Form No.HCJD/C-121

ORDER SHEET
IN THE LAHORE HIGH COURT LAHORE.

JUDICIAL DEPARTMENT

Writ Petition No.9027/2017.

Muhammad Jawad Hamid
Vs
Mian Muhammad Nawaz Sharif, etc.

S. No. of order/ proceedings	Date of order/ proceeding	Order with signature of Judge, and that of parties or counsel, where necessary

06.07.2018. Rai Bashir Ahmad, Muhammad Azhar Siddique, Mirza Naveed Baig, S. Parveen Mughal, Naeem ud Din Chaudhry, Abdullah Malik, Sardar Ghazanfar Husain, Mr. Adeel Hassan and Syed Umair Abbas, Ch. Naeem ud Din Chaudhry, Advocates for the petitioner.

Syed Ehtisham Qadir, Prosecutor General Punjab assisted by Rai Akhtar Hussain, Deputy Prosecutor General and Mr. Muhammad Amjad Rafiq, Additional Prosecutor General on court's call.

Mr. Sittar Sahil and Mr. Muhammad Hammad Khan Rai, Assistant Advocate General.

The instant writ petition has arisen out of the following admitted facts:-

A private complaint was filed by Muhammad Jawad Hamid (petitioner) under section 190(1)(a) of the Code of Criminal Procedure (Act V of 1898 (*hereinafter to be called as 'Code'*) and section 19(3) of the Anti-Terrorism Act, 1997, (*hereinafter to be called as "ATA")* for offences under sections 302/324, 295-B/452, 395/427, 365/506, 120-B, 148/149, 337-F(vi), 337-C, 337-F(iii), 337-A(v), 337-L(ii), 337-F(i), 337-A(i) Pakistan Penal Code (Act XLV of 1860) read with Section 7 of the ATA and section 155-C of Police Order, 2002 before Special Court under Anti-Terrorism Act, 1997, at Lahore (*hereinafter to be called as "ATC"*) , wherein, 139 persons were cited as accused; the case of Shahid Aziz Butt (respondent No.139) was

separated; in the separate trial he was finally convicted and sentenced and the court has been informed that he is now out after serving out his entire sentence. After recording cursory evidence, vide order dated 07.02.2017 respondents No.13 to 138 have already been summoned and are facing trial before the ATC. Vide the same order dated 07.02.2017 the learned trial court opined that there is no evidence to prove prima facie case against respondents No.1 to respondents No.12, as such, they were not summoned and their names were directed to be deleted from the list of respondents. (See para-41 of the impugned order.). The order dated 07.02.2017 to the extent of non-summoning of respondents No.1 to 12 is under challenge by the petitioner/complainant through the instant Writ Petition No.9027/2017 "*Muhammad Jawad Hamid versus Mian Muhammad Nawaz Sharif and others".*

2. Since the question about maintainability of writ petition against an order of summoning/non-summoning in the proceedings carried out under ATA was the basic legal question to be resolved, therefore, we took the same as primary issue and after hearing the learned counsel for the parties at length, vide our short order dated 11.05.2018, held that:-

> *"For the reasons to be recorded latter in a detailed judgment, after hearing the learned counsel for respective parties, we hold that against an interim order passed by a Court under Anti-Terrorism Act, 1997, during proceedings of a case, including an order of summoning/non-summoning the accused, writ petition is not maintainable, as under Anti-Terrorism Act, 1997, applicability of sections 435, 436 and 439 Cr.P.C. has not been restricted, except under section 21(d) to the extent of bail, hence, criminal revision is competent."*

This shall form the detailed reasoning of the above reproduced short order.

3. Rai Bashir Ahmad and Mirza Naveed Baig, Advocates representing the petitioner while referring to the principles of interpretation of statutes, argued that when any provision by itself is clear in its literal meaning then it may not involve question of

interpretation, however, where there remains any ambiguity, only then interpretation would be required. According to the learned counsel as ATA is a special law having overriding effect on the Code, hence, in the light of sections 21-D, 31 and 32 of ATA, criminal revision under general law i.e. Code is not maintainable and furthermore since under section 25 of the Act only a remedy of appeal has been provided, therefore, no other meaning can be imported to say that criminal revision would lie as if this was the intent of the legislators they could have provided remedy of criminal revision in the statute itself. Added that the law was promulgated for speedy trial of heinous offences, which create panic in the society and this aspect is clear from the preamble of ATA. Submit that law is to be interpreted keeping in mind the purpose of the relevant law reflected by its preamble. The learned counsel therefore, concluded that if the legislator had the intent to provide multiple remedies to the persons aggrieved of orders of the ATC under ATA, then its scope could have been extended to make the provisions of Section 435, 436, 439 of the Code, applicable. The learned counsel by referring different sections of ATA submits that since revisional jurisdiction has not been provided against interlocutory orders, and the legislators have intentionally kept the provisions of Section 435, 436, 439 of the Code away from the proceedings under the above Act, therefore, by interpreting the statute a remedy of revision cannot be extended against interlocutory orders.

4. Mr. Muhammad Azhar Siddique, Advocate adopted the arguments of his learned colleagues with a view that any illegality can be rectified by the High Court in exercise of jurisdiction under section 561-A Cr.P.C.

