

Judgment.
BEFORE PESHAWAR HIGH COURT,
PESHAWAR.

Judicial Department.

Reference / Suo Moto No. 01-P of 2019.

Secretariat, District Judiciary, Peshawar High Court, Peshawar....Petitioner.

Vs

Provincial Government & others.....Respondents.

Date of hearing.....19.03.2019.....

Date of announcement.....20.03.2019.....

Petitioner/respondents by M/s Wiqar Ahmad Khan Addl. AG & Mr. Muhammad Asghar Khan Kundi, DAG.

WAQAR AHMAD SETH, CJ: - The genesis of the

instant reference is based on the note submitted by the

Secretariat for District Judiciary through Registrar, Peshawar

High Court, Peshawar, in view of the changed circumstances

i.e. Act No. XXXVII of 2018, the (Twenty-fifth Amendment)

Act, 2018, and creation / establishment of regular Courts in the

newly merged Districts of Khyber Pakhtunkhwa.

2. Brief history of the reference in hand is that, on

 May 29, 2018, Regulation to provide for an Interim System of

Administration of Justice, Maintenance of Peace and good Governance in the Federally Administered Tribal Areas was promulgated, called the FATA Interim Governance Regulations, 2018, wherein through section-3, the Frontier Crimes Regulation, 1901 (amended in 2011) was repealed. On 31st May, 2019, the President, assented the Act, called the Constitution (Twenty-fifth Amendment) Act, 2018, promulgated on June 5, 2018, thereby omitting the Article 247 of the Constitution and altered Article 246, bringing FATA within the limits of Khyber Pakhtunkhwa.

3. The vires of FATA Interim Governance Regulation, 2018, was challenged before this Court through constitutional petition bearing No. 3098-P of 2018, which was allowed on 30.10.2018 and the same was declared as ultra vires of the Constitution to the extent of allowing Commissioners to act as Judges; Council of Elders deciding the Civil & Criminal matters; Constitution of Qaumi Jirga; Modified application of Chapter VIII & XLII of the Code for Security; Third Schedule;

administered area. The said judgment of this Court was assailed before apex Court through Civil Petition No. 773-P of 2018, which came up for hearing on 31.12.2018, and was dismissed / withdrawn with observations inter alia, that the Government of Khyber Pakhtunkhwa, was granted six months from the date of announcement of the judgment to develop infrastructure, to take steps to spread a uniform system of Courts of ordinary jurisdiction in Khyber Pakhtunkhwa, mandating the local law enforcement agencies to ensure that the rule of law is observed by reducing Jirgas / Panchayats etc. to arbitration forums which may be approached voluntarily by local residents to the extent of civil disputes only.

4. Since the interim setup qua stopgap arrangement was declared Ultra-Vires by this Court, and pursuant to the merger of FATA Tribal Districts in Khyber Pakhtunkhwa, a state of vacuum was resulted, on account of delay, with a sizable pendency of Civil & Criminal cases besides under trial prisoners languishing in jail etc, with no proper set to protect

the fundamental rights; in addition to fair trial, therefore, the hearing in the reference has been initiated, immediately.

5. Arguments on the point's heard and available record, keeping in view the facts and circumstances of the case gone through.

6. To find out ways and means regarding the distribution of cases, appeals & revision (pending before the three non-existent forums) i.e. Deputy Commissioner FCR (PA-APA-APO), Commissioner FCR & FCR Tribunal, established under the repealed FCR, 1901 (amended in 2011), amongst the Ordinary Courts i.e. Civil & Criminal, established under the Civil Courts Ordinance, 1962, the Code of Criminal Procedure & other Special / Local Laws, a meetings dated 08.03.2019 was held, the decision whereof read as under:-

1. CIVIL MATTERS.

- I. All cases pending before the Deputy Commissioners FCR as trial courts stand transferred to the courts of concerned Senior Civil Judges in the newly-merged seven districts;
- II. All the Appeals pending before the Commissioners FCR stand transferred to the concerned District Judges, subject to determination of pecuniary jurisdiction by the District Judges concerned. If it happens that some appeals fall beyond pecuniary

jurisdiction of the District Courts, the District Judge concerned shall send the same to the High Court for appropriate orders;

- III. All cases pending before FCR Tribunal as Civil Revisions shall be placed before the Hon'ble High Court for appropriate orders.

