
Post-Remand Case Transfer to Ordinary Court



RESEARCH CENTER, HIGH COURT OF BALOCHISTAN



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FOR: HON'BLE PAZEER AHMED BALOCH MEMBER INSPECTION TEAM
SUBJECT: CRIMINAL LAW
DATE: 25TH SEPTEMBER 2024
BY: WASEEM AHMED & NOOR BAKHSH MENGAL RESEARCH OFFICERS

Query:

Whether the Anti-Terrorism Court had the authority to transfer the case to an ordinary court in terms of section 23 of ATA, after it was remanded for rewriting the judgment by the Appellate Court?

Response:

The query raises critical legal issues surrounding the jurisdiction of the Courts, remand order coupled with specific direction for rewriting judgment, and transfer of case by the *Anti-Terrorism Court* ("ATC") to the *Ordinary Courts*.

Under section 12 of the *Anti-Terrorism Act 1997* ("***the Act 1997***") ATCs are conferred exclusive jurisdiction to try offenses set out in the third schedule of the *Act 1997*. Additionally, the ATCs may also try other offenses other than a scheduled offense with which the accused may be charged at the same trial under the *Code of Criminal Procedure 1898* ("the Code") or if such offense is connected with the such other offense in terms of sections 17 and 21-M of the *Act 1997* respectively. **Notably, Subsection (2) of Section 21-M of the Anti-Terrorism Act, 1997 ("ATA") provides a important legal mechanism, ensuring that justice is served when the nature of the offense committed by the accused falls outside the scope of terrorism but within the purview of other laws. It is designed to address situations where an accused, facing trial for an offense under the ATA, is found during the course of the trial to have committed another offense under either the ATA or any other law currently in force.** This view is reinforced by *Ahmed Ali case (infra)* where it was held that the ATC could convict an accused for another offense, whether under the ATA or any other law, discovered during the trial.

Unquestionably, matter of jurisdiction is critical and the legality or validity of any actions taken or orders/judgments issued hinges on the jurisdiction conferred by law; otherwise, such actions or orders/judgments would be rendered void. Section 23 of the Act 1997 mandates that if, *after taking cognizance of the offense*, Anti-Terrorism Court is of the opinion that the offense is not a scheduled offense, the Court *shall* transfer the case to the ordinary Court having jurisdiction under the law to try such offense *but this authority to transfer remains with the ATC during the proceedings of the trial till the judgment is announced* as laid down in the case of *Ali Gohar* (*infra*).

In this case, the ATC Court had already passed a *final judgment* and appellate Court's remand order to the Anti-Terrorism Court (ATC) was specific, instructing the ATC to rewrite the judgment; therefore, this order was binding, and the ATC was expected to comply by such instruction of the appellate Court by rewriting its judgment, rather than transferring the case, *particularly, in the face of its powers provided under subsection (2) of section 21-M of the Act 1997*.

The principle settled in **Khyber Tractors case** (*infra*) is that any order passed by a court without jurisdiction is void, even if it seems correct on merits. Here, the ATC's act of transferring the case after the High Court's remand appears to be outside its jurisdiction. The correct action for the ATC was to comply with the remand order and rewrite the judgment, not re-evaluate jurisdiction and transfer the case.

It is also apropos to state here that the proper procedure needs to be followed by the ATCs while transferring cases to Ordinary Courts. The ATC did not follow the proper procedure under the **Cr.P.C. (Sections 190 & 193)** when transferring the case post-remand, further complicating the jurisdictional validity of the transfer. Light is taken from the case of **Rao Fahd Ali Khan case** (*infra*).

Moreover, the High Court retains revisional authority under **Section 435 r/w section 439 of the Code of Criminal Procedure 1898** to exercise revisional jurisdiction over the ATC's decisions, as highlighted in the **Ali Gohar case**. The referral by the Ordinary Court seeking clarification on the matter, the High Court may invoke its revisional jurisdiction suo moto and

examine the propriety, legality and regularity of the order of the ATC and pass appropriate order for correcting any error committed by the ATC.

Judicial precedents referred herein above:

(i) 2017 P Cr. L J 527 [Peshawar] AHMAD ALI---Petitioner Versus The STATE and 2 others---Respondents

“8. It is settled law that the charge is framed on tentative assessment of the record and examination of the prosecution evidence, whereafter prosecution is asked to prove its case at the trial. It is always open for the accused to put up any defence available to him and make out a case according to his version. Whereas the court at the final stage is to appreciate the evidence and decide the innocence or guilt of the accused or the accused is liable to conviction, for another offence, in light of evidence. To cope with such situation, section 21-M(2) of the Act has specifically been inserted which for convenience is reproduced as follows:-

"21-M(2). Joint Trial.-

(1) xxxxxxxxx

(2) If, in the course of any trial under this Act of any offence it is found that the accused person has committed any other offence under this Act or any other law for the time being in force, the Court may convict an accused for such other offence and pass any sentence authorized by this Act or, as the case may be, such other law, for the punishment thereof."