5. Learned Prosecutor General referred 2012 P.Cr.L.J. 696, 2000 YLR 2668 and 2000 P.Cr.L.J. to contend that in these cited cases criminal revision has been held to be not maintainable, however, in the light of guidance provided in the latest case law i.e. PLD 2018 SC 351, 2016 P.Crl.L.J 1463, PLD 2012 IHC 35, PLD 2006 Lhr 290, criminal revision would lie against the orders passed by ATC. Further argued that

bar contained under section 21(d) is only to the extent of the bail and could not take away revisional jurisdiction of the High Court. By referring Section 21(d), 25, 31 and 32 of ATA, he further argued that ATA itself does not provide any bar on the jurisdiction of this Court under sections 435 and 439 of the Code, hence, the High Court can exercise revisional jurisdiction in appropriate case. By referring section 19(14) and 32 ATA and Section 6 of the Code, he argued that for all intents and purposes the High Court being the appellate court has supervisory authority over the ATC as inferior/subordinate court, therefore, the scope of Section 435, 439 of the Code, cannot be curtailed. In this respect learned Prosecutor General referred the case PLD 2016 SC 55 and PLD 2018 SC 351)

6. Mr. Muhammad Amjad Rafiq learned Additional Prosecutor General argued that in the light of *Mehram Ali's case* PLD 1998 SC 1445, this Court can exercise revisional jurisdiction in appropriate cases against the proceedings of ATC. Further added that Section 31 ATA deals with finality of the judgment and order which is appealable and when the ATA was promulgated appeal lied before the Appellate Tribunal but later on amendment was introduced and High Court became the appellate court of ATC and the ATC is deemed to be court of Sessions under ATA and the provisions of Code are applicable until they are not inconsistent with the Code, which make it clear that against the interlocutory order or an interlocutory order of final nature, against which no appeal is provided, only revision is competent. Added that in Suppression of Terrorist Activities (Special Courts) Act, 1975, Terrorist Affected Areas (Special Courts) Act, 1992 and National Accountability Bureau Ordinance, 1999 (No.XVIII of 1999), specific prohibitions have been imposed against the filing of revision but no such condition has been imposed in the ATA, as such revision is maintainable and visitorial jurisdiction of the High Court over its subordinate courts cannot be curtailed.

7. Mr. Sittar Sahil, Assistant Advocate General, while agreeing with the arguments addressed by the learned Prosecutor General as well as the learned Additional Prosecutor General, and while referring to various provisions of law argued that writ petition is not maintainable and remedy of criminal revision can be invoked by the petitioner against the impugned order.

8. We have heard the arguments of learned counsel for the parties at full length and analyzed the legal preposition in the light of Articles 175, 203 of the Constitution of Islamic Republic of Pakistan, 1973 and Sections 2(c), 13(4) 19(14), 21-D, 25, 30(2), 31 and 32 of the ATA, Sections 6, 435, 439 and 561-A, of the Code.

9. On the face of it the question whether a Writ Petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, a Revision Petition under section 435, 439 of the Code or a petition under section 561-A of the Code, would be maintainable to check the correctness, legality or propriety of any findings recorded by the ATC with respect to any order which is not appealable under ATA, appeared to be a perplexed question and admittedly there existed views of the courts for and against the said legal proposition, as some judgments of the courts held that a revision petition is not maintainable under the ATA on account of a collective reading and effect of sections 25, 31 and 32 of the said Act and in some judgments the court have held that revision petition is maintainable.

10. We have examined this issue in the light of relevant provisions of ATA and the Constitution of Islamic Republic of Pakistan, 1973. Article 175 of the Constitution deals with establishment of certain courts by implication of law other than Supreme Court, High Courts and the Federal Shariat Court. In **Mehram Ali's Case** the combined effect of Article 175, 202 and 203 of the Constitution was examined and in para No.11 thereof, it was held:-

> *(i) That Articles 175, 202 and 203 of the Constitution provide a framework of Judiciary i.e. the Supreme Court, a High Court for each Province and such other Courts as may be established by law.*

(ii) That the words ***"such other Courts as may be established by law" employed in clause (1) of Article 175 of the Constitution are relatable to the subordinate Courts referred to in Article 203 thereof****.*

(iii) That our Constitution recognises only such specific Tribunal to share judicial powers with the above Courts, which have been specifically provided by the Constitution itself Federal Shariat Court (Chapter 3-A of the Constitution), Tribunals under Article 212, Election Tribunals (Article 225). ***It must follow as a corollary that any Court or Tribunal which is not founded on any of the Articles of the Constitution cannot lawfully share judicial power with the Courts referred to in Articles 175 and 203 of the Constitution****.*

(iv) That in view of Article 203 of the Constitution read with Article 175 thereof the supervision and control over the subordinate judiciary vest in High Courts, which is exclusive in nature, comprehensive in extent and effective in operation*.*

(v) That the hallmark of our Constitution is that it envisages separation of the Judiciary from the Executive (which is founded on the Islamic Judicial System) in order to ensure independence of Judiciary and, therefore, any Court or Tribunal which is not subject to judicial review and administrative control of the High Court and/or the Supreme Court does not fit in within the judicial framework of the Constitution.

(vi) That the right of "access to justice to all" is a fundamental right, which right cannot be exercised in the absence of an independent judiciary providing impartial, fair and just adjudicatory framework i.e. judicial hierarchy. The Courts/Tribunals which are manned and run by executive authorities without being under the control and supervision of the High Court in terms of Article 203 of the Constitution can hardly meet the mandatory requirement of the Constitution.

(vii) That the independence of judiciary is inextricably linked and connected with the process of appointment of Judges and the security of their tenure and other terms and condition."