2. CRIMINAL MATTERS

- I. All criminal cases pending before Deputy Commissioners of erstwhile FATA under FCR stand transferred to the concerned Sessions Divisions. The same shall be distributed amongst the Courts of Judicial Magistrates and Sessions Judges/Additional Sessions Judges in the light of sections 177, 190, 191, 192, 193 and Column No.8 to the Second Schedule of Cr.P.C;
- II. All Criminal cases involving actions in relation to breach of peace shall be sent to the Sessions Judges concerned who shall transfer the same to the concerned Ilaqa/Judicial Magistrates for disposal;
- III. All criminal appeals pending before the Commissioners FCR shall be dealt with in the following manner;-
- a) As regards appeals against acquittal, the same shall be placed before the Hon'ble High Court for appropriate orders;
 - b) In cases involving conviction exceeding four years, such appeals shall also be placed before the Hon'ble High Court for appropriate orders; and
 - c) All other appeals stand transferred to the concerned Sessions Judge (Note: - These transfers shall be done in accordance with the provisions of section 177 of Cr.P.C).
- IV. All cases pending before FCR Tribunals as Criminal Revisions shall also be placed before the Hon'ble High Court for appropriate orders.

3. CASES UNDER CNSA, 1997

- a) Cases under section 9(a) CNSA shall stand transferred to the Courts of concerned Judicial Magistrate/Special Court;
- b) Rest of the cases shall be transferrable to the Special Judges/Sessions Judges/Additional Sessions Judges concerned;
- c) Cases registered by police station ANF shall be sent to the Court of Special Judge ANF, Peshawar.

4. CASES UNDER CUSTOMS

All customs cases shall be sent to the Custom Judge (Central) Peshawar;

5. LOCAL AND SPECIAL LAWS

All such cases shall be sent to the concerned District & Sessions Judges who will see the question of jurisdiction and accordingly send/transfer the cases to the concerned Courts of competent jurisdiction.

NOTES:-

1. All cases of Civil Districts/Sessions Divisions shall be sent to the concerned District & Sessions Judges who shall distribute the cases in the light of Paras 1 to 5 Ante and relevant provisions of Civil Courts Ordinance, Cr.P.C and Local/Special Laws.
2. Each District & Sessions Judge of newly-merged district shall immediately constitute a Committee of Judicial Officers for scrutiny of cases for the purpose of distribution thereof as aforesaid.
3. District & Sessions Judges shall ensure equitable distribution of cases amongst Additional District & Sessions Judges.

The office of Advocate General, Khyber Pakhtunkhwa, raised objections through CM, which was placed before Secretariat District Judiciary, and vide meeting dated 13.03.2019, responded as under:-

Very kindly refer to the minutes of the meeting regarding distribution of cases dated 08.03.2019 (Placed on board at Flag-B). The following points needs to be added thereto: -

- A. All cases decided under FCR, in which such judgments, decrees or orders have become final, shall be executed by the Senior Civil Judge of the concerned newly- merged district into Khyber Pakhtunkhwa;
- B. As regards Anti-Terrorism cases pending before any forum under FCR, the same shall stand transferred to the Anti-Terrorism Court of the concerned region adjacent to the newly-merged district into Khyber Pakhtunkhwa;
- C. It may be added that in view of the merger of seven districts (erstwhile FATA) into Khyber Pakhtunkhwa, it will be better if the Government of Khyber Pakhtunkhwa is asked to create seven new posts of Judges for constituting Ant-Terrorism Courts in the newly merged seven districts;
- D. No case has so far been received from the Commissioner Malakand. The Commissioner Malakand Division may be directed to send up all pending cases to this Court forthwith so that the same may be distributed amongst the newly established regular Civil/Criminal Courts; and

- E. FCR Tribunal has not so far sent the pending cases. The FCR Tribunal may also be directed to do the needful at the earliest.

COMMENTS.

In response to the views of Advocate-General, Khyber Pakhtunkhwa, Peshawar vide letter No.6330/AG dated 07.03.2019, on reference of Law Department, it may be noted as follows: -

Paras (i) (B) and (D).

