IN THE FEDERAL SHARIAT COURT
(Revisional Jurisdiction)

PRESENT

MR.JUSTICE FAZAL ILAHI KHAN, CHIEF JUSTICE
MR.JUSTICE DR.FIDA MUHAMMAD KHAN
MR.JUSTICE CH.EJAZ YOUSAF

CRIMINAL REVISION NO. 4-P OF 2000

1. Karamat Khan son of Misal Khan,
   Abdullai Mahsud,r/o Makin Tehsil Makin,
   South Waziristan Agency
2. Sher Zaman son of Akbar Jan,
   Resident of Village Segga Tehsil Ladha,
   South Waziristan Agency

Petitioners

Versus

The State	--	Respondent
For the petitioners	--	Mr.Saeed Baig, Advocate,
For the State	--	Mr.M.Sharif Janjua, Advocate.
Date of the order Of trial Court.	--	27.5.2000
Date of institution	--	31.9.2000
Date of hearing	--	13.2.2002
Date of decision	--	13.2.2002

JUDGMENT

CH.EJAZ YOUSAF, J. - This revision is directed against the order/judgment dated 27.5.2000 passed by the learned Tribunal FCR Peshawar whereby revision filed by the petitioners against the order of Commissioner FCR D.I.Khan was rejected.

2. Facts of the case, in brief, are that on 11.5.1998 motor car bearing registration No.DNS-19 was found parked in the jungle near village Mohmmad Khel South Waziristan Agency, in regard whereof, a special report was sent by the Political Naib Tehsildar Dir to the higher authorities. Resultantly a case under sections 365,392 and 401 PPC read with sections 11 and 12 (2) FCR was registered. Investigation was carried out and on completion thereof the petitionersalong with nine others were challaned to the court of Assistant Political Agent/ Additional District Magistrate Ladha South Waziristan Agency, at Tank, for trial. Record reveals that the learned Assistant Political Agent/Additional District Magistrate South Waziristan Agency while conducting trial of the case under the provisions of the FCR, constituted a jirga who, after recording evidence, held all the accused

guilty of the offences. Learned APA/ADM,therefore, convicted all the accused persons and sentenced them to various punishments vide his order dated 31.12.1998. The above order/judgment was assailed before the Commissioner FCR at D.I.Khan Division but was no avail and the appeal was dismissed vide order dated 28.4.1999. Being aggrieved, the petitioner No.1 filed a revision i.e bearing No.68/99 before the Tribunal FCR,Peshawar but it too, remained unfruitful and was ultimately dismissed vide order dated 27.5.2000. Hence this revision.

3. Mr.Saeed Baig,Advocate, learned counsel for the petitioners has contended that the petitioners along with the other accused persons were charged for the offences of decoity and robbery which, having been covered by the definition of 'Harrabah', were triable under the Hudood Laws only,therefore, trial of the case conducted under the provisions of the Pakistan Penal Code as well as the FCR by the learned Assistant Political Agent/Additional District Magistrate South Waziristan Agency, was patently illegal. He has added that since the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 was extended to the Federally Administered

Tribal Area's vide SRO 362(1)/79 dated 23.4.1979, which has had an over-riding effect over all other laws,therefore, trial of the case ought to have been conducted under the Hudood Laws. In order to supplement his contention the learned counsel for the petitioners has placed reliance on an unreported Single Bench judgment of this Court dated 24.8.1995 delivered in the case of Noor Khan etc Vs.The State (Cr.A.No.37-P-1995) whereby trial under the provisions of the FCR was held to be illegal. He has prayed that, orders/judgments passed by the Tribunal FCR Peshawar, Commissioner FCR D.I.Khan and Assistant Political Agent/Additional District Magistrate be set aside and case be remanded to the court competent to try the offences under the provisions of the "Hudood Laws".

