P L D 2009 Supreme Court 866

Present: Sardar Muhammad Raza Khan Mian Shakirullah Jan and Nasir-ul-Mulk, JJ

Civil Appeal No.1038 of 2006

GHULAM ABBAS NIAZI---Appellant

Versus

FEDERATION OF PAKISTAN and others---Respondents

(On appeal from judgment dated 29-3-2006 of Lahore High Court, Lahore passed in Writ Petition No.3541 of 2004)

Civil Appeal No.1681 of 2007

MUHAMMAD SALEEM---Appellant

Versus

FEDERATION OF PAKISTAN and others---Respondents

(On appeal from judgment dated 29-3-2006 of Lahore High Court, Lahore passed in Writ Petition No.3363 of 2003)

Civil Appeals Nos. 1038 of 2006 and 1681 of 2007, decided on 8th May, 2009.

Muhammad Akram Sheikh, Senior Advocate Supreme Court for Appellant (in C.A.No.1038 of 2006).

Col.(R) Muhammad Akram, Advocate Supreme Court, Malik Muhammad Qayyum, Senior Advocate Supreme Court, Raja Abdul Ghafoor, Advocate Supreme Court, Ch. Muhammad Abdullah, Advocate Supreme Court and Arshad Ali Chaudhry, Advocate-on-Record for Appellant (in C. A.No.1681 of 2006).

Sardar Muhammad Ghazi, D.A.-G. and Ch. Akhtar Ali, Advocate-on-Record for the State.

Altaf-ur-Rehman, Advocate Supreme Court for PAF.

Date of hearing: 24th November, 2008.

JUDGMENT

SARDAR MUHAMMAD RAZA KHAN, J.---Ghulam Abbas Niazi and Muhammad Saleem have filed the instant appeals, after leave of the Court, from the judgment dated 29-3-2006, passed by a learned Judge in chambers of Lahore High Court, whereby, their writ petitions against conviction and sentence recorded and imposed by Field General Court Martial, Rawalpindi were dismissed being not entertainable under Article 199(3) of the Constitution. Learned High Court also observed that the appellants, despite being civilians, because of their conduct, had become subject to the provisions of Pakistan Air Force Act, 1953 by virtue of section 2(dd)(i) and hence were validly tried and convicted by the Field General Court Martial under section 37(e) of the said Act.

2. Brief background of the case is that Ghulam Abbas Niazi and Muhammad Saleem, appellants, were the carriage contractors 'who had entered into a contract with Pakistan Air Force authorities for the carriage of jet petroleum (JP-4) from Karachi to different Pakistan Air Basis. They had duly executed Hired Mechanical Transport contracts. Over the passage of time, it was detected that seals of the tankers were broken, the jet petroleum was sold on its way to the destination by stealing the material. This was done in connivance with the Air Force Officers, who were made to receive the short supply of jet petroleum in collusion with the carriers for monetary considerations.

3. The serving Air Force officers were also tried for theft under section 52 of the Pakistan Air Force Act, 1953, while the appellants were tried under section 37(e) of the Act for "endeavoring to seduce the officers of the Air Force from their duty or allegiance to the Government". Upon conclusion of the trial, on 30-9-2002, Muhammad Saleem was sentenced to 25 years rigorous imprisonment, subsequently reduced to 20 years. Ghulam Abbas Niazi on conclusion of his trial on 8-2-2003 was sentenced to 23 years rigorous imprisonment.

4. The above convictions and sentences were challenged before Lahore High Court on the ground that both the appellants being civilian contractors, were not subject to the Pakistan Air Force Act, 1953 and hence could not be tried by illegal application of section 2(dd)(i) of the Act. That even if conceded, the offence committed by them was either theft or criminal breach of trust, falling under section 52 of the Act for which the civilians could not be tried by the Court Martial. The proper course to be adopted in this behalf was that a case of theft etcetera ought to have been registered against them before the Police and they should have been handed over to the concerned police authorities for necessary action and ultimate trial by the regular Courts of the country.

5. This plea was rejected by the High Court on twofold ground; firstly, that the appellants, due to their conduct, had become subject to the Pakistan Air Force Act, 1953 and hence rightly tried under section 37(e) of the Act. Secondly, that their writ petitions were not maintainable under Article 199(3) of the Constitution. They have come up in appeal.

