

PESHAWAR HIGH COURT, PESHAWAR
ORDER SHEET

Date of Order of Proceedings	Order or other Proceedings with Signature of Judge(s).
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05.11.2019	<p><u>C.M. No.2224-P/2019 in W.P. No.5265-P/2018</u></p> <p>Present: M/s. Qazi Babar Irshad, Additional Attorney General, Mr. Shumail Ahmad Butt, Advocate General and Mr. Amir Javed, Advocate, on behalf of applicants/respondents No.1, 2, 3 and 5.</p> <p>M/s. Zia Ur Rehman Tajik, Shabbir Hussain Gigyani, and Naveed Akhtar, Advocates, for the petitioners in main writ petitions.</p> <p>*****</p> <p><u>ABDUL SHAKOOR, J.</u> Through this application, applicants/respondents No.1, 2, 3 and 5, have prayed for the constitution of Larger Bench in the main writ petition and petitions connected therewith, to give an independent view in it, since Divisional Bench, headed by the Hon’ble Chief Justice in the case of <u>“Abdul Rasheed Vs. Federation of Pakistan and others”</u> (decided on 18.10.2018), has taken a view altogether different than the one earlier expressed by 21 different Benches of this Court in 24 cases involving the same points as were involved in the aforesaid case of Abdul Rasheed. It was also made a point for the constitution of Larger Bench that previously Divisional Benches of this Court, while delivering the judgments in similar cases,</p>

	<p>have held that it lacked the jurisdiction to question the verdicts of Field General Court Martial passed under the Pakistan Army Act, 1952.</p> <p>2. Learned Additional Attorney General, learned Advocate General, Khyber Pakhtunkhwa and Mr. Amir Javed, Advocate, appearing on behalf of applicants/respondents No.1, 2, 3 and 5 in support of their prayer made in the instant application for the constitution of Larger Bench in the aforesaid writ petition and petitions connected therewith, have argued, the Divisional Bench, headed by the Hon'ble Chief Justice, while acquitting the accused/convicts in the above referred case (Abdul Rasheed Vs. Federation of Pakistan and others) and connected matters therewith; who were convicted by the Field General Court Martials under the Pakistan Army Act, 1952 has not taken note of 24 decisions of almost 21 Benches of this Court, wherein, in similar cases having the same facts, in view of limited scope of the judicial review mandated under Article 199 of the Constitution of Pakistan, 1973, in the face of repeated admissions of the guilt made by the convicts, culminating in the one before the Court Martial, have observed, it would not be appropriate for this Court to interfere in the impugned conviction recorded and sentence awarded by the Field General</p>
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Court Martials under the Pakistan Army Act, 1952. It is, by now, well settled through the judicial pronouncements of the Apex Court that earlier judgment of Bench of equal Judges of the High Court on the same point of law was binding on the subsequent Bench, and if the subsequent Bench intends to take a different view, then it has to make a request for the constitution of Larger Bench, however, with all respect and humility, the Bench, headed by the Hon'ble Chief Justice, has given a different verdict than the verdicts of the earlier Divisional Benches of this Court, on the same very point, therefore, it has become essential, a Larger Bench be constituted for an independent view in the aforesaid writ petition and petitions connected therewith. Since the same will resolve the controversy of different opinions of the Benches of this Court in similar matters, decided by the Military Courts. In support of their contention, they relied upon the cases *“Multiline Associates Vs. Ardeshir Cowsjee (PLD 1995 SC 423), Ardeshir Cowsjee Vs. Karachi Building Control Authority (KMC) (1999 SCMR 2883), Atma Ram Vs. State of Punjab (AIR 1959 SC 519 ref), M/s. WAK Limited Multan Road, Lahore Vs. Collector Central Excise and Sales Tax, Lahore (Now Commissioner Inland Revenue LTU, Lahore) (2018 SCMR 1474),*

Muhammad Aamir Khan Vs. Government of Khyber Pakhtunkhwa through Senior Member Board of Revenue, Khyber Pakhtunkhwa and others (2019 SCMR 1021) and Shafqat @ Shafaat Vs. The State (PLD 2019 SC 43).

