

2010 M L D 533

[Lahore]

Before Nisar Saeed Sheikh and Khawaja Imtiaz Ahmad, JJ

GOVERNMENT OF PAKISTAN through Secretary Ministry of Interior, Islamabad---
Appellant

Versus

DR. ABDUL QADEER KHAN---Respondent

Writ Petition 1503 of 2008, C.M. No. 3428 and Intra-Court Appeal No.153 of 2009, heard on 22nd December, 2009.

(a) Appeal---

---Concept.

Appeal is a complaint made to a superior court against the decision of a subordinate court with the object of getting such order set aside or revised.

(b) Appeal---

---Scope---No party had an inherent right of appeal, unless expressly granted by a particular law dealing with matter---Principles.

The right of appeal is a right, which is always the creation of a particular statute dealing with the matter, and it can only be availed of where it is expressly granted by the law, and there is no concept of an inherent right of appeal exercisable by a party consequent upon the judgment or order or decree.

Pakistan Telecommunication Company Limited, Islamabad and another v. Rizwan Ahmed Bhatti and 2 others 2007 CLC 414; Muzaffar Ali v. Muhammad Shafi PLD 1981 SC 94; The Chief Settlement Commissioner, Lahore v. Raja Mohammad Fazil Khan and others PLD 1975 SC 331; Bahadur v. Muhammad Shoaib and 9 others PLD 1981 Kar. 788; Mst. Gul Bibi v. Muhammad Saleem and another PLD 1978 Quetta 118; Haji Suleman v. Messrs Eastern Rice Syndicate, Karachi and 3 others PLD 1976 Kar. 263' and Ohene Moore v. Akeseh Tayee AIR 1935 Privy Council 5 rel.

(c) Interlocutory order---

---Meaning.

Concise Oxford English Dictionary ref.

(d) Words and phrases---

--- "Interlocutory"---Meaning.

Black's Law Dictionary Fifth Edition ref.

(e) Words and phrases---

--- "Interim"-Meaning.

Black's Law Dictionary Fifth Edition and Volume-II of Words and Phrases by Mian Muhibullah Kakakhel ref.

(f) Law Reforms Ordinance (XII of 1972)---

---S.3(3) [as amended by Law Reforms (Amendment) Act (VIII of 1972)]---Code of Civil Procedure (Amendment) Ordinance (XX of 1980), S.15---Constitution of Pakistan (1973), Art.199---Intra-Court appeal against an interlocutory order of Single Bench of High Court granting interim relief to respondent in miscellaneous application still pending alongwith main constitutional petition---Maintainability---Appeal being a complaint made to a superior court against decision of a subordinate court with object of getting such order set aside or revised---No party had an inherent right of appeal, unless expressly granted by a particular law dealing with matter---Term "interlocutory order" would mean an order made provisionally during pendency of a legal action---Impugned order passed on miscellaneous application was an interim/interlocutory order, which did not have effect of disposing of entire case put up therein before Single Bench of High Court---No appeal against an interim order was competent under S.3(3) of Law Reforms Ordinance, 1972---Order passed by High Court under Art. 199 of the Constitution, in circumstances, could not be termed as order passed in original jurisdiction of High Court---Intra-Court appeal was dismissed in circumstances---Principles.

Asad Ali and 9 others v. Settlement and Claims Commissioner, Karachi and another PLD 1974 Kar. 345; Yusuf Ali Khan, Bar-at-Law v. Muhammad Javed Iqbal Cheema, Esq. Additional District Judge, Lyallpur and 6 others PLD 1975 Lah. 1339; Ahmad Khan v. The Chief Justice and the Judges of the High Court, West Pakistan through the Registrar, Lahore High Court, Lahore and others PLD 1968 SC 171; Muhammad Ismail v. Secretary to Government of N.-W.F.P. Settlement/Rehabilitation Department, Peshawar and 7 others PLD 1988 Pesh. 19; Mst. Inayat Bibi and another v. Settlement Commissioner and 2 others PLD 1982 Lah. 98; Pakistan Telecommunication Company Limited, Islamabad and another v. Rizwan Ahmed Bhatti and 2 others 2007 CLC 414; Muzaffar Ali v. Muhammad Shafi PLD 1981 SC 94; The Chief Settlement Commissioner, Lahore v. Raja Mohammad Fazil Khan and others PLD 1975 SC 331; Bahadur v. Muhammad Shoaib and 9 others PLD 1981 Kar. 788; Mst. Gul Bibi v. Muhammad Saleem and another PLD 1978 Quetta 118; Haji Suleman v. Messrs Eastern Rice Syndicate, Karachi and 3 others PLD 1976 Kar. 263; Ohene Moore v.