[Emphasis have been supplied by us]

Section 6 of the Code accommodates classes of various criminal courts which are liable to revisional check of High Court; for facility of reference, relevant provisions are reproduced hereunder:-

Code of Criminal Procedure (Act V of 1898)

6. Classes of Criminal Courts and Magistrates: *(1)* ***Besides*** *the High Courts and* ***the Courts constituted under any law other than this Code*** *for the time being in force, there shall be two classes of Criminal Courts in Pakistan, namely:-*
(i) Courts of Session;
(ii) Courts of Magistrate.

[(2) There shall be the following classes of Magistrate, namely:-
(i) Magistrate of the First Class;:
(ii) Magistrate of the Second Class; and
(iii) Magistrate of the Third Class,

435. Power to call for records of inferior Courts:

(1) The High Court or any Sessions Judge may call for an examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying, itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior 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.

Explanation: *All Magistrates shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section.*

439. High Court's powers Of revision:

(1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court, may, in its discretion,, exercise any of the powers Conferred on a Court of Appeal by Sections 423, 426, 427 and 428 or on a Court by Section 338, and may enhance the sentence and, when the Judges Composing the Court of Revision are equally divided in. opinion, the case shall be disposed of in manner provided by Section 429.

(2) No order under this section, shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by a Magistrate of the First Class.

(4) Nothing in this section shall be, deemed to authorize a High Court—

(a) To convert a finding of acquittal into one of conviction; or

(b) to entertain any proceedings in revision, with respect to an order made .by the Sessions Judge under Section

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

> *(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled at so to show cause against his conviction"*

Examination of Section 6 of the Code uncovers that there might be ***other courts*** established by any law other than the courts created under the Code. All criminal courts whether created by the Code or some other law are the Courts inferior/subordinate to High Court in the light of Mehram Ali Case (supra). Therefore, the revisional control under Section 435 to 439 of the Code being supervisory and curative in nature, will be available to the High Court unless expressly ousted by such special law.

11. Now the question would remain as to what would be the scope and extent of Section 21-D, 31 and 32 of ATA? Before dilating upon this legal proposition, we would like to refer the relevant provisions:-

> **21D. Bail.—** (1) **Notwithstanding the provisions of sections** 439, 491, 496, 497, 498, 498A and 561 of the Code, no Court, other than an Anti-terrorism Court, a High Court or the Supreme Court of Pakistan, **shall have the power or jurisdiction to grant bail to or otherwise release an accused person in a case** triable by an Anti-terrorism Court.

> **25. Appeal**.--(1) An appeal against the final judgment of an [Anti-Terrorism Court] shall lie to [a High Court].
>
> (2) Copies of the Judgment of [Anti-Terrorism Court] shall be supplied to the accused and the Public Prosecutor free of cost on the day the judgment is pronounced and the record of the trial shall be transmitted to the [a High Court] within three days of the decision.
>
> (3) An appeal under sub-section (1) may be preferred by a person sentenced by an [Anti-Terrorism Court] to [a High Court] within seven days of the passing of the sentence.
>
> (4) The Attorney General, (Deputy Attorney General, Standing Counsel) or an Advocate General [or an Advocate of High Court or Supreme Court of Pakistan appointed as Public Prosecutor, Additional Public Prosecutor or a Special Public Prosecutor] may, on being directed by the Federal or a Provincial Government, file an appeal against an **order** of acquittal or a sentence passed by (An Anti-Terrorism Court) within fifteen days of such **order**.
>
> [(4A) Any person who is a victim or legal heir of a victim and is aggrieved by the **order** of acquittal passed by an Anti-Terrorism Court, may within thirty days, file an appeal in a High Court against such **order**.

> (4B) If an **order** of acquittal is passed by an Anti-Terrorism Court in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grant special leave to appeal from the **order** of acquittal, the complainant may within thirty days present such an appeal to the High Court.]
>
> (5) An appeal under this section shall be heard and decided by "a High Court" within seven working days.
>
> [(6) Omitted by Ordi. IV of 1999 and XIII of 1999 w.e.f. 27.4.1999].
>
> (7) Omitted by Ordi. IV of 1999 and XIII of 1999 w.e.f. 27.4.1999].
>
> (8) Pending the appeal "a High Court" shall not release the accused on bail.
>
> [(9) For the purposes of hearing appeals under this section each High Court shall establish a Special Bench of Benches consisting of not less than two Judges.
>
> (10) While hearing an appeal, the Bench shall not grant more than two consecutive adjournments.]
>
> **31. Finality of judgment**.- A judgment or order passed, or sentence awarded, by (An Anti-Terrorism Court), **subject to** the result of an appeal under this Act shall be final and shall not be called in question in any Court."
>
> **32. Overriding effect of Act.** — (1) The provisions of this Act shall have effect notwithstanding anything contained in the Code or any other law but, save as expressly provided in this Act, the provisions of the Code shall, in so far as they are not inconsistent with the provisions of this act, apply to the proceedings before [an Anti-terrorism Court] shall be deemed to be a Court of Session.
>
> (2) In particular and without prejudice to the generality of the provisions contained in sub-section (1), the provisions of section 350 of the Code shall, as far as may be, apply to the proceedings before 1[an Anti-terrorism Court] and for his purpose any reference in those provisions to a Magistrate shall be construed as a reference to [an Anti-terrorism Court].

