD). Rule 14 of Pakistan Air Force Act Rules, 1957 provides the effective date of dismissal, removal, etc. it reads as under:--

"14. Effective date of dismissal, removal, etc.--The Federal Government may when authorizing the dismissal, removal, termination of commission, release or retirement of an officer, specify any further date from which it shall take effect; provided that when no such date is specified the dismissal, removal, termination of commission, release or retirement, shall take effect from the date on which it was duly authorized, or from the date on which the officer concerned ceased to perform air force duty, whichever is the later date."

Rule 12 provides the procedure whereby the authority is empowered to pass order regarding dismissal, removal retirement or release, etc. of an officer. Under sub-rule (2) of section 12 it is specifically provided that for the purpose of section 3 of the Act an officer shall be deemed duly retired, released, removed or dismissed from the service, if his retirement, release, removal or dismissal from the service has been notified in the Official Gazette. Under Note-2 annexed to the Rule 12 it has specifically been mentioned that unless the dismissal or removal, etc. has been notified in the Official Gazette, the officer will continue to be subject to this Act.

9. If the para-wise comments submitted by the respondent are seen a letter dated 21-7-2009 at page-16 (Annexure-C) issued on behalf of Deputy Chief of Air Staff (Per) Air Headquarters, Peshawar is annexed. The contents of which are as under:--

"Please refer to Air HQrs letter No. Air HQ/12312/ 8413/Mng/ PB dated 22-6-2009 respecting GP CAPT S.M. FAZAL, PAK/8413 A7SD.

The particulars of his LPR are as:

- | | |
|---|-----------|
| (a) Date of Struck of Duty (SOD) | 5-7-2009 |
| (b) Service Leave | 365 days |
| (c) Furlough | ____days |
| (d) Date to be Struck of Strength (SOS) | 4-7-2010" |

10. According to the above mentioned letter the date to be struck of strength

(SOS) was shown as 4-7-2010 whereas date of struck of duty (SOD) was shown as 5-7-2009 and service leave was shown as 365-days. The petitioner although his date of struck of duty was 5-7-2009 but was on LPR of 365-days when he was asked to appear before the Field General Court Martial (FGCM) and then he was charge sheeted meaning thereby that he was at the time of the trial was subject to Pakistan Air Force and was liable to be charged and tried accordingly. Admittedly under section 162-B of the Pakistan Air Force Act, 1953 right to appeal has been provided to the petitioner which fact has further elaborated at the time of confirmation of his sentence through promulgation certificate which is placed on record of this petition by the petitioner himself as Annexure-Q. Relevant paragraph of the same is reproduced as under:--

"You are apprised that under the provisions of PAF Act Section 162-B, you have a right to file an appeal (if applicable) against the findings and sentence of the said FGCM to the Court of Appeals as per the procedure as mentioned in Chapter XII, (Rules 249 to 284) of the PAF Act Rules within thirty days from the date of promulgation."

11. The petitioner did not avail the remedy of appeal provided under the relevant provision of law and even otherwise under Article 199(3) of the Constitution there is a bar. For facility of reference the same is reproduced:--

"An order shall not be made under clause (1) on application made by or in relation to a person who is member of the Armed Forces of Pakistan, or who is for the time being subject to any law relating to any of those Forces, in respect of his terms . and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces of Pakistan or as a person subject to such law.

12. In view of the above discussion, this writ petition in the circumstances, is not maintainable which is hereby dismissed accordingly.

N.H.Q./M-948/L

Petition dismissed.