Akeseh Tayee AIR 1935 Privy Council 5; Concise Oxford English Dictionary; Black's Law Dictionary Fifth Edition; Volume-II of Words and Phrases by Mian Muhibullah Kakakhel; Messrs National Security Insurance Co. Ltd. v. Messrs Hoechst Pakistan Ltd., and others PLD 1990 SC 709; Sultan Singh v. Murli Dhar and others AIR 1924 Lah. 571; V.M. Abdul Rahman and others v. D.K. Cassim and Sons and others AIR 1933 Privy Council 58; Savitri Devi v. Rajul Devi and others AIR 1961 Allahabad 245; S.N. Gupta & Co. v. Sadananda Ghose and others PLD 1959 Dacca 330 and Lahore through its Chairman and another v. Mst. Salma Afroze and 2 others PLD 1992 SC 263 rel.

Mst. Sakina Begum and 21 others v. Khalid Mustafa and 11 others 2007 CLC 1865 and Sheri-CBE and others v. Lahore Development Authority and others 2006 SCMR 1202 distinguished.

Ahmer Bilal Sofi for Appellant.

Syed Ali Zafar for Respondent.

Mehir Malik Khattak, Deputy Secretary, Ministry of Interior.

Date of hearing: 22nd December, 2009.

JUDGMENT

NASIR SAEED SHEIKH, J.---The appellant-Government of Pakistan has preferred this Intra-Court appeal against the order, dated 28-8-2009 passed in C.M. No. 3428 of 2009 by a learned Single Judge of this Court in Writ Petition No.1503 of 2008.

2. The brief facts giving rise to the present I.C.A. are that the respondent Dr. Abdul Qadeer Khan the famous Nuclear Scientist of Pakistan instituted a Writ Petition No. 1503 of 2008 against the present appellant before the erstwhile Islamabad High Court, which came up for hearing in the presence of the parties on 6-2-2009 before a learned single Judge of the former Islamabad High Court, which was disposed of by passing the following order:-

"6-2-2009. Barrister Ali Zafar Advocate, and Raja Zafar Khaliq Khan, Advocate, for Petitioner.

Mr. Amjad' Iqbal Qureshi, D.A.G. along with Mr. Zafeer Abbasi, Additional Secretary, Ministry of Interior, Islamabad.

Syed Ali Zafar Advocate, learned counsel for the petitioner has argued that petitioner is not involved in any criminal activity, including so-called Nuclear. proliferation and he be declared a free citizen with due State protection in accordance with terms of mutual agreement Annexure-'A'.

(2) Be that as it may, after arguing at some length, the respondent No.1 has offered the terms and conditions fully detailed in Annexure-'A', which has been voluntarily accepted by learned counsel for the petitioner.

(3) The petitioner is declared a free citizen- and writ petition is disposed of in accordance with Annexure-'A', contents of which shall not be issued to the press or made public in any manner as requested by both the parties".

3. It is a matter of record that on 27-8-2009, a C.M. No.3428 of 2009 was moved by the respondent Dr. Abdul Qadeer Khan before the Lahore High Court, Lahore at the Principal Seat under section 151 of C.P.C. with the following prayer:--

"That in view of the aforesaid it is most respectfully prayed that the orders of this Hon'ble Court, dated 6-2-2009 in which the petitioner has been declared a free citizen may kindly be enforced in letter and spirit and the respondent be directed not to restrain the petitioner in any manner whatsoever to move around freely in the country or stop the petitioner from meeting his family, friends and other well-wishers or to put any restraints on any of his rights which, as a free Pakistan citizen, he is entitled to exercise.