3. On the other hand, learned counsel appearing on behalf of the petitioner of the main petition and petitioners of the connected petitions, vehemently opposed, the instant application being based on malafide and not maintainable and prayed for its dismissal with costs. They, in support of the point of malafide, pointed out, the Bench, headed by the Hon'ble Chief Justice had been stressing to the applicants/respondents to argue the case but they have avoided it on the one pretext or the other. On 19.03.2019, applicants/respondents were given last opportunity by the Bench to produce the relevant record regarding conviction of the accused/convicts for the examination of their counsel on 25.05.2019 positively, failing which the matter would be heard on the available record on 28.05.2019. However, on 28.05.2019 instead of submitting the requisite record on the basis of which conviction was recorded against the accused/convicts of the aforesaid cases, applicants/respondents only submitted the comments. As the comments so filed were not supported by the sworn

	<p>affidavit, therefore, they were directed by the Bench to submit the said comments alongwith sworn affidavit on the next date of hearing. After the receipt of comments, the case was fixed for hearing on 04.09.2019 and applicants/respondents' counsel instead of arguing the case, sought further time. However, the Bench adjourned the matter with the condition that it will be decided on 01.10.2019 on the basis of written arguments of the applicants/ respondents and arguments of the counsel of the accused/convicts of the above petitions. On 01.10.2019, the applicants/respondents, instead of submitting written arguments, as per the direction of the Bench dated 04.09.2019, filed the instant application for the constitution of Larger Bench. This conduct of the applicants/respondents is more than sufficient in proving, the instant application is filed with malafide intention to delay the disposal of the above writ petitions which are pending disposal since long. In support of the point of non-maintainability of the instant application, it was contended, there is no provision in the Peshawar High Court Rules or Civil Procedure Code, 1908, which may give a right to party of case to file an application before the Court for the constitution of Larger Bench; and thus, the instant application is liable to be dismissed on this score alone.</p>
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	<p>4. We have seriously considered the submissions of the learned counsel of the parties and carefully gone through the judgment passed by the Bench of this Court in the case of <u>“Abdul Rasheed Vs. Federation of Pakistan and others”</u> decided on 18.10.2018 and earlier 24 judgments of this Court, probably, rendered by 21 different Benches.</p> <p>5. No doubt, it is well settled principle, when a subsequent Bench of the High Court comprising same numbers of Judges, does not wish to agree with the view of earlier Benches on the same point then instead of giving a different view, it has to request for the constitution of Larger Bench to revisit the earlier view of the Court. The wisdom behind to honor the earlier view of the Benches of the same High Court by the subsequent Bench on the same point of law, is to maintain harmony in the decisions of the Court on the same point of law. If, a Bench of equal numbers of Judges, is permitted to give a different view than the earlier view of the Bench of equal numbers of Judges on the same point of law, it will certainly create a chaos and confusion, not only for the public at large, but also for the Courts, subordinate to the High Court. Since, Courts subordinate to the High Court will be unable to follow different views of the High Court on the same point of</p>
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	<p>law as guiding principle for resolution of the controversy arising in the cases on the same point. Perusal of the judgment dated 18.10.2018 passed in the case of Abdul Rasheed would show that in it, no different view has been expressed than the view of earlier Benches of this Court, as submitted by the applicants/respondents. It has exercised the jurisdiction of judicial review, keeping in view the record, came before it relating to the cases of accused/convicts decided by the Military Courts. As, it is settled principle, High Court, in exercise of its judicial review under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, has the mandate to positively interfere with the decisions of the Criminal Courts/Military Courts, against which no right of appeal is available to the accused/convicts. If the case of prosecution was based on no evidence or insufficient evidence, void, quorum non-judice, without jurisdiction and based on malafide or malice in law. A close examination of the earlier judgments of the Benches of this Court would show that there was no such material before them, which came in the case of Abdul Rasheed and cases connected therewith. Hence, they have declined to interfere with the conviction recorded and sentence awarded to the convicts by the Military Courts. Whereas, the Bench decided the case of Abdul Rasheed</p>
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	<p>Vs. Federation of Pakistan and other connected cases, has summoned the complete record of the Military Courts on the basis of which it has recorded the conviction of the accused/convicts and accordingly awarded them sentences. Examination of the said record revealed to the Bench that questions put to all the accused-persons by the Military Courts were one and the same with exactly the same answers in all cases. Statements made by the accused-persons show that they spoke what they were briefed in the Interment Center, as it was next to impossible, the accused-persons, after remaining in the Interment Center for years, could remember the exact date, time and minute of the alleged occurrence in which they were convicted. Proceedings, before the Military Courts, infact, were a complete prosecution show and accused/convicts were denied their fundamental right of engaging a private counsel of their choice at their own expense. It was also observed by the Bench, nothing on the record showed that during trial, families of the accused/convicts who frequently requested for meeting with them in the Interment Center were ever informed or had the knowledge of the trial proceedings. The alleged confessional statements made by the accused/convicts without any independent advice after months/years of confinement with Military Courts</p>
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and Interment Center, cannot be made a base for awarding them a sentence of capital punishment. All this led the Bench to conclude that it, in view of the aforesaid principle of judicial review can interfere with the conviction recorded and sentences awarded to the accused/convicts by the Military Courts.

