

ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.

Cr.Misc. Appl.No.S- 282 of 2017

DATE ORDER WITH SIGNATURE OF JUDGE

1. For orders on office objection.
2. For Katcha Peshi.

Date of hearing: 23.02.2018.
Date of decision: 02.03.2018.

Mr. Saeed Ahmed Waggan, Advocate for applicant.
Mr. Amjad Hussain Shar, Advocate for respondent No.3.
Mr. Abdul Ghaffar Kalhoro, A.P.G. for the State.

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ARSHAD HUSSAIN KHAN, J: Through instant criminal miscellaneous application, applicant has assailed the order dated 29.08.2017 passed by learned 1st Additional Sessions Judge, Umerkot in Criminal Revision Application No.9 of 2017 [re-Mst. Nazi v. The State and others] and the order dated 23.08.2017 passed by learned Civil Judge & Judicial Magistrate, Umerkot in the proceedings No.01/2017 registered u/s 550 Cr.P.C.

2. The brief facts of the case as averred in the present application are that 23 Cows were found by the police during the investigation of FIR/Crime No.26/2017 lodged by respondent No.3 Hussain Shah u/s 379, 34 PPC near Moula Bux Morr, which were said to be in possession of accused Jumoon who on seeing the police party succeeding in running away while taking the advantage of jungle as no other person was available there and none had claimed the ownership in respect of said cows, therefore, same were seized u/s 550 Cr.P.C. as suspected to be stolen. Thereafter, such report was filed before the concerned Magistrate. The present applicant alongwith three others namely Pir Hashim Shah, Raj Kumar and Sher Muhammad approached the learned Judicial Magistrate, Umerkot by filing separate Criminal Miscellaneous Applications for delivery of the possession of disputed animals u/s 523 Cr.P.C. by claiming their ownership upon such property but the learned Magistrate dismissed their applications by a common order dated 23.08.2017. The relevant portion whereof is reproduced hereunder:-

“In view of the above it is observed that all parties when claim ownership the same can only be adjudged by a competent Civil Forum having jurisdiction. Therefore in circumstances as above spelt, all four parties failed to show the possession of cows in exclusive possession & control. This shows that there is more to story which cannot be determined within domain of section 550/523 Cr.P.C. In circumstances I hereby dismiss all Applications filed by the Applicants.”

3. Being aggrieved by the aforesaid order, all the four applicants preferred Criminal Revision Applications before the learned 1st Additional Sessions Judge, Umerkot but that too were dismissed vide order dated 29.08.2017, wherein the learned Judge observed as under:-

“From the perusal of record it reveals that there are four applicants who shown themselves to be the owners of the cows, none has produced any proof which shows that he is owner of the cows, none of the applicants has shown any description of the disputed cows. Applicants Pir Hashim Shah and Raj Kumar have produced receipts of purchasing of cows, but no any description of disputed cows is mentioned in the said receipts. Moreover the applicants Pir Hashim Shah and Raj Kumar have failed to produce said receipts before the court of learned Magistrate. Perusal of impugned order reveals that learned Magistrate has committed no illegality while dismissing applications of the above named applicants by relying upon the case law reported in PCRLJ 2004 Lahore 01, wherein it is held that Criminal Courts are not competent to determine the question of title or ownership of the property which falls within the exclusive domain of the Civil Court of plenary jurisdiction. Therefore no illegality or irregularity appears to have been committed by learned Magistrate. Hence, Crl. Revision Applications No.07/2017, 08/2017, 09/2017 and 10/2017 merits no consideration and are dismissed.”

4. Out of above four claimants, only the present applicant namely Mst. Nazi has challenged the aforesaid order by filing the instant criminal miscellaneous application.