4. The said C.M. No.3428 of 2009 was fixed before a learned Single Judge of the Lahore High Court, Lahore, whereupon the learned Single Judge issued an order, dated 28-8-2009, in paragraph No.3 of which order the learned Single Judge observed as under:--

"Copy of this petition be also supplied to Mr. Naveed Inayat Malik, learned D.A.G., who shall ensure the presence of any responsible officer of respondent No.1 fully conversant with the facts of the matter in hand and the submission of reply to this petition by respondent No.1 before this Court on 4-9-2009. Meanwhile as an interim relief, it is directed all the concerned will comply with the orders, dated 6-2-2009 whereby the petitioner has been declared a free citizen and subject to the terms and conditions of agreement at Annex-A with the main writ petition, no restrictions will be imposed against the movements of the petitioner as a free citizen of this country who cannot be dictated by the police officials as no permission is required by him, who has just to inform the respondents that he is going to such and such place, if they want to provide some protocol security, but under the garb of security they cannot impose restrictions upon him.

(4) Relist on 4-9-2009 and the office shall ensure that the main writ petition is also put up along with this petition on the said date."

5. Before the next of hearing fixed by the learned Single Judge i.e. 4-9-2009, the order, dated 28-8-2009 was assailed by the Federation of Pakistan through Ministry of Interior, the appellant, through the present I.C.A. No.153 of 2009, which came up for preliminary hearing before a learned Division Bench of the Lahore High Court, Lahore and the I.C.A. was admitted to regular hearing vide order, dated 2-9-2009. The main contention of the appellant at the preliminary hearing of the I.C.A. on 2-9-2009 was that at the limine/interim stage, the main relief cannot be

granted, which has been so done in the present case by the learned Single Judge while passing the order, dated 28-8-2009. upon C.M. No.3428 of 2009. In para. No.2 of the order, dated 2-9-2009, the learned Division Bench of this Court passed the following order:--

"(2) The points raised need consideration. Subject to the question of its maintainability, this appeal is admitted to regular hearing. Notice. To come up on 15-9-2009."

6. The respondent in this I.C.A. has entered appearance and has raised objection to the maintainability of the I.C.A. No. 153 of 2009 with the point that as the order, dated 28-8-2009 passed by the learned Single Judge is an interim/interlocutory order and that the main C.M. No.3428 of 2009 is still pending, therefore, in view of subsection (3) of section 3 of the Law Reforms Ordinance, 1972, an I.C.A. is not competent against the impugned order, dated 28-8-2009.

7. Lengthy arguments have been addressed by the parties on the said point.

8. It is contended by the learned counsel for the appellant that the order, dated 28-8-2009 is not an interim or interlocutory order as it has the effect of granting the entire relief prayed for in C.M. No.3428 of 2009. The learned counsel for the appellant has relied upon the judgment reported as Mst. Sakina Begum and 21 others v. Khalid Mustafa and 11 others (2007 CLC 1865) and Sheri-CBE and others v. Lahore Development Authority and others (2006 SCMR 1202) in support of his contentions to strengthen the arguments that the I.C.A. is competent in such a situation even against an interlocutory order. Alternatively the learned counsel for the appellant took the stand that in the year, 1980 an amending Ordinance Code of Civil Procedure (Amendment) Ordinance X of 1980 was enforced to the following effect:--

"S.15 Appeal to High Court in certain cases.

Notwithstanding anything contained in section 3 of the Law Reforms Ordinance, 1972 (XII of 1972), an appeal shall lie to a Bench of two or more Judges of a High Court from an interlocutory order made by a single Judge of that Court in the exercise of its original civil jurisdiction."

The learned counsel argued that even if the order, dated 28-8-2009 passed by the learned Single Judge is treated as interim/interlocutory order, the same has been made amenable to an appeal before a Bench of two or more Judges as provided for in the referred to above amending Ordinance of 1980 as according to the learned counsel the order, dated 28-8-2009 passed by the learned Single Judge was passed in exercise of its Original Civil Jurisdiction.