- I. FCR has stood repealed. FIGR has also been declared void by the august Supreme Court of Pakistan. Article 247 has been omitted by 25th Constitutional Amendment. As a result, all Federal laws already applicable in Khyber Pakhtunkhwa and all provincial laws of Khyber Pakhtunkhwa stand extended to the newly merged seven districts. Therefore, all pending cases transferred from defunct forums of FCR (Deputy Commissioner FCR, Commissioner FCR and FCR Tribunal), to the required forums under the existing law (Civil Courts, Courts of Magistrates, District & Sessions Courts and High Court) shall be decided in accordance with the laws (Federal and Provincial) applicable in Khyber Pakhtunkhwa and not according to FCR.

In this respect, it may be noted that before merger as aforesaid, the President of Pakistan made FATA Interim Governance Regulation ("FIGR") dated 29.05.2018 which repealed the FCR. It was challenged before the honourable Peshawar High Court in Writ Petition No. 3098-P/2018 titled "*Ali Azeem Afridi v. Federation of Pakistan*". Vide judgment dated 30.10.2018 in cited lis, FIGR was declared ultra vires of the Constitution, to the extent as hinted to therein. The august Supreme Court of Pakistan upheld the said decision vide judgment dated 16.01.2019 in C.P No. 24/2012 and C.P No. 737-P/2018. FIGR was declared ultra vires the provisions of Articles 4, 8, 10-A, 25 and 175 of the Constitution. The judgment of the august Supreme Court is self-contained. The Courts shall follow CPC, Cr.PC, Family Courts Act and Qanoon-e-Shahadat Order as procedural laws and all other substantive laws (Federal Laws applicable in this Province) and all provincial laws of Khyber Pakhtunkhwa.

In this regard, august Supreme Court of Pakistan has, vide judgment dated 15.10.2018 in Human Rights Case No. 70778/2001 (In the matter regarding required system in Tribal Areas after 25th Constitutional Amendment), been pleased to declare that PATA and FATA shall be governed by the constitutional provisions and the laws (provincial as well as federal) applicable in Khyber Pakhtunkhwa.

- II. As regard Para (C) of the views of Advocate-General, only those matters shall be treated as **past and closed transactions** which have become final for all legal intents and practical purposes.
- III. With regard to Para (E) of Advocate-General's views, Shari Nizam-e-Adl Regulation, 2009 has since been declared invalid by the Peshawar High Court, Peshawar. The matter is *sub judice* before the august Supreme Court of Pakistan on its appellate side. Therefore, the same cannot be touched upon in any manner unless the matter is finally decided by the august Supreme Court of Pakistan.
- IV. Para (F) of Advocate-General's views needs to be responded in that the above reply (Para-III-Ante) is self contained. However, it may be added that Shari Nizam-e-Adl Regulation, 2009 was promulgated under Article 247 of the Constitution of Pakistan. The same has been omitted from the Constitution as per 25th Constitutional Amendment. No over-riding effect can be given to the law because of omission of Article 247 from the Constitution, judgments of the august Supreme Court of Pakistan in the matters of FCR and FIGR as referred to hereinbefore and in view of pendency of the above noted appeal before the august Supreme Court in the matter of Regulation of 1999;
- Para (ii) of Advocate-General's views needs to be responded in that any such legislation, as proposed, will not only be against the spirit of the Constitution because Article 247 of the Constitution is no longer on the Constitutional Book but will also be violative of the judgments of august Supreme Court of Pakistan in FCR and FIGR cases, as referred to above, and judgment of Peshawar High Court in the matter of Shari Nizam-e-Adl Regulation, 2009.

On 19.03.2019, another meeting was held wherein the following questions of law were formulated for the determination of this Court:-

1. Whether the forums constituted under defunct FCR (Deputy Commissioner FCR, Commissioner FCR and FCR Tribunal) can continue to exercise jurisdiction in respect of the matters pending before them at the time of 25th Constitutional Amendment, judgment of this Court in FGR case (W.P. No.3098-P/2018, Ali Azim Afridi..V..Federation of Pakistan and others, judgment dated 16.01.2019 of august Supreme Court of Pakistan in C.P No.24/2012 (Under Article 184 (3) of the Constitution and C.P. No.773-P of 2018 (Government of Pakistan...V... Ali Azim Afridi and others) and Judgment

dated 15.10.2018 of august Supreme Court of Pakistan in Human Rights case No.70788 of 2018?