4. Mr.M.Sharif Janjua,Advocate,learned counsel for the State, on the other hand, while controverting the contention raised by the learned counsel for the petitioners submitted that neither it is evident on record that the case was covered by the provisions of Offences Against Property(Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as 'the Ordinance') nor the accused persons were charged, tried and convicted by any court constituted

under 'the Ordinance' nor appeal and revision against the judgment of the court of first instance, were decided by any forum constituted or established under 'the Hudood Laws' therefore, the impugned order/judgment can not be challenged before this Court. He added that since the petitioners have come before this Court after exhausting all the remedies, which were available to them under the relevant laws, including a revision, therefore, a second revision on the same count was not enteraintable.

5. We have given our anxious consideration to the respective contentions of the learned counsel for the parties and have also gone through the record of the case, minutely.

6. Admittedly, neither any case was registered against the accused persons under the provisions of 'the Ordinance' nor were they charged, tried or convicted thereunder by a court competent to hold trial. Appeal as well as revision too,were not preferred before the forum prescribed by 'the Ordinance' and rightly so because, as per settled law, an order/judgment, passed without jurisdiction even, has to be challenged in the same hierarchy. It would be pertinent to mention here that though Article 203 DD of the

Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the Constitution) empowers this Court to call for and examine record of any case decided by any criminal court under any law relating to the enforcement of Hudood for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by, and as to the regularity of any proceedings of, such court but it cannot be done unless the case squarely falls within the ambit of Article 203 DD and the following three conditions are satisfied;

(1) the record which may be called, must pertains to any "decided case",
(2) the case may be decided by any criminal court and
(3) the decision should be in any way relating to the "enfrocement of Hudood".

Article 203 DD of the Constitution is reproduced herein below for ready reference and convenience: -

"**Art.203 DD.** (1) The Court may call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of Hudood for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by, and as to the regularity of any proceedings of, such court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in

confinement, that he be released on bail or on his own bond pending the examination of the record.

(2) In any case the record of which has been called for by the Court, the Court may pass such order as it may deem fit and may enhance the sentence:

Provided that nothing in this Article shall be deemed to authorise the Court to convert a finding of acquittal into one of conviction and no order under this Article shall be made to the prejudice of the accused unless he has had an opportunity of being heard in his own defence.

(3) The Court shall have such other jurisdiction as may be conferred on it by under any law."

The learned counsel for the petitioners has though argued that since the offences allegedly committed by the petitioners were covered by the definition of "Harabah" therefore, the court constituted under the FCR had had no jurisdiction to try the offence and it be declared so yet, to our mind, the relief sought by the petitioners cannot be granted by this Court for the simple reason that the revision itself is not maintainable. It may be mentioned here that neither the decisions/judgments impugned herein, in any manner, are related to the 'enforcement of Hudood' nor the case has been decided by any criminal court which may be considered subordinate to this Court. It is evident on record that none of the petitioners were charged, tried or convicted under the provisions of 'the Ordinance'. Had it been so, it might have been, to some extent, possible to argue that since the

decision was made under the law relating to the 'enforcement of Hudood', therefore, legality or propriety thereof may be examined but, in the situation to the contrary, when the decision impugned cannot be termed or regarded to be a decision relating to the 'enforcement of Hudood' the petitioners cannot have a recourse to Article 203 DD of the Constitution.

Learned counsel for the petitioners has also tried to canvass that since by virtue of Article 203 DD of the Constitution this Court can examine the record of any case decided by any criminal court,therefore, this Court, in exercise of its revisional jurisdiction, can examine propriety of the findings yet, we are afraid this argument advanced by the learned counsel for the petitioner too, cannot prevail because the Hon'ble Supreme Court of Pakistan in the case of State Vs.Mst.Iqbal Bibi reported as 1993-SCMR-935 has clearly laid down that revisional jurisdiction of this Court is exercisable in respect of those criminal courts which may be considered subordinate to this Court. It would be advantageous to reproduce herein below the relevant discussion from the above judgment which reads as follows:-

"Even if we were to hold that an order passed by a High Court granting or refusing bail to an accused person comes within the compass of the expression "any case decided", the High Court is not covered by the term "Criminal Court" used under the above clause (1) of Article 203-DD of the Constitution. It refers to a Magistrate or a Sessions Court. The High Court,being a superior Court created under Article 192 of the Constitution, cannot be equated with a Criminal Court. Secondly, when a High Court declines to grant bail under section 497 or section 498, Cr.P.C, it does not exercise jurisdiction under any law relating to the enforcement of Hudood.