9. Conversely, the learned counsel for the respondent has vehemently opposed the arguments of the learned counsel for the appellant and further stressed upon the point that the order, dated 28-8-2009 is not at all an order, which has disposed of the entire matter urged by the petitioner of C.M. No.3428 of 2009 and that subsection (3) of section 3 of the Law Reforms Ordinance, 1972 specifically provides that an Intra-Court Appeal is not at all competent

against an interlocutory order or an order, which does not dispose of the entire case pending before the Court. Mr. Ali Zafar, the learned counsel for the respondent repelled the arguments of the learned counsel of the appellant that the order, dated 28-8-2009 was passed by the learned Single Judge of this Court in exercise of its Original Civil Jurisdiction. Mr. Ali Zafar argued that when a Judge of the High Court exercises his powers under Article 199 of the Constitution then he does not exercise the Original Civil Jurisdiction. The learned counsel for the respondent has relied upon the judgments reported as Asad Ali and 9 others v. Settlement and Claims Commissioner, Karachi and another (PLD 1974 Karachi 345), Yusuf Ali Khan, Bar-at-Law v. Muhammad Javed Iqbal Cheema, Esq. Additional District Judge, Lyallpur and 6 others (PLD 1975 Lah. 1339), Ahmad Khan v. The Chief Justice and the Judges of the High Court, West Pakistan through the Registrar, Lahore High Court, Lahore and others (PLD 1968 Supreme Court 171), Muhammad Ismail v. Secretary to Government of N.-W.F.P. Settlement/Rehabilitation Department, Peshawar and 7 others (PLD 1988 Peshawar 19), Mst. Inayat Bibi and another v. Settlement Commissioner and 2 others (PLD 1982 Lahore 98) and Pakistan Telecommunication Company Limited, Islamabad and another v. Rizwan Ahmed Bhatti and 2 others (2007 CLC 414) in support of his contentions.

10. We have considered the respective submissions of the learned counsel for the parties and have gone through the record.

11. The term "appeal" is not defined anywhere either in the Code of Civil Procedure of 1908 or the Law Reforms Ordinance, 1972. It is a complaint made to a superior Court against the decision of a subordinate Court with the object of getting such order set aside or revised.

12. The right of appeal is a right, which is always the creation of a particular statute dealing with the matter and it can only be availed of where it is expressly granted by the law and there is no concept of an inherent right of appeal exercisable by a party consequent upon the judgment or order or decree. The following law may be cited for necessary reference:--

(i) Muzaffar Ali v. Muhammad Shafi (PLD 1981 Supreme Court 94).

(ii) The Chief Settlement Commissioner, Lahore v. Raja Mohammad Fazil Khan and others (PLD 1975 Supreme Court 331).

(iii) Bahadur v. Muhammad Shoaib and 9 others (PLD 1981 Karachi 788).

(iv) Mst. Gul Bibi v. Muhammad Saleem and another (PLD 1978 Quetta 118).

(v) Haji Suleman v. Messrs Eastern Rice Syndicate, Karachi and 3 others (PLD 1976 Karachi 263).

(vi) Ohene Moore v. Akeseh Tayee (AIR 1935 Privy Council 5).

13. An Intra Court Appeal is provided for in section 3 of the Law Reforms Ordinance, 1972, which section is re-produced hereunder:-

"(3) Appeal to High Courts in certain cases:--

(1) An appeal shall lie to a Bench of two or more Judges of a High Court from a decree passed or final order made by a Single Judge of that Court in the exercise of its original civil jurisdiction.

(2) An appeal shall also lie to a Bench of two or more Judges of a High Court from an order made by a Single Judge of that Court under (clause (1) of Article 199 of the Constitution of the Islamic Republic of Pakistan) not being an order made under subparagraph (i) of paragraph (b) of that clause;

(3) No appeal shall lie under subsection (1) or subsection (2) from an interlocutory order or an order which does not dispose of the entire case before the Court.

14. The term "interlocutory order" does not find any specific definition attributed to it in the statutory provisions of Civil Procedure Code of 1908 or the Law Reforms Ordinance, 1972. The ordinary meaning of an interlocutory order or judgment is given in the Concise Oxford English Dictionary to be "(of a decree or judgment) given provisionally during the course of a legal action".