5. Learned counsel appearing for the applicant mainly contended that the order passed by learned Magistrate as well as by learned 1st Additional Sessions Judge are contrary to law and facts and have been passed without applying their judicial mind. He contended that both the learned courts have passed stereotype order by observing that the matter relates to Civil Court as the parties are claiming ownership over the disputed property which can only be decided by the Civil Court having jurisdiction in the matter. He further contended that applicant is the real owner of cows which are confined at shelter cattle pond under the administration of police of Dhoronaro and their health is going to be deteriorated by the passage of time. He therefore, prayed that the cows may be returned to the applicant by treating her to be the real owner and last possessee of the same as admittedly her

son Jumoon was found in the last possession of these cows. The learned counsel in support of his arguments has relied upon the following case law:

- (i) 2005 MLD 176 Mst. SHAHEEN BRGUM V. S.H.O.(ACLC) and others
- (ii) 1993 P.Cr. L.J 2252 GHULAM FARID v. MUHAMMAD NAWAZ and another.
- (iii) 1999 PCr.L.J 968 MUHAMMAD YOUSUF V. MUHAMMAD RAMZAN and 6 others

6. On the other hand, learned counsel appearing for respondent No.3 has supported both the impugned orders on the ground that same have been passed in accordance with law and there is no illegality or material irregularity in the said orders therefore, need not to be interfered by this court. He further contended that the applicant had already filed C.P.No.D-2579/2017 before this court with regard to the detention of his son namely Jumoo who is involved in number of cases including crime No.26/2017 which is the subject matter of this case and such petition was disposed of with direction to the police to arrest the absconder accused in view of the dicta laid down in the case of Nasrullah v. Station House Officer (PLD 2016 Sindh 238). In this regard he has filed a statement alongwith certain documents, taken on record.

7. Learned A.P.G. has also supported the impugned orders.

8. I have heard the learned counsel for the applicant, learned counsel for the respondent No.3/complainant and learned A.P.G appearing for the State as well as perused the entire material available on record with the assistance of learned counsel for the parties and the case law cited at bar.

9. The case of the petitioner is that the disputed cows belongs to her and the same were taken away by the police forcibly from her house on 02.08.2017 and subsequently prepared a false recovery memo of the same. From the perusal of subject F.I.R No.26/2017 and recovery memo (*Mashirnama*), it appears that the FIR was lodged by one Hussain Shah son of Pir Ali Madad Shah in respect of stolen of his goats which according to the complainant were stolen by the son of applicant namely Jumoon and others on 19.06.2017 but surprising to note that the FIR was lodged on 02.08.2017 after the delay of about one and half months without any plausible explanation as the case was only in respect of theft of goats then why the complainant did not lodge FIR promptly. Furthermore, according to

the version of complainant as narrated in the FIR, on the same day he was informed by one Younus s/o Ghulam Muhammad that accused Jumoon, Shadi and Jamal have committed theft of his goats but despite of such fact he remained mum for a considerable time which creates a dent in the case of complainant.

10. Apart from the above, case of the prosecution is that during the investigation of crime No.26/2017 when the police party reached at Bakhar Mori they received spy information that accused Jumoo is standing at Wah near Moula Bux More, police party reached at the pointed place where they saw accused Jumoon, nominated in the aforesaid FIR present there holding the cows in question, however after seeing the police party, accused fled away leaving behind the cows and subsequently police taken over the possession of 23 cows available there. Since no one was present at the scene nor any one had come forward with the claim of ownership of the said cows at the relevant time therefore, the police shown recovery of the said cows under section 550 Cr.P.C. as suspected stolen cows. Thereafter, besides the present applicant, three others namely, Sher Muhammad, Raj Kummar and Pir Hashim Shah filed their respective applications before the learned Civil Judge & Judicial Magistrate Umerkot and sought restoration of possession of the said cows being owners of the same. The claim of the present applicant is that possession of these 23 cows may be handed over to her being owner of the same and further on the ground that the said cows were lastly found in possession of her son namely Jumoon who was holding the same at the time of recovery of cows which fact is corroborated from the memo of recovery dated 07.08.2017. The learned civil Judge and Judicial Magistrate Umerkot dismissed the said applications thereafter all the applicants filed their respective criminal revision applications before the Sessions Judge Umerkot which too were dismissed through a common order but it appears that only the present applicant has challenged the said order through instant present criminal miscellaneous application.

11. From the record, it also appears that applicant on 10.08.2017 had filed a constitutional petitioner bearing No.2579 of 2017 before this court against the high-handedness of police officials. In the said petition, it has been, inter alia, stated that on 02.08.2017 the private respondents alongwith official respondents barged into the house of the present applicant and taken away her husband namely Jamal Din as well as her 30 cows. Though the said petition was disposed of by this court with direction to the I.O of the case to arrest the absconder accused, however, from the said petition the claim of present applicant in respect of cows appears to have been established.