We may also observe that revisional jurisdiction of the nature is exercisable in respect of the Criminal Courts, which can be considered subordinate to the Federal Shariat Court. The High Court cannot, in any way, be considered subordinate to the Federal Shariat Court for the above purpose."

(Underlining is ours)

And since the courts constituted under the provisions of the F.C.R can, by no stretch of imagination, be considered subordinate to this Court, therefore, the petition on this count too, is not maintainable.

So far as the case law cited at the bar i.e judgment delivered by a Single Bench of this Court in the case of Noor Khan etc. Vs.The State (Cr.A.No.37-P-1995) is concerned, we are afraid, the learned counsel for the petitioners in view of above clear exposition of law on the subject by the Hon'ble Supreme Court of Pakistan, cannot take advantage of the same. To us, it appears that while deciding Noor Khan's case, judgment of the Hon'ble Supreme Court of Pakistan, delivered in the case of The State

Vs.Mst.Iqbal Bibi (1993 SCMR-935), was not placed before the Hon'ble Judge and the expression "any criminal court" appearing in Article 203 DD of the Constitution was not interpreted in the light of the above referred judgment of the Hon'ble Supreme Court, as is explicit from the judgment itself. It would be advantageous to reproduce herein below the judgment of the cited case in extenso, for ready reference, and convenience, which reads as follows:-

> "The offence disclosed against the appellants in the report by the Political Tehsildar, Jamrud was covered by the provisions of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and the said Ordinance has since been made applicable to the tribal areas. So the trial should have been held for the offence under that Ordinance by the Political Agent exercising powers of the Sessions Judge/Additional Sessions Judge conferred on him under the Cr.P.C. The trial of the appellants under PPC and in accordance with section 11 of the F.C.R was without jurisdiction.
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> Consequently the appeal is accepted. The impugned judgment is set aside and the case is remanded back to the learned Political Agent, who is directed to hold a fresh trial under the provisions of the Cr.P.C and in accordance with the provisions of the aforesaid Hudood Ordinance. The learned counsel for the appellants requested for bail to the appellants but they are directed to approach the trial court in this respect."

We therefore, do not feel persuaded to agree with the contention of the learned counsel for the petitioners and also respectfully differ with the view expressed by the learned Judge in the above judgment.

7. By now, it is well settled that if a court not possessed of jurisdiction to try a case, wrongly assumes jurisdiction and exercises power not vested in it, appeal from its decision would lie in the same manner as an appeal would lie from a decision made with jurisdiction. Reference in this regard may usefully be made to the cases of Muhammad Ishfaque Vs. The State reported as PLD 1973 SC-363, Rasool Bakhsh and others Vs.The State and others reported as 1998 P.Cr.L.J-438, Nizamudin Vs.The State 1999 PSC (Cr) 1025 and Nazar Muhammad and other Vs.The State reported 1999 P.Cr.L.J-1636.

In the above referred case of Rasool Bakhsh and others Vs. The State and others a Full Bench of this Court has also laid down that a party aggrieved of the decision passed without jurisdiction, can raise the controversy before the appellate forum in the same hierarchy and if appellate forum comes to the conclusion that the decision so made was without

jurisdiction it can set aside the judgment on the ground of illegal assumption of jurisdiction, leaving the option with the concerned authorities to have the matter decided by the original forum of competent jurisdiction. It was further held therein that on the basis of wrong exercise of jurisdiction by a trial court, its judgment cannot be assailed before any appellate forum other than the one prescribed under the law, against the judgment of the court of first instance.The petitioners,therefore,instead of approaching this Court should have explored their remedy, elsewhere, if any.

The upshot of the above discussion is that the petition being misconceived and unwarranted by facts and law is hereby dismissed.

(CH.EJAZ YOUSAF)
JUDGE

(FAZAL ILAHI KHAN)
CHIEF JUSTICE

(DR.FIDA MUHAMMAD KHAN)
JUDGE

Fit for reporting.

Islamabad, 13.2.202
M.Akram/

JUDGE