

[Supreme Court of Pakistan]

Present: Syed Mansoor Ali Shah, Amin-ud-Din Khan, Jamal Khan Mandokhail,**Ayesha A. Malik and Athar Minallah, JJ****Syed ASGHAR ALI SHAH and another---Petitioners****Versus****KALEEM ARSHAD and others---Respondents**

Civil Petitions Nos. 167-P and 391 of 2022, decided on 15th January, 2024.

(Against the judgment dated 18.12.2021 passed by Khyber Pakhtunkhwa Subordinate Judiciary Service Tribunal in Service Appeal No.06-P of 2021)

Per Syed Mansoor Ali Shah, J; Amin-ud-Din Khan, Jamal Khan Mandokhail and Athar Minallah, JJ. agreeing; Ayesha A. Malik, J. also agreeing with regard to maintainability of present petitions but not with the reasons given for the same [Majority view]

Constitution of Pakistan---

---Arts. 212(2), proviso, 212(3) & 142---Order of a Tribunal created by a Provincial law---Appeal to the Supreme Court under Article 212(3) of the Constitution---Maintainability---Whether an appeal lies to the Supreme Court under Article 212(3) against an order of a Tribunal created by a Provincial law to which the proviso to Clause (2) of the Article 212 has not been made applicable---[Per Syed Mansoor Ali Shah, J. (Majority view): Proviso to clause (2) does not apply to clause (3) of Article 212 of the Constitution---Appeals against orders of the Provincial Administrative Tribunals are competent before the Supreme Court under Article 212(3) of the Constitution---Supreme Court over ruled the law declared in such regard in the judgment reported as Gomal Medical College v. Armaghan Khan (PLD 2023 SC 190)]---[Per Ayesha A. Malik, J. (Minority view): As Article 212(1) of the Constitution itself confers jurisdiction on the Provincial Legislature to establish the Provincial Tribunal under Article 212(1), the Constitution also confers appellate jurisdiction to the Supreme Court from a judgment, decree, order or sentence of the said Provincial Tribunal---Discussion of the majority opinion in the instant matter on Entry 55 of the Federal Legislative List (FLL), is not relevant to the dispute at hand]

Per Syed Mansoor Ali Shah, J. (Majority view)

Clause (2) of Article 212 of the Constitution is merely an ouster clause and not a jurisdiction clause. In case of Federal Tribunals, it provides that no other court can take jurisdiction over any matter which falls under the subject matter of the Administrative Tribunal established under Article 212(1). If clause (2) has not been made applicable to a Provincial Tribunal, it at best means that there are other forums also available to redress the grievance of the officers, e.g., the High Court under Article 199 or the Civil Courts under section 9 of the Civil Procedure Code, 1908. In the absence of clause (2), all the judicial forums in a Province have concurrent jurisdiction along with the Provincial Administrative Tribunal. Once a civil servant invokes the jurisdiction of the Provincial Tribunal, the remedy of an appeal by leave against any decision of the Provincial Tribunal before the Supreme Court becomes alive. Remedy of appeal under clause (3) will not be available if the civil servant approaches the High Court or the Civil Court for the redressal of his grievance. Applicability of clause (2) to a Provincial Tribunal is totally insignificant as it has no effect on the remedy of appeal against the decision of the Provincial Tribunal before the Supreme Court which is ensured under clause (3).

Clause (3) is the third part of Article 212, which provides that an appeal shall lie to the Supreme Court from a judgment, decree order or sentence of the Administrative Tribunal, and the Supreme Court shall grant leave if the Supreme Court is satisfied that a substantial question of law of public importance arises in the case. Clause (3) has no correlation whatsoever with the ouster clause of clause (2). Whether a Provincial Tribunal enjoys the ouster clause or not, does not affect the appellate jurisdiction of the Supreme Court. Clause (3) is independently connected with all the administrative Tribunals, including Provincial Tribunals, established under Article 212(1). The appeal to the Supreme Court is available against orders of both the Federal and Provincial Administrative Tribunals by a special constitutional scheme provided under Article 212, which due to the non obstante clause is over and above any sub-constitutional legislation under the regular constitutional scheme.

The law declared in the judgment reported as *Gomal Medical College v. Armaghan Khan* (PLD 2023 SC 190) that unless and until the proviso to Article 212(2) of the Constitution is activated, appeal against an order of a Provincial Tribunal is not available before the Supreme Court under Article 212(3) of the Constitution, and that in the absence of such a law passed by the Parliament, the decision of a Tribunal established under the Provincial law is to be challenged under Article 199 of the Constitution, is not correct and is therefore overruled.

Dean/Chief Executive, Gomal Medical College, Medical Teaching Institution, D.I. Khan v. Muhammad Armaghan Khan PLD 2023 SC 190 overruled.