12. According to the F.I.R., the allegation on the son of the applicant (nominated accused) was for theft of goats whereas during the investigation of said crime police found 23 cows from the place where the accused Jumoon was found possessing / holding cows, who after seeing the police party fled away, hence in my humble opinion the subject cows cannot be termed as case property of crime No.26/2017 as the same were not stolen and the complainant had never claimed to have owned the same. Since it is not a case property, therefore, same cannot be refused to the applicant who is mother of accused Jumoo who according to the mashirnama of recovery dated 07.08.2017 was the person lastly seen and holding cows at the place where the police found the said cows. Since the said cows are not required in any case and were taken into possession, therefore, same were to be returned to the person from whom it were taken. Reliance in this regard can be placed on the case of KHALID SALEEM v. MUHAMMAD JAMEEL alias Billa and 6 others (1996 SCMR 1544).

13. It is significant to mention that in both impugned orders passed by the learned Judicial Magistrate Umerkot as well as learned Additional Sessions Judge, Umerkot, they directed the present applicant as well as other claimants of the said cows to approach the concerned Civil Court for seeking declaration regarding the ownership of the said 23 cows. Indeed, learned trial Court has not examined the peculiar circumstances of the instant controversy judiciously and seems that they have got influence from mere raising claim of ownership by the applicant as well as other claimants and consequently failed to consider that who was in last possession of the cows which admittedly is apparent from the mashirnama of recovery dated 07.08.2017 that the accused Jumoo was available there by holding the said cows. It is undeniable fact that in villages, people do not maintain any documentary record regarding the sale and purchase of animals, therefore, it would not be possible for the parties to establish their right of ownership by producing any documentary proof or tangible evidence regarding 23 recovered cows. It is worthwhile to mention that it is incumbent upon the trial Court to examine the claims raised by the parties, in juxtaposition while deciding application for restoration of seized property as temporary custody till final decision of the criminal case and Court should not be influenced mere raising any objection by any of the parties or any objector in absence of any solid legal substance. It is now well settled that where a property not proved to be subject-matter of an offence should be restored without detailed enquiry as to ownership of property to persons from whom it had been taken. Reliance in this regard can be placed in the cases of

JALAL KHAN alias JALLEY KHAN v. The STATE and another (PLD 1975 Lahore 45) and Sardara v. Boota (PLD 1950 Lahore 97). In similar circumstances, this court in the case of Mst. SHAHEEN BEGUM v. SHO (ACLC) and other (2005 MLD 176) has held that scope of section 516-A, Cr.P.C. is limited and the court in normal course would restore possession of the property to the party from whose same was recovered and question of title would be left open to be decided by civil court. Furthermore the cows recovered under mashirnama of recovery dated 07.08.2017 in connection with crime No.26/2017 however the allegation leveled in the said FIR is with regard to theft of goats and having no relevancy with the alleged recovery.

14. As the sequel of the above discussion of the facts and circumstances, both impugned orders passed by learned Civil Judge and Judicial Magistrate as well as learned 1st Additional Sessions Judge, Umerkot being devoid of merits are set aside. Consequently, present Criminal Miscellaneous Application stands allowed and the temporary custody (superdari) of above 23 cows is handed over to applicant Mst. Nazi under Section 516-A, Cr.P.C. on furnishing solvent surety in the sum of Rs.3,00,000/- (Rupees Three Lac Only) and P.R Bond in like amount to the satisfaction of the learned trial Court. It is also made clear that the present order is subject to the final outcome of criminal proceedings or any civil proceedings if filed in respect of ownership of the said cows and further the applicant Mst. Nazi will neither sell nor dispose of any cow till final disposal of the subject criminal case and in case of death or any damage caused to any of the cow she shall inform the learned trial Court instantly and the Court will pass appropriate orders in this regard. However, the other claimant of the said cows are at liberty to avail the legal remedy by filing appropriate proceedings before the competent forum, if they so advised.

15. For the facts and reasons referred supra, this Criminal Miscellaneous Application stand disposed of in the above terms.

JUDGE