9. Perusal of quoted clause, clearly suggests that **if during the course of trial, it is proved that accused has committed any other offence under this Act or under any other law for the time being in force, other than Anti-Terrorism Act, the court may convict the accused for such offence and pass sentence accordingly. Phrase "other law" is of great significance, which is sufficient enough to allay the apprehension of an accused, by virtue of which Legislature has clearly drawn a line of demarcation that if the accused is not found guilty of an offence, provided under the Anti-Terrorism Act, rather has been found guilty of some other offence, provided in any other law, he may be convicted for that offence. The provision of section 21-M(2) of the Act seems pari materia to section 237 of the Code of Criminal Procedure, 1898, which also copes with the similar situation; that when accused is charged for a particular offence and during the trial it is found that he has committed a different offence, he may be convicted therefor.** Though the Legislature has provided the procedure for alternate conviction, when the case does not fall within the definition of terrorism, nevertheless on account of some misconception, every now and then, applications are filed by invoking section 23 of the Act for transfer of cases to the court of ordinary jurisdiction.

**(ii) P L D 2020 Supreme Court 427 ALI GOHAR and others---
Petitioners Versus PERVAIZ AHMED and others---
Respondents**

33. To sum up the above discussion on the authority vested in the ATC to transfer a case, as envisaged under section 23 of the Act, we may note that:

- I) Both, the Administrative Judge and any other ATC to whom the case is assigned by the Administrative Judge, after taking "cognizance of the case", have the authority to transfer the case under section 23 to an ordinary criminal court for trial under Cr.P.C.
- II) The authority of ATC to transfer the case under section 23 to an ordinary criminal court for trial under Cr.P.C. can take place after taking cognisance of the case, and this authority to transfer remains with the ATC during the proceedings of the trial till the judgment is announced.
- III) The condition precedent for ATC to exercise the authority to transfer the case under section 23 of the Act are: firstly when the ATC takes cognizance of the case; and secondly, if ATC is of the opinion that the offences referred to it for trial does not come within the scope of offences triable under the Act.
- IV) The words "cognizance of the case" employed in section 23 of the Act simply means, when the ATC on receipt of the challan takes any step indicative of proceeding with the trial.

(iii) Sikandar Ali Lashari v The State and others, passed by Hon'ble Supreme Court in Criminal Petition No.822 of 2017.

"This Court at this stage cannot give any opinion without deeper appraisal of the evidence. Section 23 of the ATA caters for a situation of this type. The court which has recorded evidence can at any stage transfer the case for trial to a court of competent jurisdiction according to the nature of the case. We thus, do not feel persuaded to interfere with the impugned orders. However, if the trial Court on appraising the evidence comes to the conclusion that it is not a case triable under the ATA, it would be at liberty to send it to the Court of ordinary jurisdiction without being influenced by any of the observations made in the impugned orders. The petitioner would thus be at liberty to move an application in this behalf if in his view the evidence recorded shows that it is not a case triable by Anti-Terrorism Court".

**(iv) 2014 P Cr. L J 1071 [Islamabad] Rao FAHD ALI KHAN---
Petitioner Versus The STATE and another---Respondents**

(d) Anti-Terrorism Act (XXVII of 1997)---

----S. 23---Criminal Procedure Code (V of 1898), Ss. 190 & 193---Transfer of case from Anti-Terrorism Court to court of ordinary jurisdiction and vice versa-

--Procedure---Though S. 23 of the Anti-Terrorism Act, 1997 provided a procedure for transfer of case to the court of ordinary jurisdiction, but same could not be done by by-passing procedural law---Anti-Terrorism Court was not empowered to transfer the case directly to the Court of Session or Additional Sessions Judge without following the procedure laid down under Ss.190 & 193, Cr.P.C.---Likewise Sessions Judge had no authority by virtue of law to transfer or send the case (directly) to any court constituted under the Anti-Terrorism Act, 1997---Both courts (Anti-Terrorism Court and Sessions Court) had no alternate except to return back the F.I.R. and final report submitted by police to the prosecution or concerned investigating officer for the purpose of its onward process by presenting the same before the court of competent jurisdiction.