6. Learned High Court has declined to assume jurisdiction on the basis of Article 199(3) of the Constitution. We would take up this matter on priority because whenever there arises a question of jurisdiction, it must be settled first before dilating upon other aspects of the case.

7. This question was taken by a 10 members larger Bench of this Court in Federation of Pakistan v. Malik Ghulam Mustafa Khar PLD 1989 SC 26. It is an oft-repeated principle, once again upheld in the afore-mentioned judgment, that any provision, seeking to oust the jurisdiction of superior Courts is to be strictly construed with pronounced leaning against ouster. With this principle in mind, the larger Bench of this Court was to consider the bar of jurisdiction provided under Article 270-A(2)(5) and (4) as well as Article 199(3) of the Constitution, both baring provisions being identical in nature. This Court rendered a' unanimous verdict that no such bar can curtail the jurisdiction of High Courts from reviewing acts, actions or proceedings which suffer from defect of jurisdiction or were coram non judice or were mala fide. It was further observed that drawing a distinction between malice-in-fact and malice-in-law as unnecessary for the purpose involved.

8. A Full Bench of this Court in Secretary of Religious Affairs v. Syed Abdul Majeed 1993 SCMR 1171(d) considered a case where the order of an authority under Martial Law Regulation was challenged. It was observed that where any order passed by any authority under Martial Law Regulation was void without jurisdiction, mala fide or coram non judice, superior Courts had the jurisdiction to entertain constitutional petition. It would be pertinent to notice that authority under Martial Law Regulation is altogether different from a Court Martial or Field General Court Martial. The latter are the creation of normal law of the land. The jurisdiction of Courts, if not held barred against the forums abnormally constituted, it is but logical that such jurisdiction could not be barred against forums created under normal laws of the land provided always, if the act challenged happened to be void, mala fide, without jurisdiction and coram non judice.

9. The view afore-said was re-affirmed by a full Bench judgment in Mrs. Shahida Zahir Abbasi v. President of Pakistan PLD 1996 SC 632(e) and Mst. Tahira Almas v. Islamic Republic of Pakistan PLD 2002 SC 830(a). This brings us to the only conclusion, having attained the force of law of the land, that the bar under Article 199(3) of the Constitution is not attracted to a case, where the authority involved has acted without jurisdiction, mala fide and coram non judice. Having so determined, we would now advert to the facts and circumstances of the present case in order to see if the trial and conviction of the appellants by Field General Court Martial was without jurisdiction, coram non judice and mala fide.

10. It is an established fact that under original provisions of Pakistan Air Force Act, 1953, the civilians were not subject to the Act until an amendment was brought about through the insertion of clause (dd) by section 3 of the Defence Services Laws (Amendment) Ordinance, 1967 (III of 1967). In the amended form, section 2 of the Act stands as follows:--

"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;

(dd) persons not otherwise subject to Air Force law who are accused of--

(i) seducing or attempting to seduce any person subject to this- Act from his duty or allegiance to Government, or

(ii) having committed, in relation to any work of defence, arsenal, naval, military or air force establishment or station, ship or aircraft, or otherwise in relation to the naval, military or air force affairs of Pakistan, an offence under the Official Secrets Act, 1923;

(e) to such extent and subject to such conditions as the Federal Government may direct, persons subject to the Pakistan Army Act, 1952 (XXXIX of 1952), or the Pakistan Navy Ordinance, 1961 (XXXV of 1961), when seconded for service with the Air Force."

11. Section 2(dd)(i) of the Pakistan Air Force Act, 1953 is indicative of the fact that a civilian becomes subject to the Act and liable to be tried by Field General Court Martial when he "seduces or attempts to seduce any person subject to this Act from his duty or allegiance to Government It is not a mere coincidence, so far as the legislature is concerned, that sub-clause (i) of subsection (dd) of section 2 happens to be almost verbatim reproduction of section 37(e) of the Act of 1953. Five clauses of section 37 individually or collectively, as the case may be, go to define an offence called `Mutiny'. Meaning thereby that a civilian, guilty of either commission or attempt to commit Mutiny shall become subject to the Act of 1953 and hence triable by the Field General Court Martial. For the sake of ready reference, section 37 of the Act is reproduced below:-