Per Ayesha A. Malik, J. (Minority view)

Article 212(3) of the Constitution is the constitutional mandate which prescribes that leave to appeal before the Supreme Court for the Tribunal established under Article 212(1) of the Constitution can be filed directly, meaning thereby, the Constitution itself provides for the remedy of appeal before the Supreme Court. Both Sub-Articles (1) and (3) of Article 212 of the Constitution are exceptions to the legislative authority contained in Article 142 of the Constitution as the Constitution itself authorizes and permits the Federal and Provincial Legislature, irrespective of the authority given in Article 142 of the Constitution read with the Federal Legislative List (FLL), to establish the Tribunal and to allow its leave to appeal directly before the Supreme Court. Article 212(2) merely ousts the jurisdiction of other courts or fora. Resultantly, even though the Tribunal is established under Article 212(1), the ouster of jurisdiction of other courts is automatically triggered by Article 212(2) of the Constitution and with respect to federal courts but for the provincial courts it is necessary that the Provincial Assembly activate the proviso to Article 212(2) of the Constitution. In such case, the Tribunal will be an exclusive forum, which totally and completely ousts the jurisdiction of all other courts or fora with respect to the special subject-matters contained in sub Articles (a), (b) and (c) of Article 212(1) of the Constitution. However, if the proviso is not activated, meaning there is no resolution by the Provincial Legislature (followed by an Act of Parliament) the ouster of jurisdiction will not be triggered. Consequently, a litigant will have the option to avail its remedy before any other forum including the remedy before the Supreme Court.

The law declared in the judgment reported as *Gomal Medical College v. Armaghan Khan* (PLD 2023 SC 190) appears to read exclusivity and ouster as synonymous, because it relies on the principle that the Provincial Legislature cannot act upon the jurisdiction of the Supreme Court without intervening Federal legislation, hence, in order for the Tribunal to have exclusive jurisdiction, the proviso must be activated. This in turn means that if the proviso is activated, then the exclusivity of the Tribunal will mean ouster of the jurisdiction as well. However, exclusivity will not per se oust the jurisdiction of other courts without an express provision stating so as exclusivity of jurisdiction does not imply the ouster of jurisdiction. For ouster of jurisdiction to take effect an express provision is required which is precisely what Article 212(2) of the Constitution does. In other words, the proviso does not act as a bridge between Sub-Articles (1) and (3) of Article 212, rather it allows and empowers the Provincial Legislature to decide whether, for the purposes of the establishment of the Provincial Tribunal, remedy should lie exclusively to the Supreme Court or, in the alternate, giving more options to the litigant.

The discussion of the majority opinion in the instant matter on Entry 55 of the Federal Legislative List (FLL), is not relevant to the dispute at hand. The issue before the Court in this matter is simply whether the remedy of appeal as provided in Article 212(3) of the Constitution is available to the petitioners. The answer to this question is in the affirmative as this remedy has been provided, specifically and categorically, by the Constitution itself, and not by way of any ordinary legislation. Therefore, there is no issue pertaining to legislative competence under Entry 55 of the FLL.

Petitioner in -person (in C.P. 167-P of 2022).

Hafiz S. A. Rehman, Senior Advocate Supreme Court for Petitioners (in C.P. 391 of 2022).

Syed Hamid Ali Shah, Advocate Supreme Court and Syed Rafaqat H. Shah, Advocate-on-Record for Respondents (in C.P. 391 of 2022).

Hasan Nawaz Makhdoom, Additional A.G.P., Ch. Amir Rehman, Additional A.G.P., Ayyaz Shoukat, A.G. (Islamabad), Khalid Ishaq, A.G. (Punjab), Sanaullah Zahid, Additional A.G. (Punjab), Baleeghuzzaman, Additional A.G. (Punjab), Malik Waseem Mumtaz, Additional A.G. (Punjab), Sultan Mazhar Sher Khan,

Additional A.G. (Khyber Pakhtunkhwa), M. Ayyaz Khan Swati, Additional A.G. (Balochistan) and Barrister Zeeshan Adhi, Additional A.G. (Sindh) for Respondents.

Date of hearing: 15th January, 2024.

ORDER

SYED MANSOOR ALI SHAH, J.—Petitioners seek leave to appeal under Article 212(3) of the Constitution of the Islamic Republic of Pakistan, 1973 (Constitution) against the judgment of the Khyber Pakhtunkhwa Subordinate Judiciary Tribunal (Tribunal), dated 18.12.2021, whereby the issue of seniority of respondent No.1 appointed as Additional District and Sessions Judge from the selection process of the year 2001 was considered and decided in terms of Rule 10(a) of the Khyber Pakhtunkhwa Judicial Service Rules, 2001¹ read with section 8(3) of the Khyber Pakhtunkhwa Civil Servants Act 1973, and his seniority was fixed along with his batchmates above the petitioners who were appointed from the selection process of the years 2002 and 2003.

2. Learned counsel for respondent No. 1, in the course of hearing of the petitions before a regular Bench of this Court, raised a preliminary objection regarding the maintainability of these petitions for leave to appeal under Article 212(3) of the Constitution on the basis of the law declared by this Court in *Gomal*,² which held that no appeal lies to this Court in terms of Article 212(3) against the decision of a Tribunal created by a Provincial law to which the proviso to clause (2) has not been applied.³ Admittedly, there is no federal law that extends clause (2) to the Tribunal in terms of the said proviso. The question of maintainability, raised by the learned counsel, entailed the interpretation of Article 212 of the Constitution. Under section 4 of the Supreme Court (Practice and Procedure) Act, 2023 (Act of 2023) if any matter involves interpretation of a constitutional provision, the Committee⁴ is to constitute a Bench comprising not less than five Judges of the Supreme Court to hear the matter. The regular Bench of this Court, therefore, referred the matter to the Committee for constitution of the larger Bench in accordance with section 4 of the Act of 2023, on 09.01.2024. Hence, this Bench. On the last date of hearing, this Bench issued fresh notices under Order XXVII A, C.P.C. to the Attorney-General for Pakistan and Advocate-General, Khyber Pakhtunkhwa, as well as Advocates-General of other provinces.