2. Whether the Appellate and Revisional forums (Commissioner FCR and FCR Tribunal) constituted under defunct FCR can continue to retain the jurisdiction over Civil and Criminal Appeals and Civil and Criminal Revisions pending before them after the coming into force of the 25th Constitutional Amendments and the judgment of this Court in FGR case (W.P. No.3098-P/2018, Ali Azim Afridi..V..Federation of Pakistan and others and judgment of august Supreme Court of Pakistan referred to above?
3. Whether the Hon'ble High Court can answer the questions regarding disposal of civil matters, transferred to the Ordinary Courts established in the newly-established seven district of Khyber Pakhtunkhwa in consequence of 25th Constitutional Amendment and judgment of this Hon'ble Court and those of august Supreme Court of Pakistan referred to above?
4. Whether the Hon'ble High Court can exercise powers of reference in relation to questions regarding disposal of criminal matters transferred to the Ordinary Courts established in the newly-established districts of Khyber Pakhtunkhwa after 25th Constitutional Amendment and judgments referred to above?

7. Where a law requires a thing to be done in a particular manner then it should be done in that way or not at all. The functions of judicial work i.e. settlement of civil and criminal disputes have to be done by a Judge and in the entire country the same is being done. The questions No.1 & 2 are interconnected, so taken together for determination & answer. Perusal of record would depict that before (Twenty-fifth amendment) Act, 2018, FATA Interim Governance Regulation, 2018, was promulgated whereby Deputy Commissioners, Additional Deputy Commissioners & Assistant Commissioners have been vested with the powers to act as Judge, in the Tribal Districts & Sub-Divisions, under the Code to try offences under

the regulation. Under section-3 of the said regulation, Frontier Crimes Regulation, 1901, was repealed, however, it would be seen that whether by virtue of said section the FCR is expressly repealed or otherwise, especially after the judgment of this Court declaring the portion of IGR, as ultra vires, and in view of section-6 of General Clauses Act. The reply to this query lies in the ascertainment of the *raison detre* of the *ibid* pronouncement. The IGR is violative of the fundamental rights and in particular the right to fair trial guaranteed by the constitution and it would be absurd to imply from the *ibid* pronouncement that the material part of the IGR is dismantled inclusive of the provision repealing the FCR s.(3) In effect revitalizing the FCR; which indeed is not the intention of the legislature while enacting IGR and on declaration of IGR being ultra vires, the whole superstructure thereof has crumbled to ground inclusive of S.52, thus the FCR stands impliedly repealed for the reasons that the same was restricted in its applicability to FATA, which through (Twenty-fifth constitutional amendment) cease to exist, and thus FATA is now alien to the constitution, the enactment restricted specifically to FATA would through implication stand repealed therefore, s.6 GCA would be applicable.

8. As regards ratio decidendi of case law reported as Government of NWFP and another...V...Muhammad Irshad and others in **PLD 1995 Supreme Court 281**, the same is not applicable to the facts and in the circumstances of this reference for three-fold reasons: firstly it was a matter under PATA Criminal Law (Special Provisions) Regulation No.1 of 1975; secondly such Regulation No.1 of 1975 had been promulgated under Article 247 of the Constitution of Pakistan; and thirdly, the said Article has since been omitted from the Constitution by 25th Constitutional Amendment.

9. Likewise in the case law reported as Abdul Samad and others...V...Painda Muhammad and others in **PLD 1997 Peshawar 35**, the same is also not applicable to the facts and in the circumstances of this case for the reasons: i) it was in relation to matters arisen out of PATA Regulation No.1 of 1975 (Supra); ii) that was issued under Article 247 of the Constitution of Pakistan; iii) it was repealed and PATA (Nifaz-e-Nizam-Sharia) Regulation No.2 of 1994 was also issued under the said Article; iv) the said Regulation of 1994 was repealed by Shari Nizam-e-Adl Regulation, 1999; v) the said Regulation has also been repealed by Shari Nizam-e-Adl

Regulation, 2009; vi) the said Regulation of 2009 has been declared invalid by this Hon'ble Court; and vii) C.P is sub judice before the august Supreme Court of Pakistan. Besides, the FCR and FGR are no longer in the field as laws in the light of judgment of this Hon'ble Court and those of august Supreme Court of Pakistan referred to above. The forums created under FCR, as noted above, have become non-existent for all purposes. It is Ordinary Courts which are now functioning in newly-established districts, viz, Criminal Courts and Civil Courts established under Cr.P.C, C.P.C and Civil Courts Ordinance.