By examining Section 31 along with section 25 ATA (relating to appeal), it becomes crystal clear that section 31 specifies just such orders which achieve conclusiveness after the decision of the High Court in appeal. The words "*subject to*" used in Section 31 ATA get significance as these words have not been defined; therefore, we need to think about their strict and lexicon meaning. This expression was examined in the case "*DADA SOAP FATORY LIMITED versus COMMISSIONER OF INCOME TAX, CENTRAL ZONE, KARACHI* (PTCL 1987 CL 569), as

"*The word 'subject to' are not descriptive words but they impose conditions and obligation. These are words of qualification and conditions*." Further, in the case *"ISLAMIC REPUBLIC OF PAKITAN versus ABDUL WALI KHAN*" (PLD 1976 SC 57), the expression 'subject to' has also been defined as 'conditional upon or dependent upon' or 'exposed to (some contingent action)', being under the contingency." The case *"A.P. Moller versus Taxation Officer of Income Tax*" (2011 PTD 1460), is also referred. The circumstances in this manner develop that the word "*subject to*" used in section 31 ATA in the light of qualified condition of Section 25 ATA only included the orders of acquittal and not any interlocutory order, regardless of the fact that if it may be of a final nature. Following are some of the examples of such orders which are not covered under section 31 ATA being not appealable but are final in nature :-

i) Discharge of an accused;

ii) Remand of an accused;

iii) Dismissal of a private complaint under section 203 Cr.P.C.

iv) Summoning or non-summoning of blamed in a private complaint;

v) Summoning or non-summoning of a private witness;

vi) Summoning or non-summoning of a document or any other thing;

vii) Rejection of application under section 265-K Cr.P.C.

12. In the case of ***"Mian Khalid Rauf Vs. Chaudhry Muhammad Saleem and another"*** **(PLD 2015 SC 348)** Leave to Appeal was granted by the Hon'ble Supreme Court to consider the question, inter alia, whether the High Court was legally barred from entertaining a criminal revision petition against the Judgment of a Special Court and whether the bar of maintainability of appeal contained in section 10(2) of the Act 1958 would be extended to a Special Court created under Section 3 of the Act 1958 by an appropriate Provincial Government? While answering the said question it was observed that the Special Court/Judge is a Court inferior to the High Court and hence the High Court's revisional powers under section 435, Cr.P.C. to check the correctness, legality or propriety of any finding or order recorded or passed by an inferior Court would not stand excluded particularly as the Act itself

does not exclude the same. Further, in the case "***Abdul Hafeez Vs. The State*" (PLD 1981 SC 352)** it was argued that in the Drugs Act there was a provision as contained in subsection (7) of section 31 which provided for an appeal against a sentence passed by a Drug Court, to the High Court, but there was no express provision providing for or bestowing a revisional jurisdiction on the High Court, with the result, that in this case the High Court, had no jurisdiction or authority to enhance the petitioner's sentence in his own appeal, and as such, the order of the High Court in this respect was nullity and liable to be set aside. Repelling the aforesaid contention, Hon'ble Supreme Court observed:-

> *5. The contention has no merit. Section 435 of the Criminal Procedure Code says that the High Court (to put in broad words) will have a revisional jurisdiction against orders of "inferior criminal Courts". The word "inferior" here means judicially inferior Nobin Kristo Mookerjee v. Russick Lall Laha (1 L R 10 Cal. 269). It is to point out that a Court whose orders are subject to appeal to another independent and separate Court, is in that particular sense, inferior to the appellate Court. It will be worthwhile to mention here that in the Criminal Procedure Code of 1872, in the corresponding section 295, the words used were "any Court subordinate to such Court or Magistrate". It appears to unreasonable to suppose that this new expression has been substituted without any definite object, and the obvious conclusion which can legitimately be drawn is, that it refers to a Court over which the High Court proceeding under section 435, has appellate jurisdiction. From the above principle it is further evident that there may be inferiority without subordination but there cannot be subordination without inferiority. The epithet "inferior" seems to have been used simply in order to avoid the use of "subordinate" on account of the special limitation of the latter word which would prevent the superior Court from looking into certain cases arising beyond the line of "subordination" to it; which yet might properly be examined for the purpose of as order under sections 436 and 437 or reference under section 438, and then by High Court under section 439. It is to keep the hands of the High Court quite free in dealing with a case in its ultimate stage of revision etc. that expression "inferior" has been substituted for the word "subordinate". In that context, therefore, **when in the manner aforesaid, a Drug Court has been made subject to appellate jurisdiction of the High Court and in that sense inferior to the High Court, the latter could exercise revisional jurisdiction against its order and proceedings as laid down in sections 435/439, Cr. P. C. In other words once having made the Drug Court, in that manner judicially inferior to the High Court, there was no necessity of duplicating the matte over again by expressly providing for a revisional jurisdiction of the High Court; because, the same already inhered in the status and position i which the Drug Court stood to the High Court. It is well settled that an appeal is a complaint to a superior body of any injustice done or***

> ***error committed by an inferior one with a view to its reversion or correction etc. From that point of view also the Drug Court being subject to the appellate jurisdiction of the High Court is an "inferior criminal Court" whose orders and proceedings will be revisable by it under section 435.*** *(Emphasis added)*

After in-depth analysis, the Court concluded:-

> The result is that looked from whatever angle, **the conclusion is inevitable that no provision of the Drugs Act ousts the revisional jurisdiction of the High Court (and rather points to the contrary as discussed above) and the use of the word "final" does not detract anything from the same in the context above explained.** The cumulative effect of all the above provisions and the discussion is that the High Court in cases under the Drugs Act is simultaneously a Court of appeal and revision and can, not only, exercise appellate powers but also, those under section 439 of the Cr. P. C. and can enhance sentence passed by, the inferior Court viz. the' Drug Court. (Emphasis added)

In the case of "***Habib Bank Ltd. Vs. The State and 6 others***" **(1993 SCMR 1853)** Section 10 of Suppression of Terrorist Activities (Special Courts) Act, 1975 came under consideration. The said provision is reproduced hereunder for ready reference.