"37. Mutiny.--Any person subject to this Act who commits any of the following

offences, that is to say:

(a) begins, incites, causes, or conspires with any other person to cause, any mutiny in the Military, Naval or Air Force of Pakistan or any forces co-operating therewith; or

(b) joins in any such mutiny; or

(c) being present at any such mutiny, does not use his utmost endeavors to suppress the same; or

(d) knowing or having reason to believe in the existence of any such mutiny, or of any intention to commit such mutiny or any such conspiracy does not, without delay, give information thereof to his commanding or other superior officer; or

(e) endeavors to seduce any person in the Military, Naval or Air Force of Pakistan from his duty or allegiance to the Government

shall, on conviction by Court-martial, be liable to suffer death.

12. It is a settled principle of criminal jurisprudence that while legislating a penal statute that aims at creating an offence, the legislature sets down the definition in such simpliest possible manner of drafting that it is capable of being comprehended by ordinary persons, of what is prohibited and what is not. The word of a penal statute is always objective and not' at all subjective. It has to be intelligibly expressed and reasonably defined. The interpretation of the definition of a crime is not, therefore, needed at all and becomes so needed only when language employed is ambiguous. This Court had laid down the above criteria in case of Jamat-i-Islami Pakistan v. Federation of Pakistan PLD 2000 SC 111. Applying such principle to the contents of section 2(dd)(i) and section 37(e) of the Act of 1953, we confront no ambiguity or confusion at all in arriving at the conclusion as to what act or series of acts, legislature in its wisdom, chose to define as Mutiny.

13. In the present case a simple and unambiguous narration of facts is that the 'appellants, in connivance with the Air Force Officers, had stolen jet petroleum on different occasions for monetary considerations during transit between Karachi and other destinations of Air Force Basis. Even a layman (as the law is addressed to layman) would not hesitate in concluding that narrated facts constitute the offence of theft which is quite elaborately defined by section 52 of the Act of 1953 as follows:--

"52. Offences in respect of property.--Any person subject to this Act who commits any of the following offences, that is to say:

(a) commits theft of any property belonging to the Government, or to any Military, Naval or Air Force mess, band or institution, or to any person subject to Military, Naval or Air Force law; or serving with, or attached to, the Air Force;- or

(b) dishonestly misappropriates or converts to his own use any such property; or

(c) commits criminal breach of trust in respect. of any such property; or

(d) dishonestly receives or retains any such property in respect of which any of the offences under clauses (a), (b) and (c), has been committed, knowing or having reason to believe the commission of such offence; or

(e) wilfully destroys or injures any property of the Government entrusted to him; or

(f) does any other thing with intent to defraud, or to cause wrongful gain to one person or wrongful loss to another person;

shall, on conviction by Court-martial, be liable to suffer long imprisonment."

14. By no stretch of imagination and by no novelty of logic and reasoning, one can conclude that an offence of theft, with direct reference to the present case, can be interpreted or converted into an offence of Mutiny. Field General Court Martial has done something unprecedented in defining the offence of theft as an offence of Mutiny. After all, there should be some latitude of error. in the interpretation of certain intelligible things, but in the instant case, the interpretation has brought two utterly different and non-cognate offences together, which, in fact, are domiciled poles apart.

15. Quite interesting it is to note, that Field General Court Martial itself was very clear about the fact that the offence in the instant case constituted theft and theft alone, which" is why, the Air Force Officers, conniving with the civilian accused, were tried for an offence of theft under section 52 of the Act- of 1953. This, being a grave discrimination, is a manifest mala fide-in-law. We would agree with the learned Deputy Attorney General that the Members of the Court Martial had no personal bias against the civilian accused but, as observed, it was clear mala fide-in-law which entails upon the same consequence, so far as the violation of justice, fundamental rights and principles of equality are concerned.

16. Principles for application of equality clause with reference to Article 25 of the Constitution have exhaustively been laid down and explained by this Court in Government of Balochistan v. Azizullah Memon PLD 1993 SC 43(h). It was laid down, besides others, that people similarly situated and similarly placed shall not be discriminated and treated differently. In case of a crime or to determine as to who are to be treated as accused, the placement of the accused is to be determined by narration of facts of each crime. In this view of the matter, all persons involved in the commission or omission of similar facts are to be considered as similarly situated. Chambers English Dictionary defines similarly "situated" as similarly "circumstanced". In the case in hand, all the civilians accused and all the Air Force Officers accused were similarly circumstanced and hence could not be discriminated. Any such discrimination is a gross

violation of Article 25 of the Constitution which, in cases of crimes, becomes pronouncingly magnified.

