Zain Sheikh & Associates, Advocates & Corporate Consultants

P L D 1999 SC 504

SH. LIAQUAT HUSSAIN AND OTHERS

V/S

FEDERATION OF PAKISTAN through Ministry of Law, Justice and Parliament

Frame (6)

(a) Constitution of Pakistan (1973) Arts. 184(3) & 245(3)-

It the learned Attorney-General is relying on clause (3) of Article 245 of the Constitution which suspends the jurisdiction of High Court under Article 199 of the Constitution for such period the Armed Forces Act in aid of civil power, the provision clearly is not attracted to proceedings under Article 184(3) of the Constitution before this Court. To deal with the first part of the above contention of learned Attorney-General, it is necessary to consider the scope of Article 8 of the Constitution, which reads as follows:-

Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void. [p. 653] KKK

(b) Constitution of Pakistan (1973), Art. 8(3)-
r/w Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance (XII of 1998) Preamble-

The contention of learned Attorney-General in substance is, that the Ordinance enumerates the power as is evident from the preamble of the Armed Forces acting in aid of civil power as is evident from the preamble of the Ordinance. It is, accordingly, argued by the learned Attorney-General that the Ordinance is a law relating to Armed Forces which has been promulgated to ensure proper discharge of their duties while acting in aid of civil power and as such even if its provisions are found to be in derogation of any of the rights conferred by Chapter I of Part II of the Constitution, it cannot be questioned in view of the provisions of Article 8(3) of the Constitution.

Clause (1) of Article 8 declares all laws, customs or usages having the force of law void to the extent they are inconsistent with the rights conferred by Chapter I (Articles 8 to 28) of Part II of the Constitution. Clause (2) of Article 8 ibid, prohibits the State to enact any law which takes away or abridges the rights conferred by chapter I, Part II and further declares that any law made by the State in contravention of the above prohibition will be void to the extent of such contravention. Sub-clause (a) of clause (3) of Article 8, with which we are concerned here, is in the nature of a proviso or an exception to clauses (1) and (2) of Article 8 (ibid). It provides that any law enacted to ensure the proper discharge of the duty or maintenance of discipline amongst the members of the Armed Forces, a Police Force or any other force charged with the duty of maintaining public order, will be out of the purview of Article 8 of the Constitution. It is well-settled rule of interpretation that the proviso or an exception to the main enacting part is to be construed strictly. Therefore, unless the case falls strictly within the letter and spirit of the proviso or exception, it will be covered by the main enacting part. A careful reading of sub-clause (a) of clause (3) of Article 8 (ibid), shows that in order to take a legislation out of the purview of clauses (1) and (2) of Article 8 of the Constitution two conditions must be satisfied. Firstly, the legislation must relate to Armed Forces or a police force or a force charged with the maintenance of public order and, secondly, the purpose

of legislation must be to ensure proper discharge of their duties or maintenance of discipline among them. Here we are only concerned with interpretation of the word "duties" used in Article 8(3)(a) of the Constitution with reference to armed forces which have been called in aid of civil power. The word "duties" in this context would mean duties which can be lawfully assigned to or discharged by the armed forces either under the Constitution or under any law. There is no difficulty in holding that the Ordinance satisfies the above first condition as the legislation relates to Armed Forces. However, the Ordinance fails to satisfy the second condition mentioned in Article 8(3)(a) (ibid). The learned Attorney-General has relied on the preamble of the Ordinance which states "whereas it is expedient to enumerate the powers and duties of the Armed Forces acting in aid of civil power, under Article 245 of the Constitution of Pakistan for the purpose of security, maintenance of law and order, and restoration of peace", in support of his contention that the Ordinance also satisfies the second condition mentioned in Article 8(3)(a)(ibid). No doubt, the preamble of the Ordinance does State that the object of legislation is to enumerate the powers and duties of armed forces acting in aid of civil power the purpose of security, maintenance of law and or, and restoration of peace, but the preamble can neither restrict nor control the meaning of the enacting part of the Statute. If the enacting part of the Statute goes beyond the preamble it is the enacting part which prevails and not the preamble. The preamble of the Ordinance shows that the Armed Forces have been called in aid of civil power under Article 245 of the Constitution for purposes of security, maintenance of law and order, and restoration of peace. Now if we go to the enacting part of the Ordinance which consists of sections 1 to 14, it shows that the Armed Forces have been vested with powers to convene Courts for trial of civilians charged with the offences specified in the Ordinance. Can the provision in the Ordinance vesting the Armed Forces with power to try civilians for offences nor connected with Armed Forces, be terms as a law which ensures proper discharge of their duties? To answer this question, we must look to the Scheme of the Constitution which is based on the principle of trichotomy of power, meaning thereby that the power is divided between Executive, the Legislature and the Judiciary. Each of these three limbs of the State enjoys complete independence in their own sphere. Since the Armed Forces admittedly are not part of the judicature, the Ordinance vesting the Armed Forces with power to hold trial of civilians in respect of offences which are not connected with Armed Forces, is not immune from scrutiny under Article 8(3)(a) of the Constitution. The preliminary objection raised by the learned Attorney-General to the maintainability of these petitions, accordingly, fails. [p. 654, 655 & 656] LLL