> ***10. Act to override other laws.****- The provisions of this Act shall have effect notwithstanding anything contained in the Code or in any other law for the time being in force.*

The Hon'ble Supreme Court resolved that the powers of the High Court under sections 435 and 439 remained intact despite prohibitory and negative provisions contained in section 10 of the Ordinance.

13. Honourable Karachi High Court in the case of ***"Huzoor Bux Vs. The State"*** **(PLD 2008 Karachi 487)** while referring to Criminal Appeals Nos. 257 of 2000 and others (***Syed Hussain Abbass v. The State***) decided by the august Supreme Court observed:-

> *"Criminal Appeals Nos. 257 of 2000 and others (Syed Hussain Abbass v. The State) had observed that High Courts being appellate forum against the orders of the Anti-Terrorism Court in a suitable and appropriate cases can exercise powers, as required under sections 435 and 439, Cr.P.C"*

A Division Bench of this Court, in the case of ***Atta Ullah Vs. Ghulam Rasool and others*** **(PLD 2006 Lahore 290)** it was held:-

> *22. The conclusions drawn are that a petition for leave to appeal can be filed by an aggrieved person against an order or acquittal*

> *passed by 'A.T.A. Court before a High Court within the timeframe as prescribed and the aggrieved person includes the victim, a legal heir or a private complainant.* ***Likewise, the High Court has the visitorial powers over the Anti-Terrorist Courts and, therefore, can entertain petitions in the nature of those as covered by section 439 of the Criminal Procedure Code.*** *The law is now so declared and this constitutional petition is accordingly disposed of.* **[Emphasis have been supplied by us]**

The same view has been followed in the cases reported *as Muhammad Obaid Iqbal and others Vs. Khadim Hussain and others* 2006 PCr. LJ 78 [Lahore]; *Muhammad Yunus Bhatti Vs. Muhammad Arif and others* 2007 Y L R 1171 [Lahore]. Whereas, contrary view has been taken in the cases reported as ***Muhammad Arif Vs. Nazeer Ahmed and others*** 2012 P Cr. L J 696 [Lahore].

14. We have considered the argument of learned counsel for the petitioners that the law was promulgated for speedy trials and observe that although in the preamble of ATA, the purpose of the Act has been depicted as speedy trial of the case but the trial is to be conducted and completed by adopting all the legal parameters and no court can be permitted to circumvent the procedure or pass an illegal interim order which may prejudice the rights and privileges of the parties, now protected by Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 and when no limitation has been forced in the statue then same cannot be embedded by deciphering the state in the light of preamble.

15. There are a number of judgements at High Courts level wherein contrary and contradictory interpretations of a single legal question have been offered by the different Benches of coordinate jurisdiction. This lack of coordination and non-adherence to the principles of horizontal stare decisis, judicial propriety and judicial comity create a lot of uncertainty and confusion. The Courts subordinate to High Court, which are bound to follow the principles of law enunciated by this Court as per Article 201 of the Constitution, face awkward situation and general public perception and trust in the judicial system stands compromised. In another context but on the same point august

Supreme Court in case of ***Ameer Zeb Vs. The State*** **(PLD 2012 SC 380)** observed:-

> *5. Because of the conflict of decisions of this Court on the above point, the High Courts and subordinate Courts are making pick and choose to apply any of the decisions in the case which apparently is causing miscarriage of justice. Now it is left at the discretion of the High Courts and subordinate Courts to give benefit or otherwise to any particular accused which apparently is frustrating the intention of lawmakers and diminishing the rigour of law for which it is made…*

With reference to binding authority of the ruling of Division Bench of High Court, august Supreme Court in cases "***Multiline Associates v. Ardeshir Cowasijee***" (PLD 1995 SC 423**)** observed as under:-

> *In such circumstances, legal position which emerges is that the second Division Bench of the High Court should not have given finding contrary to the findings of the 1st Division Bench of the same Court on the same point and should have adopted the correct method by making a request for constitution of a larger Bench, if a contrary view had to be taken. [...] We, therefore, hold that the earlier judgment of equal Bench in the High Court on the same point is binding upon the second Bench and if a contrary view had to be taken, then request for constitution of larger Bench should have been made. [emphasis added]*

Earlier same view was taken by the august Supreme Court in the case of ***The Province of East Pakistan Vs. Dr. Azizul Islam*** **(PLD 1963 SC 296)**, it was observed:-

> *With respect we must point out that the decision was a direct authority also on this question, as in spite of the rubber-stamp signature the validity of the order of requisition was upheld and if the learned Judges of the High Court deciding the present case were inclined to take a different view, they should have, in accordance with the rules of their own Court, referred the matter to a larger Bench. Alternatively, they could have expressed their doubts regarding the view taken in the precedent case1 in a Court of co-equal jurisdiction, while yet following that view, and left the matter to be raised in appeal before this Court*.
>
> **[Emphasis supplied by us.]**