Reconsideration of *Gomal* and the maintainability of the petitions for leave to appeal under Article 212(3) of the Constitution.

3. First, we take up the question of maintainability of the instant petitions for leave to appeal. The question raised in *Gomal* was whether an appeal lies to the Supreme Court under Article 212(3) against an order of a Tribunal created by a Provincial law to which the proviso to Clause (2) of the Article 212 has not been made applicable. *Gomal* answered this in the negative by holding that no appeal lies to this Court in terms of Article 212(3) against the decision of a Tribunal created by a Provincial law to which the proviso to Clause (2) has not been applied. *Gomal* went ahead to direct that all the pending petitions or appeals, being not maintainable, were to be returned forthwith by the Office and that no such leave petitions were to be entertained in future except matters regarded as past and closed or reserved or part heard, subject to the direction of the Bench concerned, and matters heard under the direction of the Hon ble Chief Justice.⁵

4. In *Gomal*, the facts were that an employee of Gomal Medical College (College) upon being terminated from service filed an appeal before the Appellate Tribunal established under the Khyber Pakhtunkhwa Medical Teaching Institution Reforms Act, 2015⁶ (Reforms Act). The said appeal was allowed, and the employee was directed to be reinstated in service with back benefits. Against this order of reinstatement, the College preferred a petition for leave to appeal under Article 212(3) of the Constitution before this Court. In this background, the above question regarding the maintainability of the petition for leave to appeal before this Court under Article 212(3) arose.

5. In *Gomal*, a two-member Bench of this Court held that the appeal arising from the decision of a Provincial Tribunal constituted under Article 212(1)(a) are not maintainable before this Court under Article 212(3) unless the Federal Legislature extends the provision of clause (2) of Article 212 to the said Provincial Tribunal through a Federal Act. This Court in *Gomal* first identified the principle and then proceeded to interpret Article 212 in the light of the said principle. According to *Gomal*, the principle is that it is only the Parliament that can (if at all) enact legislation that affects or acts upon the jurisdiction of this Court. The Provinces have no such

legislative competence.⁷ Taking this further, Gomal reasoned that jurisdiction can only be conferred on this Court through the federal legislature in terms of entry No. 55 of the Federal Legislative List of the Constitution and that the provincial legislature while establishing a Provincial Tribunal cannot confer jurisdiction of appeal on this Court, unless and until effect is given to proviso to Article 212(2) of the Constitution through an Act of Parliament. According to Gomal, clause (3) of Article 212 could only be activated through proviso to clause (2) which formed the necessary bridge connecting clauses (2) and (3) of Article 212 and only under the cover of an Act of Parliament could the door to this Court be opened under Article 212(3). Gomal went ahead to hold that if the Provincial Assembly does not wish to follow this route or Parliament refuses to enact the enabling legislation in terms of the proviso, then the door to this Court remains shut. And when clause (2) does not apply, the jurisdiction of the other courts, which in practical terms would mean recourse to the High Court under Article 199, would remain open, holding clause (2) and its proviso the gateway to clause (3).

6. We have heard the learned counsel for respondent No.1, the Attorney-General and the Advocates-General of all the Provinces and ICT. All⁸ of them argued that Article 212(3) is a stand-alone provision and decision of the Provincial Tribunals established under Article 212(1) can be appealed before the Supreme Court. They also contended that Article 212(2) is an ouster clause that keeps the other courts away in matters that fall within the jurisdiction of the Tribunal and do not in any manner confer any additional jurisdiction on the Provincial Tribunals, hence even if clause (2) is not made applicable to the Provincial Tribunals established under Article 212(1), the Provincial Tribunals under Article 212(1) still continue to exist and function, their jurisdiction is not affected and the appellate jurisdiction conferred by the Constitution on this Court against any decision of the Provincial Tribunals under Article 212(3) remains intact. Mr. Amir Rehman, Additional-Attorney General for Pakistan explained that the object of clause (2) of Article 212 is to leave the option of invoking the ouster clause with the Provinces, respecting their provincial autonomy under our federal scheme. He added that clause (2) does not confer jurisdiction as understood in Gomal but simply provides for an ouster clause, keeping away other courts from taking up matters falling under the jurisdiction of the Provincial Administrative Tribunals. If the proviso to clause (2) is not invoked, only the ouster clause is not available in a Province, which neither affects the jurisdiction of the Provincial Administrative Tribunals nor the appellate jurisdiction of this Court against the decisions of these Administrative Tribunals under clause (3). We have noticed that the arguments of the law officers before us were similar to the ones submitted by the then law officers before the two-member Bench in Gomal.

7. During the course of hearing in Gomal, it was pointed out by the Advocate-General, KPK that the interpretation of Article 212 in this case will also apply to Khyber Pukhtunkwa Subordinate Judiciary Service Tribunal Act, 1991, as decisions from the said Tribunal are also challenged through leave to appeal before this Court under Article 212(3). This submission was acknowledged by the Bench and therefore notices were issued to Advocates-General of all the Provinces.⁹ Gomal, therefore, while interpreting Article 212, had considered its impact on all the provincial laws relating to the Tribunals established in respect of the terms and conditions of service of the members of the subordinate judiciary.

