

Judgment Sheet
IN THE PESHAWAR HIGH COURT,
PESHAWAR.

JUDICIAL DEPARTMENT.

JUDGMENT
Writ Petition No.3587-P/2022.
Date of hearing 16.05.2023.

Maqbool Khan etc
Vs
Assistant Commissioner, Lower Kurram, Sadda &
others.

Petitioner (s) by: Mr. Abdul Hafeez
Advocate.

Respondent(s) by: M/s Muhammad Moazzam
Butt Advocate & Junaid
Zaman AAG.

WIQAR AHMAD, J:- Petitioners in instant Constitutional Petition, are aggrieved from order/ letter No.307-9/AC LK dated 17.09.2022, rendered by Assistant Commissioner, Lower Kurram Sadda, whereby direction had been issued to respondents No.2 to 4 for dispossessing petitioners from premises in dispute.


2. Comments have been filed wherein respondent No.1 has relied on

provisions of Khyber Pakhtunkhwa Alternate Dispute Resolution Act, 2020 (hereinafter referred to as ADR Act).

3. During pendency of instant Constitutional Petition private respondents No.5 to 8 had also filed an application (CM No.2141-P/2022) for their impleadment, which was allowed by this Court vide order dated 15.11.2022 and resultantly they have also been impleaded in panel of respondents.

4. We have heard arguments of learned counsel for petitioners, learned counsel representing respondents No.5 to 8 as well as learned AAG for official respondents and perused record.

5. Perusal of record reveals that through instant Constitutional petition, propriety of impugned order has been challenged but vires of law under which same had purportedly been issued, has not been challenged in instant petition. Scope of our discussion would therefore be restricted to propriety of impugned order in light of



law i.e, Section 3 of the ADR Act, (relied upon by respondents). Through impugned order, respondent No.1, i.e, Assistant Commissioner, Lower Kurram Satta had issued direction to local police for vacating two houses (Compounds) from its occupants and to retain its possession by deputing police personnel there. To know the nature of the directions issued, said order is also reproduced herein for ready reference:-

“Reference above noted subject and to inform that there is a dispute over land situated near Mir Bagh/ Sateen between the inhabitants of Sateen Lower Kurram and inhabitants of Mir Bagh/Badama Masozai of Central Kurram. Both parties have earlier private Jirga members for resolution of the dispute between them.

In this connection, approx.02 compounds/ houses have been constructed at two different places, reportedly on the advise of private Jirga members in an effort to resolve the issue between the parties. Now, one of Jirga members namely Mula Nabi of Thall, has intimated this office to vacate the said rooms/houses from its occupants for taking over its possession by the administration

till amicable resolution o the issues between the parties.

Keeping in view, please vacate the said two compounds/houses constructed near Sateen from its occupants and deploy 03/04 constables over the same so that the issue between both parties could be resolved at its earliest.”

6. Respondent No.1 in his comments has relied upon the powers vested by him under provisions of ADR Act, section-3 whereof is also reproduced herein for ready reference:-

3. Reference in Civil disputes.---

(1) The court, after appearance of all parties, as soon as possible, may refer a Civil dispute for Alternate Dispute Resolution except, where- (a) any of the parties to the dispute do not agree for Alternate Dispute Resolution; (b) the court, having regard to the facts and circumstances of the case, is satisfied that there is no possibility of resolution of the dispute through Alternate Dispute Resolution; or (c) an intricate question of law or facts is involved in the case which cannot otherwise be resolved through Alternate Dispute Resolution. (2) Without limiting the powers of the court under sub-section (1), the Deputy Commissioner or any other officer nominated by

Government may also refer a Civil dispute for Alternate Dispute Resolution. (3) Before referral of a Civil dispute to Alternate Dispute Resolution under sub-sections (1) and (2), the referring authority may frame issues with the consent of the parties, for facilitating the settlement: Provided that the Saliseen (ثالسين), (with the consent of the parties, frame additional issues if so required during the course of Alternate Dispute Resolution proceedings. 5 (4) In every Civil dispute where a reference is made for Alternate Dispute Resolution, the referring authority shall provide a time table for completion of Alternate Dispute Resolution proceedings not exceeding three months: Provided that the referring authority, on the application of both the parties, may extend the time granted for resolution of the case through Alternate Dispute Resolution: Provided further that the total time, granted for completion of Alternate Dispute Resolution proceedings, shall not exceed six months in any case. (5) The trial or final adjudication of a case, referred for Alternate Dispute Resolution, shall be postponed till the completion of the time allotted for under subsection (3). (6) The referring authority or the Saliseen (ثالسين), (in order to prevent the Civil dispute from further aggression or to maintain status quo, if deem appropriate, may issue interim injunction.