In more elaborated terms a Full Bench of Karachi High Court in case *"****Murad Ali V. Collector of Central Excise and Land Customs*****"* **(PLD 1963 (W. P.) Karachi 280(F.B)** also observed:-

In order to maintain judicial propriety;

> *(i) the decision of a Division Bench on a question of law should be followed by the other Bench. If they differ, the proper course to adopt would be to refer the question for the decision of a Full Bench;*
> *(ii) the decision of one Division Bench on a question of fact is not binding on the other Division Bench;*
> *(iii) if the decision of one Division Bench has not come to the notice of the other Bench and a different view is taken in the subsequent Division Bench case and when such two conflicting decisions are placed before the Bench, the proper procedure to follow in such a case would be, for the Bench hearing the case, to refer the matter to a Full Bench in view of the conflicting authorities without deciding the question itself.*

The same view has been followed in the case of "***Syed Muhammad Murtaza Zaidi Vs. Motor Registration Authority and others 2010***" **PTD 1797 (DB Lahore)**. In the case of ***Asif Mahmood Vs. Deputy Commissioner, Sheikhupura and another*** **(2005 M L D 589 [Lahore]) a** Division Bench of this Court observed:

> *Even otherwise we cannot bypass the judgment of the D.B. over the judgment of the Single Bench of this Court. Even otherwise it is settled principle of law that earlier judgment of the* ***equal Bench*** *in the High Court* ***on the question of law*** *is binding upon the Second Bench as per law laid down by the Honourable Supreme Court in Multi Line Associates' case (1995 SCMR 362).* [Emphasis added]

On the same point august Supreme Court in **Ameer Zeb** Case (Supra) applied the principles laid down in **Ardeshir Cowasijee** Case (supra) to benches of equal strength of august Supreme Court and held:-

> *4. It appears that a contrary view was taken by* ***two other Benches of equal number of Judges*** *in the cases of Muhammad Hashim and Amanat Ali (supra). In such a situation. apparently the rule laid down by the case of Multiline Associates v. Ardeshir Cowasjee PLD 1995 SC 423 was required to have been followed which is that if a Bench of equal Judges does not agree with the earlier Bench of equal Judges, then the matter should be referred to a larger Bench. It appears that earlier decisions of this Court in the cases of Nadir Khan and Ali Muhammad (supra) were not brought to the notice of the Benches in the cases of Muhammad Hashim and Amanat Ali (supra), therefore, the principle laid down in the said cases was never discussed. In such a situation this Court in the case of Province of the Punjab v. S. Muhammad Zafar Bukhari PLD 1997 SC 351 observed as under:---*

> "Halsbury's Laws of England. Fourth Edition, volume 26 in paras 577-578, has commented on the "judgment per incuriam" as under:
>
> "A decision is given per incuriam **when the Court has acted in ignorance of previous decision of its own or of a Court of coordinate jurisdiction which covered the case before it in which case it must decide which case to follow or when it has acted in ignorance of House of a Lords' decision, in which case it must follow that decision or when the decision is given in ignorance of the terms of statute or rule has statutory force**."
> **[Emphasis added by us]**

Indian Supreme Court, while highlighting the importance of judicial discipline in the case of "***Dr. Vijay Laxmi Sadho Vs. Jagdish"*** **(2001 (2) SCC 247)** observed:-

> *It is well-settled that if a **Bench of coordinate jurisdiction disagrees with another Bench of coordinate jurisdiction** whether on the basis of "different arguments" or otherwise, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs."*
> **[Emphasis added]**

A Division Bench of Allahabad High Court explained the principle of judicial comity in the case of ***"Arun Kumar Singh v. State of U.P."*** **2013(1) ADJ 457** in the following terms:-

> *9. Moreover, there is a principle known as "comity of Judges'. Particularly when the issue relates to High Court itself, such principle has to be applied for taking uniform stand, if not, make an observation to place the matter before the appropriate Court which had passed original order, that too when it is of a Division Bench, whose order has a binding effect, but not to show any judicial over-activism at the behest of handful of persons. In this regard, we have come across the judgements reported in **(State of U.P. v. C.L. Agrawal), 1997 (5) SCC 1 (Furest Day Lawson Ltd. v. Jindal Exports Ltd.),2001 (6) SCC 356 (State of Madhya Pradesh v. Narmada Bachao Andolan), 2011 (7) SCC 639 (Rattiram v. State of M.P.), 2012 (4) SCC 516** and **(U.P. Power Corpn. Ltd. v. Rajesh Kumar)., 2012 (7) SCC 1** In Furest Day Lawson Ltd. (supra) the Supreme Court has held that a prior decision of the Court on identical facts and law binds the Court on the same points of law in a latter case. This is not an exceptional case by inadvertence or oversight of any judgement or statutory provisions running counter to the reason and result reached. Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgement "per incuriam". In U.P. Power Corpn. Ltd. (supra) it has*

> *been held by the Supreme Court that judicial discipline commands in such a situation when there is disagreement, to refer the matter to a larger Bench. It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a*
>
> *learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a Single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned Single Judge departed from this traditional way in the present case and chose to examine the question himself. It was further held that one must remember that pursuit of the law, howsoever, glamorous it is, has its own limitation on the Bench. In a multi-Judge court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned Single Judge or a Division Bench does not agree with the decision of a Bench of coordinate jurisdiction, the matter should be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure. The Supreme Court has also held that judicial enthusiasm should not obliterate the profound responsibility that is expected from the Judges.*
>
> **[Emphasis suppled]**