8. In order to better understand Gomal, we have gone through Article 212 of the Constitution, which is reproduced hereunder, for ready reference:-

Administrative Courts and Tribunals

212(1) Notwithstanding anything hereinbefore contained, the appropriate Legislature may by Act provide for the establishment of one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of

(a) matters relating to the terms and conditions of persons who are or have been in the service of Pakistan, including disciplinary matters;

(b) matters relating to claims arising from tortious acts of Government, or any person in the service of Pakistan, or of any local or other authority empowered by law to levy any tax or cess and any servant of such authority acting in the discharge of his duties as such servant; or

(c) matters relating to the acquisition, administration and disposal of any property which is deemed to be enemy property under any law.

(2) Notwithstanding anything hereinbefore contained, where any Administrative Court or Tribunal is established under clause (1), no other court shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends and all proceedings in respect of any such matter which may be pending before such other court immediately before the establishment of the Administrative Court or Tribunal other than an appeal pending before the Supreme Court, shall abate on such establishment:

Provided that the provisions of this clause shall not apply to an Administrative Court or Tribunal established under an Act of a Provincial Assembly unless, at the request of that Assembly made in the form of a resolution, Majlis-e-Shoora (Parliament) by law extends the provisions to such a Court or Tribunal.

(3) An appeal to the Supreme Court from a judgment, decree, order or sentence of an Administrative Court or Tribunal shall lie only if the Supreme Court, being satisfied that the case involves a substantial question of law of public importance, grants leave to appeal.

Article 212, starts with a non-obstante clause and has three parts: (i) clause (1) empowers the appropriate legislature to establish Administrative Tribunals with exclusive jurisdiction over specific subject matters provided in clauses (a), (b) and (c); (ii) clause (2) does two things, it provides for an ouster clause, excluding the jurisdiction of other courts in matters falling under the jurisdiction of the Administrative Tribunals under clause (1), and an abatement clause, abating any proceedings in respect of any such matter pending before any other court except the Supreme Court. The proviso to clause (2) extends the ouster clause in clause (2) to the Provincial Administrative Tribunals established under clause (1) only if on the request of the Provincial Assembly through a resolution, clause (2) is extended to a Provincial Tribunal through an Act of Parliament; and (iii) under clause (3) an appeal by leave is provided to the Supreme Court against the decisions of these Administrative Tribunals, if they involve a substantial question of law of public importance.

9. Article 212(1) has a non-obstante clause, i.e., Notwithstanding hereinbefore contained, that overrides other provisions of the Constitution, in particular, Article 142,¹⁰ which vests exclusive power in the federal legislature to make laws with respect to any matter in the Federal Legislative List and concurrent power in the federal and provincial legislatures to make laws only with respect to criminal law, criminal procedure and evidence. Article 212(1) authorizes and allows the appropriate legislatures, both federal and provincial, to establish Administrative Tribunals with exclusive jurisdiction for dealing with specific subject matters as provided in clauses (a), (b) and (c) thereof. Federal legislature might not otherwise possess legislative competence under the Federal Legislative List, or under the concurrent power mentioned in Article 142, to establish these Administrative Tribunals regarding subject matters enumerated under clauses (a), (b) and (c) of Article 212(1); however, Article 212(1) of the Constitution empowers both the federal and provincial legislatures to establish such Administrative Tribunals over and above the permissible legislative competence under Article 142 and the Federal Legislative List. This unique legislative power of the provincial and federal legislatures to establish Administrative Tribunals under Article 212 with specialized subject matter and a dedicated forum of appeal, i.e., the Supreme Court, is the significance of the non-obstante clause that enables Article 212 to override the regular constitutional regime.

10. Clause (2) of Article 212 also contains a non-obstante clause, which does two things: first, it ousts the jurisdiction of all other courts vested in them in terms of Article 175 to deal with matters covered under the exclusive jurisdiction of the Administrative Tribunals established under Article 212(1); and second, it provides that any such matter pending before any other court shall abate, excluding matters pending before the Supreme Court. The proviso to clause (2) further provides that the said ouster clause will come into effect for the Provincial Tribunals only if on the resolution of the Provincial Assembly the Parliament passes an Act, which extends the provisions of clause (2) to such a Tribunal. Such a Federal Law was once enacted in 1974 titled, the Provincial Service Tribunals (Extension of Provisions of the Constitution) Act, 1974 and admittedly there is no such law that extends to the Provincial Tribunal in question.

11. Clause (2) of Article 212 is, in our opinion, merely an ouster clause and not a jurisdiction clause. In case of Federal Tribunals, it provides that no other court can take jurisdiction over any matter which falls under the subject matter of the Administrative Tribunal established under Article 212(1). If clause (2) has not been made

applicable to a Provincial Tribunal, it at best means that there are other forums also available to redress the grievance of the officers, e.g., the High Court under Article 199 or the Civil Courts under Section 9 of the Civil Procedure Code, 1908. In the absence of clause (2), all the judicial forums in a Province have concurrent jurisdiction along with the Provincial Administrative Tribunal. Once a civil servant invokes the jurisdiction of the Provincial Tribunal, the remedy of an appeal by leave against any decision of the Provincial Tribunal before this Court becomes alive. Remedy of appeal under clause (3) will not be available if the civil servant approaches the High Court or the Civil Court for the redressal of his grievance. Applicability of clause (2) to a Provincial Tribunal is totally insignificant as it has no effect on the remedy of appeal against the decision of the Provincial Tribunal before this Court which is ensured under clause (3).