15. In the Black's Law Dictionary Fifth Edition, the term "interlocutory" has been defined as "Provisional' interim; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy". Similarly, the term "interim" has been defined in the Black's Law Dictionary Fifth Edition as "in the meantime; meanwhile; temporary, between". In Volume-II of Words and Phrases by Mian Muhibullah Kakakhel, interlocutory means "An application or order or judgment which is made during the pendency of an action and has not the intention or effect of finally determining it".

16. The term has also been interpreted by the superior Courts in a number of judgments. The Hon'ble Supreme Court of Pakistan in a judgment reported as Messrs National Security Insurance Co. Ltd. v. Messrs Hoechst Pakistan Ltd. and others (PLD 1990 Supreme Court 709) after discussing different judgments laid down that "an order, which Goes not decide the matter finally and the proceedings still remain to be tried and the rights in dispute between the parties have yet to be determined is nut a final order and that it is an interlocutory order in nature against which an appeal before the Court is not competent".

17. In a judgment delivered by a Full Bench of Lahore High Court Lahore reported as Sultan Singh v. Murli Dhar and others (AIR 1924 Lahore 571) the term "final order" was determined in the following manner:--

"It is the nature of the order sought to be appealed against that determines the right to appeal, and an order is a "final order" within the meaning of section 109(a) only if it puts

an end to the litigation between the parties or disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision".

In an other judgment reported as V.M. Abdul Rahman and others v. D.K. Cassim and Sons and others (AIR 1933 Privy Council 58) while interpreting the provisions of section 109 of C.P.C. read with Order XLIII Rule 23 of C.P.C., their lordships of the Privy Council observed as follows:--

"The test of finality is whether the order finally disposes of the rights of the parties where order does not finally dispose of those rights, but leaves them "to be determined by the Courts in the ordinary way" the order is not final. That the order "went to the root of the suit, namely, the jurisdiction of the Court to entertain it," is not sufficient. The finality must be of finality in relation to the suit. If, after the order, the suit is still alive suit in which the rights of the parties have still to be determined, no appeal lies against it under section 109(a).

19. In a Full Bench judgment reported as Savitri Devi v. Rajul Devi and others (AIR 1961 Allahabad 245) the following principle of law interpreting the term "final order" was laid down:-

"(1) That an order is final only if it finally disposes of the rights of parties;

(2) That the finality of the order must be determined in relation to the suit;

(3) That the order cannot be treated to be a final order if the suit is still left alive suit for the purpose of determining the rights and liabilities of the parties in the ordinary way;

(4) That the, mere fact that a cardinal point in the suit has been decided or even a vital and important issue determined in the case is not enough to make the order a final one: AIR 1933 P.C. 58 Foil."

20. In the judgment reported as S.N. Gupta & Co. v. Sadananda Ghose and others (PLD 1959 Dacca 330) the term "final order" in contradistinction to interlocutory order, was explained in the following words:--

"The expression `final order' in section 109 of Civil Procedure Code, 1908 has been used in contradistinction to what is known as `interlocutory order'. The test to determine the finality of an order is whether the judgment or order finally disposed of the rights of the parties. The finality must be a finality in relation to the suit. If after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it. The fact that the order decides an important and even a vital issue is by itself not material. If the decision on an issue put an end to the suit, the order will undoubtedly be a final one, but if the suit is still left alive and has got to be tried in the ordinary way, no finality could attach to the order".

21. A bare reading of section 3 of subsection (3) of the Law Reforms Ordinance, 1972 thus clearly provides that no appeal is competent against an interim order. This legal position has further been confirmed by the Hon'ble Supreme Court of Pakistan in the judgments reported as Messrs National Security Insurance Co. Ltd. v. Messrs Hoechst Pakistan Ltd., and others (PLD 1990 Supreme Court 709) and Board of Intermediate and Secondary Education, Lahore through its Chairman and another v. Mst. Salma Afroze and 2 others (PLD 1992 Supreme Court 263).