A Full Bench of Gujrat High Court (India) in the case of ***"State of Gujarat v. Gordhandas Keshavji Gandhi and others"*** **AIR 1962 Gujarat 128,** observed:-

> **One Judge of a High Court has, however, no right to overrule the decision of another Judge of the same High Court nor has one Division Bench of a High Court the legal right to overrule another decision of a Division Bench of the same High Court**. (Emphasis added)

With regard to powers of Full Bench of High Court, Bombay High Court in the case of ***Emperor v. Ningappa Ramappa Kurbar*** ***(A.I.R. 1941 Bombay 408)***, observed as follows:

> *"There seems to be very little authority on the powers and constitution of a Full Bench. There can be no doubt that a Full Bench can overrule a Division Bench and that a Full Bench must consist of three or more Judges; but it would seem anomalous to hold that a later Full Bench can overrule an earlier Full Bench, merely because the later bench consists of more Judges than the earlier. If that were the rule, by a majority of four to three, could*

> *overrule a unanimous decision of a bench of six Judges, though all the Judges were of co-ordinate jurisdiction. In* ***Enatullah v. Kowsher Ali, ILR 54 Calcutta 266 : (A.I.R. 1926 Calcutta 1153) (SB)*** *Sanderson, C.J., stating the practice in Calcutta, seems to have been of opinion that a decision of a Full Bench could only be reversed by the Privy Council or by a bench specially constituted by, the Chief Justice."*

Therefore, any contrary decision given by the subsequent bench of equal strength of High Court in ignorance of the terms of statute, binding precedent of Supreme Court or previous decision of bench of equal strength/Benches of coordinate jurisdiction of the same Court will be a judgement per incuriam and without any precedential value. Moreover, whenever a contrary view has been taken after considering the previous decision of the Bench of the same Court, then such a decision would be in violation of law of precedent as set by the august Supreme Court in ***Ameer Zeb Case*** *(supra) and* ***Ardeshir Cowasijee Case*** (supra). Hence, subsequent judgements given by the subsequent benches of equal or less strength in the ignorance of ***Atta Ullah Case*** *(*supra) are held to be per incuriam.

16. It may be noted that this Full Bench vide short order dated 11.05.2018 held and declared that "- - - - -against an interim order passed by a court under Anti-Terrorism Act 1997, during proceedings of a case, including an order of summoning/non-summoning the accused writ petition is not maintainable, as under Anti-Terrorism Act, 1997, applicability of Section 435, 436 and 439 Cr.PC has not been restricted except under Section 21-D to the extent of bail, hence, criminal revision is competent". In the meanwhile, a new development has also arisen, which needs consideration. Another full Bench of this Court (at Multan) in Criminal Revision No. 417 of 2006 vide order dated 31.05.2018 held that Criminal Revision against the order passed by Anti-Terrorism Court for dismissal of private complaint is incompetent and Constitution petition would be maintainable. The view taken by the learned second full bench (at Multan) is contrary to the declaration made by this Bench vide short order dated 11.05.2018.

Now the anomaly has arisen that, whether this Full Bench is bound by the decision of second Full Bench on the same question of law or the second bench was bound to follow the declaration of law made by this Bench through short order referred supra. It is well settled law that a short order announced by the court of competent jurisdiction has the operational effect of judgement pronounced by the court (reference may be made to ***D.-G. A.N.F. RAWALPINDI and others Versus MUNAWAR HUSSAIN MANJ and others*** **(2014 SCMR 1334);** ***REVIEWS ON BEHALF OF JUSTICE (RETD.) ABDUL GHANI SHEIKH and others*** **PLD 2013 SC 1024;** ***JUSTICE HASNAT AHMED KHAN and others Versus FEDERATION OF PAKISTAN/STAT*****E P L D 2011 Supreme Court 680;** ***WISRAM DAS Versus SGS PAKISTAN (PVT.) LTD. and another*** **2010 SCMR 1234;** ***WAFI ASSOCIATES (PVT.) LIMITED Versus FAROOQ HAMID and others*** **(2010 SCMR 1125)**. From perusal of case law on precedential value of a short order, we are of the view that there may be two types of short orders i.e. (i) which decide the question of law in clear and operative terms, and (ii) which only adjudicates the matter and no question of law is clarified in terms of Article 189 and 201 of the Constitution of Islamic Republic of Pakistan, 1973. In the light of these principles, we have again carefully examined our short order dated 11.05.2018 and hold that the same is covered under the first category, therefore, has the precedential value. However, second type of orders have no precedential value, as those do not qualify the test as laid down in the case of ***MUHAMMAD TARIQ BADR and another Vs. NATIONAL BANK OF PAKISTAN and others*** **(2013 SCMR 314)**

> [--] Moreover, for the purpose that a judgment of the apex Court should have due effect and due deference, three conditions as per Khan Gul Khan and others v. Daraz Khan (2010 SCMR 539) should be met (**a) judgment decides a question of law; (b) it is passed upon the basis of law; and (c) it enunciate the principle of law**…
>
> **[Emphasis added]**

In the case of ***KHAN GUL KHAN and others Vs. DARAZ KHAN*** **2010 SCMR 539** it was held:-