12. Gomal repeatedly lays stress on clause (2) and its proviso to say that unless the provision of clause (2) is made applicable to a Provincial Tribunal, the remedy of appeal under clause (3) before this Court is not available against any decision of a Provincial Tribunal. This line of reasoning is based on the central principle formulated in Gomal; that only federal legislature can vest jurisdiction in the Supreme Court under the Constitution (entry 55 of the Federal Legislative List) and therefore unless there is an Act of Parliament extending clause (2) to a Provincial Tribunal, right to appeal is not available to this Court under clause (3). This line of reasoning is, with respect, flawed as Gomal fails to appreciate the clear and direct provision of the Constitution, i.e. clause (3) of Article 212, and instead places reliance on the legislative competence to enact a sub-constitutional law under the Constitution. While Gomal is right when it reasons that the appellate jurisdiction can only be conferred upon the Supreme Court by federal legislature under entry 55 of the Federal Legislative List and not by the provincial legislature, it utterly fails to appreciate that it is the non-obstante provision of Article 212 of the Constitution itself that is allowing appeal by leave from a Provincial Administrative Tribunal to the Supreme Court. The principle enunciated in Gomal, that it is only the Parliament that can (if at all) enact legislation that acts upon or affects the jurisdiction of this Court[:] [t]he provincial assemblies cannot do so, has little significance once the Constitution itself has conferred appellate jurisdiction on the Supreme Court against matters arising from a Tribunal constituted under Article 212(1)(a). Even otherwise, the foundational premise of Gomal that only federal legislature can vest jurisdiction in this Court seems to have no nexus or co-relation with clause (2) which is simply an ouster clause. It is not as if the act of the Parliament under the proviso to clause (2) converts the Provincial Tribunal into a Federal Tribunal, or the provincial legislation into federal legislation, it simply ousts other courts from exercising jurisdiction in matters covered by a Provincial Tribunal.

13. Clause (3) is the third part of Article 212, which provides that an appeal shall lie to the Supreme Court from a judgment, decree order or sentence of the Administrative Tribunal, and the Supreme Court shall grant leave if the Supreme Court is satisfied that a substantial question of law of public importance arises in the case. Clause (3) has no co- relation whatsoever with the ouster clause of clause (2). Whether a Provincial Tribunal enjoys the ouster clause or not, does not affect the appellate jurisdiction of this Court. Clause (3) is independently connected with all the administrative Tribunals, including Provincial Tribunals, established under Article 212(1). It is once again reiterated that the appeal to the Supreme Court is available against orders of both the Federal and Provincial Administrative Tribunals by a special constitutional scheme provided under Article 212, which due to the non-obstante clause is over and above any sub-constitutional legislation under the regular constitutional scheme. Gomal, with respect, overlooks this important distinction and proceeds to assess the maintainability of appeal before the Supreme Court under Article 212(3) through a sub- constitutional lens. If there were no Article 212(3), Gomal would have been right in holding that only federal legislature can confer jurisdiction on the Supreme Court and not the provincial legislature, but the provincial legislature (or for that matter even the federal legislature) has not conferred the right of appeal on this Court; it is the Constitution itself that has done so under Article 212(3). It is therefore difficult for us to understand how Gomal holds that clause (2) is the gateway to clause (3), when we find no such co-relation between the two clauses. The view in Gomal that unless there is an Act of the Parliament in terms of the proviso to clause (2), the Supreme Court cannot sit over the decisions of the Provincial Tribunal in appeal, in our view and with due respect, is erroneous and deconstructs the unique constitutional scheme of establishing Administrative Tribunals under Article 212,

which grants an appellate remedy to the Supreme Court from the decisions of the all Administrative Tribunals federal and provincial.

14. For the above reasons, the law declared in Gomal that unless and until the proviso to Article 212(2) of the Constitution is activated, appeal against an order of a Provincial Tribunal is not available before this Court under Article 212(3) of the Constitution, and that in the absence of such a law passed by the Parliament, the decision of a Tribunal established under the Provincial law is to be challenged under Article 199 of the Constitution, is not correct and is therefore overruled.

Merits of the present case

15. Coming to the merits of the present case, briefly the facts are that vide letter dated 6th November 2000 issued by the Services and General Administration Department, Government of NWFP (as it then was), the provincial government wrote to the Registrar, Peshawar High Court for creation of 10 additional posts of Additional District and Sessions Judges to be filled on the recommendation of the Peshawar High Court under the erstwhile NWFP Senior Judicial Officers (Terms and Conditions of Service) Rules, 1979 (Rules, 1979). Names were solicited for the above posts by the Peshawar High Court from the District and Sessions Judges of KPK. One such letter addressed to District and Sessions Judge, D.I. Khan, is dated 09.12.2000. And in response, vide letter dated 21.02.2001 issued by the District and Sessions Judge, Dera Ismail Khan, name of respondent No.1, namely, Kaleem Arshad Khan, advocate along with one other was proposed from District D.I. Khan for the post of Additional District and Sessions Judge (ADJ) in the selection process initiated by the High Court in the year 2001. Respondent No.1 sat through the written examination and stood first in the said examination.¹¹ He was called for an interview and appeared before the Selection Committee and stood at the top of the merit list.¹² In pursuance to delegation notification dated 29.08.2001 issued under section 5 of the N.W.F.P Civil Servants Act, 1973, the Chief Justice of Peshawar High Court appointed four Additional and Sessions Judges vide Notification dated 19th September 2001; however, respondent No.1 who stood first in the said selection process was denied appointment. It is also pointed out that Khyber Pakhtunkhwa Judicial Service Rules, 2001 (Rules, 2001) were introduced repealing Rules, 1979.