17. This discrimination and mala fide-in-law is apparent from another fact as well. The appellants were the civilians who had entered into contract with the Air Force authorities. The nature of contract was such that the commission of theft and pilferage, during transporation, could never have been ruled out. Having this eventuality in mind, a specific provision in the contract was provided as clause 11 that runs as follows:-

> "11. Any bowzer driver/contractor or his agent found involved in tampering with seals and pilferage of fuel or using unfair means for stealing of fuel will be handed over to civil police and F.I.R. will be lodged against the defaulter by the concerned PAF Base."

The Air Force authorities were, reasonably and logically aware of the apprehended stealing of fuel. They were also aware of the fact, and rightly so, that such pilferage, stealing, tampering with seals etcetera constitute the offence of theft, defined by section 52 of the Act for which civilians could not be tried. The clause of the contract, therefore, wisely provided that such offenders shall be halided over to the civil police and F.I.R. would be registered against them. This was a correct course of action and so was it provided in the agreement itself and so was it known to the Pakistan Air Force authorities. It is not known as to why, when the actual offence happened to be committed, the theft got transformed into Mutiny.

18. The learned Deputy Attorney General argued, that the trial of civilians by Military Courts has never been unheard of and that this Court in case of Shahida Zahir Abbasi (supra), Brig (R) F.B. Ali v. The State PLD 1975 SC 506 and Mushtaq Ahmad v. Secretary Ministry of Defence PLD 2007 SC 405 has approved the same. We have minutely gone through all the judgments afore-said. The facts of all the cases are diametrically opposite to the facts of the case in hand. In Shahida Zahir Abbasi's case, the bias attributed to the Field General Court Martial was that the convening officer happened to be a subordinate to the accused officer. It was held that the mere fact of subordination by itself was not enough to constitute and conclude bias. In the same case it was rather held that a bar under Article 199(3) of the Constitution was not absolute when there was a case of mala fide, lack of jurisdiction and coram non judice.

19. Brig. (R.) F.B. Ali's case, quite interestingly, was relied upon by both the parties. Coming to the arguments of learned Deputy Attorney General, the trial of civilians/non subjects of Pakistan Air Force Act, 1953 was approved by this Court because the offence that the accused was charged with, squarely fell within the mischief of section 31(d) of Pakistan Army Act analogous to section 37(e) of Pakistan Air Force Act, 1953. There, all the officers, retired as well as in active service, were charged of forming a plot to. overthrow the government established by law in Pakistan by putting under arrest, with the help of troops at their disposal, the President, the Governor of Punjab, the Ministers, all the Generals assembled in a conference and other officials holding key positions in the administration and thereby to assume the power in the country for themselves by means

of criminal force. If the facts aforesaid are identical to the facts of the case in hand, it is any body's guess and wisdom to decide. Learned counsel for the appellants relied upon the same judgment because therein it was categorically observed that the bar of Article 199(3) shall not apply to such actions and to such trials conducted without jurisdiction, coram non judice and mala fide.

20. The case of Mushtaq Ahmed also rested on altogether distinguishable facts because, there the nature of offence and the nature of seduction was altogether different, in that, numerous people had joined together to assassinate by explosion General Pervez Musharaf, the then President of Pakistan. This Court held, and rightly so, that civilians therein could be tried under section 37(e) of Pakistan Air Force Act, 1953 by Field General Court Martial. That they could be punished accordingly and not necessarily under section 131 P.P.C.

21. Having discussed all the above rulings in the light of circumstances of the present case, we are of the firm view that the offence committed in the instant case was a theft simpliciter as defined by section 52 of the Pakistan Air Force Act, 1953 read with section 34, P.P.C., for which the civilians could not be tried by the Field General Court Martial. The fact that the offence in the instant case was theft, is proved by the very conduct of the Court Martial which tried its own officers for the offence of theft. The trial was, therefore, coram nonjuduce, without jurisdiction and a mala fide-in-law, where the provisions of section 2(dd)(i) read with section 37(e) were remotely and far fetchedly attracted so as to bring the civilian appellants within their jurisdiction.