Respondent No.1 has more specifically been claiming existence of powers in his office being provided under sub Sections 2, 3 of Section 3 of ADR Act. The power of referring a civil dispute has been provided to be lying with a civil Court under sub section 1 of the above reproduced Section 3 of the ADR Act. Sub section 2 thereof has however been providing for powers of Deputy Commissioner or any other officer nominated by government to refer a civil dispute for alternate dispute resolution but (as per sub Section 3 of the ADR Act) for such referral of dispute and framing of issues by referring authority or the *Saliseen* consent of parties would be required. The consent mentioned in sub section 3 would also be required for empowering the referring authority, be it a civil Court or the Deputy Commissioner or other officer authorized under the law. On holistic reading of Section 3 of ADR Act, this fact

becomes manifestly clear that for referring of matter to *Saliseen* for alternate dispute resolution, consent of parties would be sine qua non. The order impugned herein has been passed in purported exercise of powers vested with Referring Authority under sub Section 6 of Section 3 of the ADR Act. The legislature while enacting said clause has only been intended to authorize the referring authority or *Saliseen* for making an order of maintaining status quo in order to prevent a civil dispute from further aggression and only for such a purpose power of issuing an interim injunction has been provided. This was not an open ended power, for making any order, in guise of interim injunction. Legislature has consciously used restricted language and same restriction may readily be found in said clause. An order under subsection-6 of section-3 of the ADR Act should therefore be regulated. For said purpose the exercise of powers shall only be made in the following conditions and would

be subject to the limitation given herein below;


A. An order under above referred provision may only be issued when a Referring Authority is entrusted with such capacity by express consent of parties, in writing, same is the situation of Saliseen, who may issue such an order after the matter is being referred to them with express consent of all the affected parties;

B. Such order may only be passed when there is apprehension that a civil dispute is likely to result into aggression or breach of peace;

C. Such order cannot be given beyond scope of maintaining status quo;

D. Such order should be time bound in nature and should be subject to final decision in matter.

7. If we discern the impugned order on above mentioned touchstone, we do not find it to be justified on a number of scores. First of all it is noticeable that the required consent of petitioner, (whereunder respondents should have been authorized) could not be found in case in hand.




Although it is mentioned in comments that petitioner had earlier given his consent for private members Jirga but when matter had subsequently been taken up by respondent No.1 and consent of petitioners had been solicited, they had not given such consent but had asked for some time to consult the issue with other co-tribesmen (Para B of comments). In such a situation the Assistant Commissioner (respondent No.1) could not show that petitioners had given their consent at the time of issuance of impugned order. Any earlier consent statedly acquired from petitioners cannot be deemed sufficient for authorizing respondent No.1 for all times to make any injunctive order in respect of disputed premises.

8. The impugned order was also not for maintaining status quo but for altering status quo. It has been directed through impugned order that possession of the house should be taken from its inhabitants and retained by local police. An

order of this nature can never be deemed authorized under sub section 6 of Section 3 or any other provision of ADR Act or other laws.

9. The order was also not indicating how had the urgency erupted in a matter which had earlier been referred for decision of *Saliseen* and what particular apprehension of breach of peace was there under which even order for maintaining status quo could be issued. The order has simply been issued on direction of a private member Jirga i.e, Mula Nabi and even no unanimous decision of Jirga was there in field. On all scores the impugned order was not found justifiable, which requires interference of this Court for course correction.



10. In light of what has been discussed above, instant writ petition is allowed the impugned order is set aside. For rest of the reliefs in respect of immovable property, petitioner would be at liberty to

have recourse to appropriate forum available
to him under the law.

Announced.
16.05.2023.


CHIEF JUSTICE


JUDGE