16. The respondent No.1 challenged this non-selection before the Peshawar High Court, through a writ petition which was allowed vide judgment dated 09.4.2004 [reported as Kaleem Arshad Khan v. Secretary to Government of NWFP (2004 PLC (C.S.) 1558)] with the direction to appoint respondent No.1 as Additional and District Sessions Judge on the available seat. Thereafter, the petitioner was appointed vide Notification dated 22.02.2005. Thereafter, respondent No.1 was granted seniority w.e.f. the date of his Notification and not from the date of Notification of the rest of his batchmates, i.e., 19.09.2001, who were appointed from the same selection process held in the year 2001. The issue of seniority became more important because through selection process in the year 2002 and 2003, several other ADJs were appointed, who were placed higher in seniority than the said respondent. After the denial of the seniority by the Administration Committee of the Peshawar High Court vide letter dated 13.03.2021, the respondent No. 1 challenged the same before the Khyber Pakhtunkhwa Subordinate Judiciary Service Tribunal (Tribunal), which through the impugned judgment dated 18.12.2021, allowed his appeal and granted him seniority along with his batchmates who were appointed from the same selection process held in 2001. The contention of the petitioners, who are admittedly appointed from the selection process of the years 2002 and 2003, is that they are senior to respondent No.1 because the date of appointment of respondent No.1 is 22.02.2005.

17. We have heard the learned counsel for the parties and have examined the case record. Section 8(3) of the Khyber Pakhtunkhwa Civil Servants Act, 1973 provides that the seniority shall be determined in accordance with the Rules prescribed under the said Act and Rule 10(a) of the Rules, 2001 provides that persons selected for the service in the earlier selection shall rank senior to the persons selected in a later selection. The date or year of selection process determines the seniority of an officer as per Rule 10(a). Implied in the selection process is a group or batch of candidates who go through the selection process together and are subsequently selected and appointed together. Admittedly, respondent No.1 was a part and parcel the selection process of the year 2001 but he was denied appointment which he challenged before the High Court and was successfully appointed on the direction of the High Court. His seniority under Rule 10(a) will be considered from the date of his

selection process along with his group and batchmates who were a part of the same selection process. It is also admitted that the petitioners were appointed through the subsequent selection process of the years 2002 and 2003. Hence, the petitioners cannot claim seniority over respondent No.1.

18. We have gone through a well-reasoned judgment of the Tribunal, which has elaborately attended to the issue of seniority and other ancillary questions relating to limitation and res judicata, which were not specifically raised before us. We see no reason to take a view different from the view taken by the Tribunal and also find that there is no substantial question of law of public importance in this case that qualifies grant of leave to appeal. Hence, these petitions are dismissed, and the seniority of respondent No.1 settled by the Tribunal is upheld.

Sd/-

Syed Mansoor Ali Shah, J

Sd/-

Amin-ud-Din Khan, J

Sd/-

Jamal Khan Mandokhail, J

While I agree with the outcome and result I do not agree with the reasoning given, hence I have appended my separate opinion on maintainability.

Sd/-

Ayesha A. Malik, J

Sd/-

Athar Minallah, J

AYESHA A. MALIK, J---I have read the opinion of the majority as authored by Syed Mansoor Ali Shah, J. and while I agree with the conclusion on the issue of maintainability, being that these Petitions are maintainable, I do not agree with the reasons given therein. So far as the reasons and conclusions drawn on the merit of the case, I have no disagreement.

2. On the question of maintainability, the Gomal case¹ has been relied upon for its interpretation of Article 212 of the Constitution of the Islamic Republic of Pakistan, 1973 (Constitution). In the instant Petitions, the dispute emanates out of service appeals decided by the service tribunal for the Khyber Pakhtunkhwa against which Petitions under Article 212(3) of the Constitution have been filed before this Court. The relevant Provincial law is the Khyber Pakhtunkhwa Subordinate Judiciary Service Tribunal Act, 1991 (SJST Act) read with the Khyber Pakhtunkhwa Judicial Service Rules, 2001 (JS Rules), and the issue is whether leave to appeal can be filed before this Court in terms of Article 212(3) of the Constitution given the decision rendered in the Gomal case.

3. The Gomal judgment finds that where a Provincial law establishes Administrative Tribunals or Courts (herein after referred to as the Tribunal) under Article 212(1) of the Constitution, it must first, by way of a resolution followed by an Act of Parliament, oust the jurisdiction of all other courts to grant exclusive jurisdiction to the Provincial Tribunal, and only then can the remedy of appeal before this Court, as contained in Article 212(3) of the Constitution, be availed. The relevant law under consideration in the Gomal judgment was the Khyber Pakhtunkhwa Medical Teaching Institutions Reforms Act, 2015 (Act) which provided for a medical tribunal which heard appeals in service matters under the Act. The decision of the medical tribunal was challenged before this Court under Article 212(3) of the Constitution by way of a leave petition wherein the question of maintainability arose being whether a leave petition under Article 212(3) of the Constitution is maintainable. The Gomal judgment finds that where a Province establishes the Tribunal under Article 212(1) of the Constitution, then an appeal to the Supreme Court from a judgment, decree, order or sentence of the Tribunal shall lie to the Supreme Court, subject to the fulfilment of the requirements contained in the proviso to Article 212(2) of the Constitution. The said judgment explains that the proviso must be activated for the remedy under Article 212(3) of the Constitution to be made available because the Provincial Legislature, on its own, cannot affect or act upon the jurisdiction of this Court without intervening Federal legislation. The Gomal judgment refers to the proviso to Article 212(2) as the bridge between Sub-Articles (1) and (3) of Article 212 for the purposes of availing the constitutional remedy of an appeal before this Court. It further explains that if the

Provincial Assembly does not activate the proviso then the remedy of appeal before this Court is not available to such Provincial Tribunal.