22. Civilians are subject to the normal law of the land and this is recognized by the Pakistan Air Force Act, 1953 as well except when they are guilty of commission or attempt to commit the offence of Sedition and Mutiny. This right is so fundamental that a nine member larger Bench of this Court in Liaqat Hussain v. Federation of Pakistan PLD 1999 SC 504 (o, p and v) had struck down section 6 and schedule, of an otherwise valid piece of legislation (Pakistan Armed Forces (Acting in Aid of Civilians) Ordinance, 1998) insofar as it allowed the trials of civilians by Military Courts. Section 6 and the schedule to Ordinance was declared unconstitutional without lawful authority and of no legal effect.

23. The mala fide-in-law is apparent from another fact also that the Pakistan Air Force officers accused were not only tried for much smaller an offence as compared to the present appellants, but the punishment awarded to such accused officers was more than four times lesser than that awarded to the present appellants. As a matter of principle, in-service officers of a highly disciplined force should have been punished more severely as compared to the civilian appellants. They should have also been booked for corruption and corrupt practices. This incidence of disparity in punishment is merely referred, only to highlight the mala fide-in-law, otherwise, it is irrelevant when the very trial of the appellants happened to be without jurisdiction and without lawful authority by unlawfully attracting the provisions of sections 2(dd)(i) and 37(e) of the Act, in order only, to hook the appellants.

24. It is another settled principle of law in every civilized State of the world that people charged of similar offence during same transaction or transactions, are to be jointly tried. This rule of law, practice and procedure is strictly derived from the principles of equality. The wisdom behind is that those who are co-accused in the same transaction and tried for the same offence or cognate offences, as the case may be, should be in a position to defend themselves equally against the same narration of facts as well as charges. Another reason is that if one accused shifts his burden to the other one, the other should be in a position to defend himself and rebut the allegations there and then, in the presence of the other co-accused. In the instant case, though the facts are exactly the same, yet the Air Force Officers were given a separate trial while the appellants were tried separately. It leads us to quite an amazing, rather stunning situation that the same evidence and the same set of circumstances in one trial against the Air Force Officers were treated as theft while against the appellants it was treated as Mutiny. If the appellants had seduced the Air Force Officers from their duty or allegiance to the Government, and hence Mutiny, then the Air Force Officers must also have been tried for Mutiny. If so done, it might have sounded to be based on equality, but still unreasonable because under no stretch of imagination could a theft be transformed into Mutiny. Seen from another angle, even if one civilian instigates the military officer for any insubordination etcetera, it cannot fall under section 37(e) of the Pakistan Air Force Act, 1953, because not an individual but collective act of insubordination can be dubbed as Mutiny. This was so observed by Mr. Justice Masood Ahmed, J, while sitting with Mr. Justice M. R. Kiyani, C.J, as their lordships then were, in M.A. Khanedkar v. Pakistan PLD 1959 West Pakistan Lahore 482.

25. Consequent upon what has been discussed above, we are of the view and do hereby observe and declare that the attraction of the provisions of sections 2(dd)(i) and 37(e) of the Pakistan Air Force Act, 1953 against the appellants was an act of mala fide-in-law, thereby rendering the trial coram non judice and without jurisdiction. The conviction as well as the sentence are, therefore, void and unlawful. As the appellants have already remained in jail for a period longer than the sentence of the Air Force Officers, their fresh trial by regular Courts of the Country shall be nothing but a double jeopardy, violative of Article 13 of the Constitution, read with section 403 of the Cr.P.C.

26. Consequently, the conviction and sentence recorded by the Field General Court Martial against the appellants is hereby set aside as without jurisdiction, coram non judice and mala fide-in-law. Appellants Ghulam Abbas Niazi and Muhammad Saleem are acquitted of the charge under section 37(e) of the Pakistan Air Force Act, 1953 on all counts. They, having also not been granted the benefit of section 382-B, Cr.P.C., are directed to be released forthwith, if not required to be detained in any other cause. Both the appeals are accepted.

M.H./G-16/SC Appeal allowed.