6. The conduct of the applicants/respondents which has been pointed out by the learned counsel of the petitioners is showing, they have filed the instant application simply to linger on the matters pending adjudication before this Court for its disposal since long. It is also worth to mention here, applicants/respondents since the admission of the aforesaid petitions till 27.09.2019 has never made a request for the constitution of Larger Bench. When they were finally directed by the Bench to submit their written arguments on 01.10.2019 for the disposal of the aforesaid cases then they sprung into action for filing the aforesaid application for the constitution of Larger Bench. We are fully agreed with the contention of the learned counsel of the accused/convicts that there is no provision either in Peshawar High Court Rules or Civil Procedure Code, 1908, which may give a right to party of a case to make a request for the constitution of Larger Bench. It is also not out of context to mention here, this Court till date has

neither heard the arguments of the learned counsel of the parties in the aforesaid writ petition and petitions connected therewith, nor a situation has arisen wherein it could examine the record. As, till date, the applicants/respondents have not produced the record of the Military Courts on the basis of which it has recorded conviction of the accused/convicts of the petitions pending disposal. Thus, no question of constitution of Larger Bench arises.

7. Apart from the above, it is a matter of record, applicants/respondents have already challenged the decision of this Court rendered in the case of Abdul Rasheed and cases connected therewith before the Apex Court. The Apex Court, after entertaining the appeals of the applicants/respondents, was pleased to suspend the operation of the judgment rendered by this Court in the case of Abdul Rasheed and cases connected therewith. When such being the case, we understand, this Court cannot constitute a Larger Bench in the case, which's operation stood suspended by the order of the Apex Court viz-a-viz the judgments rendered by the earlier Benches of this Court.

8. For what has been discussed above, we do not see any reason for the constitution of Larger Bench as prayed for by the applicants/respondents No.1, 2, 3 and

	<p>5. Accordingly, the instant CM is dismissed, being based on malafide and not maintainable.</p> <p>9. Main writ petition and petitions connected therewith are adjourned to 26.11.2019 for final arguments. Till the date fixed, interim order granted in all the cases shall continue.</p> <p>10. It may be noted, no further adjournment shall be granted in the aforesaid cases to anyone on any ground on the date fixed. Copy of this order be placed on the connected writ petitions.</p> <p><u>Announced</u> Dt:05.11.2019</p> <p style="text-align: right;">Chief Justice</p> <p style="text-align: right;">Judge</p>
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