4. Consequently, the question before us is whether these Leave to Appeal Petitions (Petitions) under Article 212(3) of the Constitution are maintainable given that these Petitions arise out of a judgment from a Provincial Tribunal, admittedly for which the requirements contained in the proviso to Article 212(2) have not been fulfilled.

5. The relevant Article of the Constitution (Article 212) provides that the appropriate legislature may by an Act establish the Tribunal having exclusive jurisdiction in respect of the subject-matters described in Sub-Articles (a), (b) and (c) of Article 212(1) of the Constitution. So, Article 212(1) allows the competent legislature, be it Federal or Provincial, as the case may be, to establish the Tribunal with exclusive jurisdiction for the given subject-matters. Article 212(1) starts with a non-obstante clause notwithstanding anything hereinbefore contained which addresses the constitutional authority with respect to legislative competence set out in Article 142 of the Constitution. It may be noted that Article 212(1) of the Constitution has an overriding effect on Article 142 of the Constitution which provides that it is subject to the Constitution. Therefore, the constitutional command is that while legislative competence is derived from Article 142 of the Constitution, the Constitution itself grants competence to the relevant legislature to establish the Tribunal on the given subject-matters under Article 212. Effectively, Article 212(1) of the Constitution gives competence to the Federal and Provincial Legislatures to establish the Tribunal on the given subject-matters such that the Tribunal has exclusive jurisdiction and Article 212(3) further provides that an appeal to the Supreme Court from the judgment, decree, order or sentence of the Tribunal shall lie to the Supreme Court. This appeal under Article 212(3) is not as of right but is subject to the satisfaction that a substantial question of law of public importance arises in the case.

6. Article 212(2), on the other hand, provides that notwithstanding anything hereinbefore contained, no other court can grant an injunction, or make any order, or entertain any proceeding in respect of any matter for which the Tribunal established under Article 212(1) has exclusive jurisdiction, and any pending matter before such other court shall abate. For the purposes of the Provincial Legislature, by way of a proviso, it states that the ouster of jurisdiction as explained in Article 212(2) of the Constitution shall not apply unless the Provincial Assembly, in the form of a resolution, requests for an Act of Parliament to extend the provisions of Article 212(2) to the Tribunal. Accordingly, Article 212(2) ousts the jurisdiction of all other courts for the purposes of the Tribunal under Article 212(1) established by Parliament and where the Provincial Assembly is concerned, it must by way of a resolution request for an Act of Parliament which will oust the jurisdiction of all other Provincial courts or tribunals. An example of this proviso being activated is the Provincial Service Tribunals (Extension of Provisions of the Constitution) Act, 1974 being a Federal law which extended the provisions of Article 212(2) of the Constitution to the Provincial Service Tribunals of Balochistan, Khyber Pakhtunkhwa, Punjab and Sindh resulting thereby in a direct leave to appeal petition before this Court under Article 212(3) of the Constitution.

7. Hence, the question is what is the effect of this ouster of jurisdiction under Article 212(2) and whether it is mandatory for the proviso contained therein to be activated in order for the leave to appeal to be filed before this Court. To my mind, Article 212(3) of the Constitution is the constitutional mandate which prescribes that leave to appeal before the Supreme Court for the Tribunal established under Article 212(1) of the Constitution can be filed directly, meaning thereby, the Constitution itself provides for the remedy of appeal before the Supreme Court. Both Sub-Articles (1) and (3) of Article 212 of the Constitution are exceptions to the legislative authority contained in Article 142 of the Constitution as the Constitution itself authorizes and permits the Federal and Provincial Legislature, irrespective of the authority given in Article 142 of the Constitution read with the Federal Legislative List (FLL), to establish the Tribunal and to allow its leave to appeal directly before this Court. Article 212(2) merely ousts the jurisdiction of other courts or fora. Resultantly, even though the Tribunal is established under Article 212(1), the ouster of jurisdiction of other courts is automatically triggered by Article 212(2) of the Constitution and with respect to federal courts but for the provincial courts it is necessary that the Provincial Assembly activate the proviso to Article 212(2) of the Constitution. In such case, the Tribunal will be an exclusive forum, which totally and completely ousts the jurisdiction of all other courts

or fora with respect to the special subject-matters contained in Sub-Articles (a), (b) and (c) of Article 212(1) of the Constitution. However, if the proviso is not activated, meaning there is no resolution by the Provincial Legislature (followed by an Act of Parliament) the ouster of jurisdiction will not be triggered. Consequently, a litigant will have the option to avail its remedy before any other forum including the remedy before the Supreme Court.