22. Applying the abovementioned criteria and the case-law pronounced by the Hon'ble Supreme Court of Pakistan, and opinion of law enunciated by the Courts in the judgments cited above, the order passed by the learned Single Judge in question is undoubtedly an interim order. In this context the wording adopted by the learned Single Judge in passing the order, dated 28-8-2009 is itself self-sufficient and self-speaking. The following portion is again re-produced as under:--

"Meanwhile as an interim relief, it is directed all the concerned-----cannot impose restrictions upon him".

23. Paragraph No.4 of the order, dated 28-8-2009 passed on C.M. No.3428 of 2009 further casts important light upon the words used by the learned Single Judge as quoted above. In this paragraph, the learned" Single Judge ordered:

"Re-list on 4-9-2009 and the office shall ensure that the main writ petition is also put up along with this petition on the said date".

It is absolutely clear that C.M. No.3428 of 2009 was still intended to be disposed of by the learned Single Judge as the matter was kept alive by the learned Single Judge of this Court.

24. The contention of the learned counsel for the appellants while relying upon the judgments reported as Mst. Sakina Begum and 21 others v. Khalid Mustafa and 11 others (2007 CLC 1865) and Sheri-CBE and others v. Lahore Development Authority and others (2006 SCMR 1202) to argue that the impugned order has the effect of deciding the entire issue raised in C.M. No.3428 of 2009 is not tenable.

25. In the judgment reported as Mst. Sakina Begum and 21 others v. Khalid Mustafa and 11 others (2007 CLC 1865), as application moved under section 12(2) of C.P.C. before a learned Single Judge for setting aside a revisional order was dismissed and such an order was considered to be a final order as the matter raised for setting aside of the judgment challenged in the application under section 12(2) of C.P.C.' stood finally decided and nothing more was to be done by the learned Single Judge, therefore, I.C.A. against the said order was held to be competent. The facts of the said case are distinguishable from the facts of the present case.

26. The other judgment reported as Sheri-CBE and others v. Lahore Development Authority and others (2006 SCMR 1202) relied upon by the learned counsel for the appellant wherein an interim injunction granted by a learned Single Judge of the High Court was assailed in an

Intra Court Appeal before a Division Bench of the High Court and the contention raised before the Hon'ble Supreme Court of Pakistan was that no Intra-Court Appeal was competent against the said interim order and accordingly the order passed by the Division Bench of the High Court in the case was sought to be declared as an order without jurisdiction having been passed in an incompetent appeal filed. The Hon'ble Supreme Court of Pakistan granted the leave to appeal in the said order against the contention raised and did not finally decide the question, therefore, the said judgment also does not support the contention raised by the learned counsel for the appellant as such.

27. The case-law cited by the learned counsel for the respondent highlights the settled proposition of law on the concept of order passed by the High Court in exercise of Original Constitutional Jurisdiction and in Original Civil Jurisdiction; It is authoritatively and consistently held that the orders passed by the Hon'ble High Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 cannot be termed as order passed in Original Civil Jurisdiction of the Court so as to make the appeals competent against the consequent orders by it, under the Law Reforms (Amendment) Ordinance, 1972 read with section 15 of Code of Civil Procedure (Amendment Ordinance of 1980) Ordinance (XX) of 1980 whereby an appeal to a Bench or two or more Judges was provided against an interlocutory order made by a learned Single Judge of this Court in exercise of its Original Civil Jurisdiction.

28. In view of all the above discussion, this Court, is of the view that the order passed by the learned Single Judge of this Court, dated 28-8-2009 on C.M. No.3428 of 2009 is an interim or an interlocutory order, which does not have the effect of disposing of the entire case put up before the Court in C.M. No.3428 of 2009, thus, the present Intra Court Appeal No.153 of 2009 against the said order is not maintainable as it is strictly barred by subsection (3) of section 3 of the Law Reforms Ordinance, 1972. The instant Intra-Court Appeal is, therefore, Dismissed without any orders as to costs.

29. As the matter is still pending before a learned Single Judge of this Court, therefore, the parties are directed to appeal before the said learned Court for a date to be fixed by the learned Single Judge immediately after winter vacations and the C.M. No.3428 of 2009 shall be disposed of by the learned Single Judge expeditiously in accordance with law.

S.A.K./G-4/L

Petition dismissed.