> *In Muhammad Tariq's case supra, contentions raised by the learned counsel as noted in para.6. Precedents were also noted in paras.6 and 7 but the learned Judges had given conclusions in para.9. The same is result of per-incuriam as the conclusion is not in consonance with the provisions of section 20 of the Pre-emption Act.* ***The following are three basic ingredients of every decision****:---*
>
> *(a) Findings of fact both direct and inferential.*
> *(b) Statement of principles of law applicable to the legal terms disclosed by the facts.*
> *(c) The judgment passed on the combined effect of the above ingredients.*
> *A decision of apex Court is binding only when it fulfils the following three conditions: ---*
> *(i) It decides a question of law.*
> *(ii) It is passed upon the basis of law.*
> *(iii) It enunciates a principle of law.*
> *Mere mentioning the precedents in the judgment without adverting to the ratio laid down, in the cited judgments raises questions than resolving the same.*

[Emphasis supplied by us]

The decision of the second full bench of this Court (at Multan) has been based upon ***The State through Mehmood Ahmad Butt, Deputy Director, Regional Directorate, Anti-Narcotics Force, Lahore Vs. Mst. Fazeelat Bibi*****, (PLD 2013 SC 361)** wherein the question before the court was, "---whether the learned High Court in dismissing State's appeal has correctly interpreted the import of section 48 of the Control of Narcotic Substances Act, 1997". Responding the aforesaid question, it was held:-

> *[---] The right of appeal conferred by section 48(1) of the Control of Narcotic Substances Act, 1997 is all pervasive catering for every kind of appeal from every kind of order passed by such a Special Court and the provisions of section 48(1) of the Control of Narcotic Substances Act, 1997 do not make any distinction between an appeal against a conviction, an appeal against an acquittal or an appeal seeking enhancement of a sentence passed against a convict. The restrictive scope of section 48 of the Control of Narcotic Substances Act, 1997 visualized by the learned Division Bench of the Lahore High Court, Lahore confining it only to an appeal against conviction has been found by us to be offensive to the clear and unambiguous provisions of the said section and, thus, the same cannot be sustained or upheld by us.*

Therefore, in the light of ***Khan Gul Khan Case*** (supra), ***Fazeelat Case*** cannot be cited as a binding authority on the question of revisional

powers of this court against an interim order/order for summoning or non-summoning of the accused passed by the "subordinate" Anti-terrorism Court. Moreover, the second Full Bench of this Court was not informed about unreported judgement of Supreme Court of Pakistan in case of ***Syed Hussain Abbass v. The State*** **(Criminal Appeals Nos. 257 of 2000 and others)** wherein it has been held that High Courts being appellate forum against the orders of the ATA in suitable and appropriate cases can exercise powers, as required under sections 435 and 439, Cr.P.C.

17. This Court has already decided the issue through a short order dated 11.05.2018 which discloses that the question of law has been decided to the effect that only restriction of bail had been imposed under section 21(d) of ATA and Sections 435, 436, 439 of the Code have not been restricted. Despite the fact that it was a short order, it resolved a question of law and it appears that this order was not brought to the notice of the learned Full Bench at Multan. Further it has also been observed that before this Bench the matter was argued by the learned Prosecutor General as well as representative of the Advocate General in favour of maintainability of revision petition, but the ultimate decision rendered by this Court in the presence of learned Prosecutor General and the representative of the Advocate General was not conveyed to the Full Bench at Multan by their representatives during the course of arguments before the said learned Full Bench. Furthermore, through the same short order, the office was directed to convert writ petition into criminal revision, it was thus duty of the office to have conveyed this order to the administrative officers at the benches for further future references, but it appears that needful was not done. From the above reasons perhaps, the order of this Full Bench, appears to have not been brought to the notice of the Full Bench at Multan and in addition to the above the judgment of the apex court in Syed Hussain Abbas v. The State (Criminal Appeals Nos.257 of 2000 and others), also appears to have not been referred to the learned Full Bench at Multan. As a consequence of our above discussion, the **judgment dated 31.05.2018 passed by the Full Bench at Multan in Criminal Revision No.417/2006 "*Aziz Ahmad versus***

***Syed Irshad Hussain Shah and others*" is held to be per incuriam and may not be treated as a binding precedent.**

18. 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 Section 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. The above exhaustive discussion on the point with reference to the case law, forms the reasoning of our above reproduced short order dated 11.05.2018.

19. Before parting with this Judgment, we observe that the question before us was not only complicated, but was also a case of first impression, therefore, deep rooted legal acumen was expected from the learned counsels representing the respective sides, and at this stage we acknowledge the skill of all the learned counsel for the parties who rendered marvelous assistance to this Bench. More particularly the determination and effort put in by Rai Bashir Ahmad, Mr. Muhammad Azhar Siddique, Mirza Naveed Baig, Mr. Azam Nazir Tarrar as well as Syed Ehtisham Qadir (learned Prosecutor General), Mr. Muhammad Amjad Rafiq (Additional Prosecutor General) and Mr. Sittar Sahil, (Assistant Advocate General) is commendable. At the same time we appreciate the effort put in by Mr. Qaisar Abbas, Research Officer, of this court, as by his assistance we have been able to lay our hands on almost whole of case law on the subject by the superior courts. Thus, we would like to bring on record a sense of appreciation and words of gratitude in respect of valuable assistance rendered to this Court by all of the above.

(Muhammad Qasim Khan)
Judge.

(Sardar Ahmad Naeem)
Judge.

(Miss Aalia Neelum)
Judge.

APPROVED FOR REPORTING.

Javed* 06.07.2018