8. Gomal appears to read exclusivity and ouster as synonymous, because it relies on the principle that the Provincial Legislature cannot act upon the jurisdiction of this Court without intervening Federal legislation, hence, in order for the Tribunal to have exclusive jurisdiction, the proviso must be activated. This in turn means that if the proviso is activated, then the exclusivity of the Tribunal will mean ouster of the jurisdiction as well. However, to my understanding, exclusivity will not per se oust the jurisdiction of other courts without an express provision stating so as exclusivity of jurisdiction does not imply the ouster of jurisdiction.

9. For ouster of jurisdiction to take effect an express provision is required which is precisely what Article 212(2) of the Constitution does. In other words, the proviso does not act as a bridge between Sub-Articles (1) and (3) of Article 212, rather it allows and empowers the Provincial Legislature to decide whether, for the purposes of the establishment of the Provincial Tribunal, remedy should lie exclusively to the Supreme Court or, in the alternate, giving more options to the litigant.

10. As far as the discussion of the majority opinion in the instant matter on Entry 55 of the FLL², to my mind, and with great respect, is not relevant to the dispute at hand. The issue before us in this matter is simply whether the remedy of appeal as provided in Article 212(3) of the Constitution is available to the Petitioners. The answer to this question is in the affirmative as this remedy has been provided, specifically and categorically, by the Constitution itself, and not by way of any ordinary legislation. In my opinion, therefore, there is no issue pertaining to legislative competence under Entry 55 of the FLL. Consequently, the entire discussion as to Entry 55 of the FLL in the instant case, has no bearing or impact on the outcome of the issue of maintainability.

11. Furthermore, as to my understanding, even Gomal discusses Entry 55 of the FLL in its Paragraph No. 14 in a specific and limited context with reference to the Interim Constitution, 1972 (1972 Constitution) as an explanation to the point that competence to make law conferring additional jurisdiction on the Supreme Court lies only with Parliament, if at all, that too, to the extent and manner specified therein and further that the Provinces do not have legislative competence with regard to the jurisdiction of the Supreme Court. Thus with reference to this discussion, Gomal highlights that the 1972 Constitution did not have a provision equivalent to Article 212(3) of the existing Constitution and linked the legislative entry to Article 188 thereof. This provision of the 1972 Constitution has no equivalent in the present Constitution and it is for this reason that Gomal has expressed its reservations as to Entry 55 of the FLL by using the words if at all in parentheses, the import of which may have escaped the attention of the majority's opinion. While discussing the present Constitution in Paragraph No. 15, Gomal stresses on the fact that the Provinces have no legislative competence to enact legislation that affects or acts upon the jurisdiction of this Court, and hence, in this context, Gomal considers the proviso to Article 212(2) as a bridge between Article 212(1) and (3) of the Constitution, meaning thereby Article 212(3) cannot be regarded as an independent standalone provision as it needs the proviso to activate the exclusivity and ouster of jurisdiction. So the focus of Gomal in fact is the issue of legislative competence of the Provincial legislature with respect to the jurisdiction of this Court.

12. Accordingly, as Article 212(1) of the Constitution itself confers jurisdiction on the Provincial Legislature to establish the Provincial Tribunal under Article 212(1), the Constitution also confers appellate jurisdiction to the Supreme Court from a judgment, decree, order or sentence of the said Provincial Tribunal, the remedy of leave to appeal before the Supreme Court is available against the decision of the KPK Service Tribunal established under Article 212(1) since these Petitions are with reference to the appeal under section 5 of the SJST Act from an order of the said Service Tribunal.

13. Accordingly, these Petitions under Article 212(3) of the Constitution are maintainable.

MWA/A-2/SC Petitions dismissed.

[1](#) Or Rule 9(1)(a) of the Khyber Pakhtunkhwa Senior Judicial Officers (Terms and Conditions of Service) Rules, 1979 (since repealed by Rule 14 of the Rules, 2001)

[2](#) Dean/Chief Executive, *Gomal Medical College, Medical Teaching Institution, D.I. Khan v. Muhammad Armaghan Khan*, PLD 2023 SC 190.

[3](#) Para 20 *ibid*

[4](#) Constituted under the Act, 2023.

[5](#) See para 20a, b, c and d of *Gomal*

[6](#) As a matter of background Khyber Pakhtunkhwa Medical Teaching Institution Reforms Act, 2015 was enacted and in the year 2020 through an amendment in the said Act an Appellate Tribunal was established in terms of Article 212(1)(a) of the Constitution.

[7](#) Para 15 of *Gomal*

[8](#) Except the Advocate-General Sindh who took a novel argument that both the remedies under Article 199 and under Article 212(3) are available, however, he failed to substantiate his point.

[9](#) Para 6 of *Gomal*

[10](#) Article 142 also begins with the phrase: Subject to the Constitution

[11](#) Award List dated 21 April 2001.

[12](#) See para 4 of *Kaleem Arshad Khan v. Secretary to Government of N. W.F.P*, 2004 PLC (C.S.) 1558

[1](#) Dean/Chief Executive, *Gomal Medical College, Medical Teaching Institution, D.I. Khan v. Muhammad Armaghan Khan and others* (PLD 2023 SC 190) (*Gomal*).

[2](#) Entry 55 of the Part-I in Fourth Schedule:

55. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List and, to such extent as is expressly authorized by or under the Constitution, the enlargement of the jurisdiction of the Supreme Court, and the conferring thereon of supplemental powers.