(c) Constitution of Pakistan (1973) Arts. 245, 243, 2A, 5,6,175 & 203-

Thus visualized, the Courts established pursuant to the impugned Ordinance do not fall within the purview of any of the Constitutional provisions. The Constitution envisages trichotomy of powers of the three organs of the State, namely, Legislature, Executive and the Judiciary. The Legislature is assigned the task of law-making, the Executive to execute such laws and the Judiciary to construe and interpret the laws. None of the organs of the State can encroach upon the fields allotted to others. The Constitution dies not countenance the take-over of the judicial functions by the Armed Forces at the direction of the Federal Government in the purported exercise of power conferred on it under Article 245 of the Constitution. Article 245 does not by itself create the law but enables the making of a law which should have nexus with the phrase 'to act in aid of civil power'. The replacement of Courts either partially or wholly is not recognized under any provisions of the Constitution. A bare reading of Article 243 would show that the Armed Forces are subject to the control and authority of the Federal Government i.e. a civilian Government. No circumstances existed in the country which indicated the breaking down of the judicial organ, necessitating establishment of Military Court. It is imperative for the preservation of the State that the existing

judicial system should be strengthened and the principle of trichotomy of power is adhered to by following, in letter and spirit, the Constitutional provisions and not by making deviation thereof on any ground whatsoever. [p. 791] E