The judgment dated 15.10.2018 of the august Supreme Court of Pakistan in Human Rights case No. 70788 of 2018 declares:-

“Both the learned Additional Attorney General for Pakistan and the Advocate General, Khyber Pakhtunkhwa (K.P), state that after the 25th Amendment to the Constitution of the Islamic Republic of Pakistan, 1973 (Constitution) the Federally Administered Tribal Areas and the Provincially Administered Tribal Areas shall be governed by the constitutional provisions and laws (Provincial as well as federal laws) applicable in the Province of K.P in light of the above, this matter having been fructified stands disposed of”.

10. To determine questions No.3 & 4, it would be imperative to go through and reproduced section 24 of the Civil

Procedure Code, 1908, & section 526 Cr.PC, respectively,

which read as under:-

“General power of transfer and withdrawal.---(1) On the application of any of the parties and after notice to the parties, and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage;

- (a) Transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or**
- (b) Withdraw any suit, appeal or other proceedings pending in any Court subordinate to it, and**
 - (i) Try or dispose of the same; or**
 - (ii) Transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or**
 - (iii) Transfer the same for trial or disposal to the Court from which it was withdrawn.**

(2). Where any suit or proceedings has been transferred or withdrawn under sub-section (1), the Court which thereafter tries such suit may, subject to any special direction in the case of any order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3). for the purpose of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4). The Court trying any suit transferred or withdrawn under this section from a Court or Small Causes shall, for the purpose of such suit, be deemed to be a Court of Small Causes.

Section 526 Cr.PC.

526.(1) Whenever it is made to appear to the High Court Division-

- (a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or**
- (b) that some question of law of unusual difficulty is likely to arise, or**
- (c) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same, or**
- (d) that an order under this section will tend to the general convenience of the parties or witnesses, or**
- (e) that such an order is expedient for the ends of justice, or is required by any provision of this Code; it may order**
- (i) that any offence be inquired into or tried by any Court not empowered under sections 177 to (both inclusive), but in other respects competent to inquire into or try**

- such offence;
- (ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;
 - (iii) that any particular case or appeal be transferred to and tried before itself; or
 - (iv) that an accused person be sent for trial to itself or to a Court of Session.
- (2) When the High Court Division withdraws for trial before itself any case from any Court it shall observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn.
- (3) The High Court Division may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative

Provided that no application shall lie to the High Court Division for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

- (4) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Attorney-General, be supported by affidavit or affirmation.
- (5) When an accused person makes an application under this section, the High Court Division may direct him to execute a bond, with or without sureties, conditioned that he will, if so ordered, pay any amount which the High Court Division may under this section award by way of compensation to the person opposing the application.

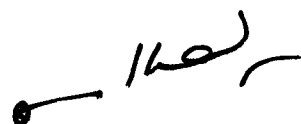
11. In view of the above quoted sections of law it became very clear that under section 24 of the CPC & 526 Cr.PC, this Court has got ample powers to transfer cases from one Court of law to another, therefore, summarizing the process of subject matter pending before the previous hierarchy, it is held that under trial cases be transferred to the Court of Civil Judge / Judicial Magistrate, having jurisdiction under the law, appeals to the Court of District & Sessions Judges, and thereafter proceedings excluding past and closed chapters

would be filed before this Court, as revisional matter. On criminal side, all pending cases in trial Court irrespective of the same pending before Additional Commissioner or Commissioner, but in trial stands transferred to the respective Court i.e. Judicial Magistrate or Sessions Judge, as defined earlier, where the punishment proposed is more than seven years will be tried by Sessions Judge and below would be Magistrate. Where the appeals are pending against the conviction of four years and above, the same would be filed before this Court.

12. In view of the above, the questions No.1 & 2 are answered in negative while questions No.3 & 4 are answered in affirmative.

Announced.
20.03.2019.


Chief Justice


Judge