**(v) P L D 2020 Supreme Court 427 ALI GOHAR and others---
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"19. There can be no contest that, ATC is a "criminal court", within the contemplation of section 6 of the Cr.P.C. As far as ATC being "inferior" to High Court, the fact that the competent High Court is the appellate forum against the orders of ATC under section 25 of the Act, would surely render the ATC "judicially inferior"¹⁰ to the competent High Court. More so, when in the Act, the legislature has not expressly barred the High Court from exercising its revisional jurisdiction, as has been rendered in other special enactments¹¹. This court has while considering the vires of challenged orders passed under special statutes before the revisional jurisdiction of the High Court provided under Cr.P.C., kept in view two essential considerations: firstly, the express provision of providing in the special statute, remedy of appeal before the High Court; and secondly, in some cases, also the omission in the special statute to expressly bar the revisional jurisdiction of the High Court. Where these two conditions are fulfilled, the orders passed in exercise of revisional jurisdiction of the High Court under section 435 read with section 439 of Cr.P.C. have been legally maintained. Reference in this regard can be made to some of the leading case decided by this court while dealing with The Drugs Act, 1976¹², Suppression of Terrorist Activities (Special Courts) Act 1975¹³, Offences in Respect of Banks (Special Courts) Ordinance (IX of 1984)¹⁴, Pakistan Criminal Law Amendment Act, 1958¹⁵ and even the Act¹⁶. Recently, a Full Bench of Lahore High Court in Muhammad Jawad Hamid v. Mian Muhammad Nawaz Sharif (PLD 2018 Lahore 836) has aptly explained the scope of revisional jurisdiction of the High Court in the face of the finality¹⁷ attributed to the impugned order passed by the ATC, and declared that:

"8. For what has been discussed above, we hold that ATC is subordinate/inferior court to the High Court; in ATA no restriction has been imposed for filing of revision petition, hence, the High Court has the visitorial power over ATC, therefore, can entertain petitions in the nature of those covered by Sections 435, 439 of the Code, except to grant bail or release an accused in a case triable by ATC, in the light of restriction imposed under section 21(d) of the ATA, and writ petition is not maintainable."

*“24. In view of the above deliberations, it would be safe to state that ATC being a judicially "inferior criminal court" to the High Court and that the order of transfer of the case dated 13-11-2018 was passed during the "proceedings" of the case before the ATC. Accordingly, the two condition precedents for invoking the revisional jurisdiction of the High Court under section 435 was satisfied, and thus the grievance of the present respondent/complainant in FIR No.20 was maintainable under the revisional jurisdiction of the High Court under section 435, Cr.P.C. **This being so, the challenge of the present respondent/complainant in FIR No. 20 made to the order of the ATC transferring the case to an ordinary criminal court of competent jurisdiction was not maintainable before the High Court under its inherent jurisdiction of section 561-A, Cr.P.C., or its constitutional jurisdiction under Article 199 of the Constitution, as they had an alternative remedy available before the criminal revisional jurisdiction under section 435, Cr.P.C.** It is also an admitted position that neither the learned High Court on its own motion nor the present respondent/complainant in FIR 20 made any request to convert their petition filed under section 561-A, Cr.P.C. into one under section 435, Cr.P.C. Accordingly, the impugned decision before us can, now, only be adjudged as one rendered by the High Court, while exercising its inherent jurisdiction under section 561-A, Cr.P.C., and not otherwise.”*

(vi) Muhammad Jawad Hamid Versus Mian Muhammad Nawaz Sharif (PLD 2018 Lahore 836)

“8. For what has been discussed above, we hold that ATC is subordinate/inferior court to the High Court; in ATA no restriction has been imposed for filing of revision petition, hence, the High Court has the visitorial power over ATC, therefore, can entertain petitions in the nature of those covered by Sections 435, 439 of the Code, except to grant bail or release an accused in a case triable by ATC, in the light of restriction imposed under section 21(d) of the ATA, and writ petition is not maintainable.”

(vii) P L D 2005 Supreme Court 842 KHYBER TRACTORS (PVT.) LTD. through Manager---Appellant Versus PAKISTAN through Ministry of Finance, Revenue and Economic Affairs, Islamabad---Respondents

• (a) Jurisdiction---

*----Question of jurisdiction of a forum is always considered to be very important and any order passed by a Court or a forum, having no jurisdiction, even if it is found to be correct on merits, is not sustainable--**Jurisdiction of a Court lays down a foundation stone for a judicial or a quasi-judicial functionary to exercise its powers/authority and no sooner the question of jurisdiction is determined in negative, the whole edifice, built on such defective proceedings, is bound to***

crumble down. Pearey Lal v. Nanak Chand AIR 1948 PC 108; Pervez Iqbal v. Muhammad Hanif 1979 SCMR 367 and Chief Settlement Commissioner v. Muhammad Fazil PLD 1975SC 331 ref.

In conclusion, taking into account the nature of the legal issue involved and the procedure adopted by the ATC, it is appropriate that in the light of the reference sent by the ordinary transferee Court, the Hon'ble High Court, may invoke its revisional authority as outlined in sections 435 and 439 of the Code, summon the record, and assess the legality of the ATC's order to transfer the case to the Court of Ordinary Jurisdiction, following the remand of the case by the appellate court with instructions to rewrite the judgment anew, ***as the revisional power of the High Court is a corrective jurisdiction, and in this case, it would be appropriate for the High Court to review whether the ATC's transfer order was lawful after the remand.***

RCBHC