The term 'Court' as used in the Army Act was intended to include Courts Martial as distinguished from Martial Law Courts. The latter Courts are established during the continuance of Martial Law either during war or even when due to internal disturbances the Civil Administration/ Government completely comes to an end. Military Courts as distinguished by Courts Martial envisaged under the Army Act, 1952, are primarily meant for maintaining discipline in the Armed Forces. The mere fact that the procedure prescribed for trial of offences is mentioned in the Schedule attached to the Ordinance, the provisions of Army Act and the Rules made thereunder are applicable, would not convert these Courts into Courts Martial. The Courts Martial are the creatures of Army Act and Naval Act and Air Force act, which authorise them to decide cases of persons subject to Army Act and to pass orders of sentences in accordance with law. Having regard to the object for which they are created, the functions which they perform, fall within the term "Court" as used in the Army Act, Naval Act, Air Forces Act but do not form part of the judicial hierarchy established under Article 175(1) of the Constitution. The decisions rendered by the Courts martial are entitled to very great respect but are relatable only to persons subject to Army Act but they cannot exercise jurisdiction as is exercised by the ordinary Courts with respect to civilians. The courts Martial can exercise jurisdiction only with respect to persons who are members of the Armed Forces and in certain cases even in civilian offences in respect of those persons alone. But there is no statue, law or any provision of the Constitution conferring jurisdiction on the Military Courts, to try the civilians. It is true that the cases before the Courts Martial are to be disposed of expeditiously but it was never intended under the scheme of the Constitution that under any circumstances they will also hear the cases of the civilians, the adjudication of dispute in respect of whom can only be done by the ordinary Courts as distinguished from Military Courts created under the impugned Ordinance. It is true that the existing conditions, in which the law has to be applied cannot be ignored in adjudging its validity because it is relatable to the object sought to be achieved. It is also true that terrorism and other criminal activities are negation of the principles of democracy, freedom, equality, tolerance and social justice as enumerated by Islam. A law made to facilitate maintenance of law and order and/or to restore peace and curb terrorism, which is the spirit behind the Objectives Resolution, now forming part of the Constitution by Article 2A of the Constitution, is permissible. But in making such a law the Constitutional provisions cannot be permitted to b contravened. Clearly, an accused charged of offences/an unconvicted person is presumed to be innocent and has a vested right to a fair trial before a Court or Tribunal validly established under Article 175(1) of the Constitution. Even if Military Courts are treated as Special Courts, they cannot be declared valid as in the impugned Ordinance, no provision of appeal has been provided against the orders of the Military Courts before the Supreme Court nor their functioning and supervision have been made subordinate to it. Thus visualized, they do not fulfil the criteria of a 'Court' exercising judicial functions within the purview of the guide-lines provided in the case of Mehram Ali (supra). The establishment of Military Courts is, therefore, unwarranted by any Constitutional provision. Viewed from this angle as well, the impugned legislation does not fall within the category of reasonable classification. Thus visualised, notwithstanding the bona fides and the noble object of the Federal Government to suppress/curb terrorism and punish the persons/accused mentioned in the Ordinance, the same cannot be called intra vires of the Constitution.

Needless to say that Courts today are choked by 'legal pollution' and the society has become litigious. The goal of access to justice is defeated, when too many claims overwhelm the limited resources of the Courts. The right to participate in the legal process as envisaged by the

Constitution and a valid law is fundamental to a just society. If the citizens are deprived of their Constitutional rights to have access to justice in accordance with the Constitution and the law because they are unable to utilize the Courts effectively for the resolution of their disputes or the disputes between the Government and the citizens or that a particular class of citizens is excluded from having access to justice by creating a parallel judicial system i.e. a 'barrier' to access to justice, certainly such a course would be repugnant to the Constitutional mandate provided under Article 5 of the Constitution that obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be and of every other person for the time being within Pakistan while Article 4 thereof guarantees the right of individuals to be dealt with in accordance with law. The right of access to justice to all is enshrined in the Constitution, which is also found in the doctrine of 'due process of law'. Such a right includes the right to be treated according to law; the right to have a fair and proper trial and the right to have an impartial Court or Tribunal. In Al-Jehad Trust case (supra), it was held that without having an independent Judiciary, the fundamental rights enshrined in the Constitution will be meaningless and will have no efficacy or beneficial value to the public at large. [p.792, 793 & 794] F

Viewed from whatever angle, the impugned Ordinance is ultra vires of the Constitution in so far as it takes away the adjudicatory powers of the Judiciary. In this connection, reference may also be made to the observations in the Mehram Ali's case (supra), wherein one of us (Irshad Hasan Khan, J), observed thus :-

"………. Efficiency in the Courts is serious national problem, an expression o greater public concern than even the threat of war. Article 37(d) of the Constitution of Islamic Republic of Pakistan, 1973, enjoins upon the State to ensure 'inexpensive' and 'expeditious justice'. Thus visualized, speedy resolution of civil and criminal cases, is an important Constitutional goal, as envisaged by the principles of policy enshrined in the Constitution. It is, therefore, not undesirable to create Special Courts for operation with speed but expeditious disposition of cases of terrorist activities/heinous offences have to be subject to Constitution and law. Viewed in this perspective, no objection can be taken to the establishment of Special Courts for speedy trials and prevention of terrorist acts/heinous offences under the Anti-Terrorism Act, 1997 (hereinafter referred to as the Act). [p. 794] G

This site uses Akismet to reduce spam. Learn how your comment data is processed.

Entries (RSS) and Comments (RSS).