ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Civil Transfer Application No.28 of 2016

DATE	**ORDER WITH SIGNATURE OF JUDGE(S)**

1. For orders on CMA-2245/2016
2. For katcha peshi.

27.02.2018.

None present for the applicant.
Mr. Wali Muhammad Jamari, Assistant A.G

O R D E R

AGHA FAISAL, J: The present civil transfer application was preferred in 2016, in respect of a family suit, seeking *inter alia* the following relief:

> *"To transfer/withdraw the Family Suit No.07 of 2016 [Mst. Farah Naz Vs. Rashid] from the Court of Judicial Magistrate/Family Judge-I, Mirpurkhas and transfer the same to any other Court having jurisdiction for its trial and disposal according to law"*

2. This transfer application has been instituted under Section 25-A of the West Pakistan Family Courts Act, 1964, the relevant portion whereof is reproduced herein below:

> **" [S. 25-A. Transfer of cases.**—Notwithstanding anything contained in any law the High Court may, either on the application of any party or on its own accord, by an order in writing—
>
> (a) transfer any suit or proceeding under this Act from one Family Court to another Family Court in the same district or from a Family Court of one district to a Family Court of another district; and
>
> (b) transfer any appeal or proceeding under this act from the District Court of one district to the District Court of another district.

3. The matter was called earlier in the morning, however, none appeared for the applicant and in the interest of justice the matter was kept aside with a direction for the same to be taken up in the second

session. The matter was then taken up again during second session and once again no one appeared on behalf of the applicant in this matter.

4. It was observed from the diary that at a previous date of hearing, being 05.05.2017, the following caution was issued by this Court:

> *"None present on behalf of the applicant. As an indulgence this time matter is adjourned to a date in office with a note of caution that in case on the next date of hearing none has appeared on behalf of the applicant appropriate orders shall be passed."*

5. This matter has been pending for two years and it appears that the applicant is no longer interested in proceeding herewith and therefore it may otherwise be a fit case for dismissal for non-prosecution. However, in the interests of justice, it was considered proper by this Court to consider the relevant submissions on record and then pass appropriate orders on the merits hereof.

6. The allegation leveled by the applicant is that the attitude of the Presiding Officer with the applicant is incongruent with the expectation of the applicant and therefore, he has lost faith in the learned trial Judge.

7. The specific allegation is that the learned Judge turned down a request for adjournment made by the applicant's counsel and allegedly remarked "*Defendant has no case and I will not allow any adjournment application on behalf of defendant on any ground and I will decide the case within a week"*.

8. There is no corroboration of the aforesaid alleged statement anywhere on the record.

9. The applicant hence apprehends that the learned Judge is biased and that he cannot get a fair trial in the said Court.

10. There appears to be no other grounds pleaded in the memorandum of application in support of the applicant's prayer.

11. There is also no corroboration of any sort whatsoever, available on the file, to support the pleadings of the applicant.

12. The allegation, pertaining to the alleged contrary attitude of the learned Presiding Officer, is merely a general statement and no corroboration has been pleaded in respect thereof.

13. It is well settled law that the transfer of a matter from one Court to another could only be granted in exceptional circumstances, where it was shown that the same would be in the interests of justice.

14. The august Supreme Court has delved into the issue of transfer of adjudication fori and in such regard it was held in the case of *GOVERNMENT OF N.W.F.P THOUGH CHIEF SECRETARY AND ANOTHER VERSUS DR. HUSSAIN AHMED HAROON AND OTHERS,* reported as *2003 SCMR 104,* as follows:

> *"…It is an age-old fundamental principles of law that justice should not only be done but manifestly and undoubtedly it should seen to have been done. To achieve this objective/goal it is of prime importance that a Judge/person equipped with the authority of decision should not be having any sort of personal interest in the outcome of the matter under issue before him. The conduct of the proceedings should not generate any reasonable apprehension in the mind of a person that the deciding officer has harboured any grudge or bias agaisnt him. This principle that no person should be a judge in his own cause (memo debet esse in propria sua causa) was discussed threadbare in Dimes v. Grant Junction Canal Co. (1852) 3 H.L. Cas. 759). The learned Judges of this Court in a case reorrted as Federation of Pakistan v. Muhammad Akram Shaikh (1990 PSC 388) has highlighted the above principle after discussing the ratio of the aforesaid case. They have incorporated the dicta underlying this principle which are as under:-*

"There is no doubt that any direct pecuniary interest, however, small in the subject of inquiry does disqualify a person from acting as a Judge in the matter." Blackburn, J. in R.v Rand (1986) LR 1 WB 230, 232.

"If he has any legal interest in the decision of the question one way he is disqualified no mater how small the interest may be" Lush, J. in Serjeant v. Dale (1877) 2 QBD 558, 567.

"….the least pecuniary interst in the subject-matter of the litigation will disqualify any person from acting as a Judge." Stephen, J. in R v. Farrant (1887) 20 ABD 58, 60.

"….a person who has a judicial duty to perform disqualifies himself from performing it if he has a pecuniary interest in the decision which he is about to give or a bias which renders him otherwise than an impartial Judge. If he has a pecuniary interest in the success of the accusation he must not be a Judge." Bown, L.J. in Lesson v. General of Medical Education. (1889) 43 Ch. D 366, 384,"

It is to be judged whether a reasonable person in the similar situation would assume the possibility of bias in the mind of the deciding officer. It is always a question of fact to be decided independently in each case. In the present case the doctors community though their Association was agitating from the very beginning agaisnt the posting of a non-technical person as Secretary Health. This issue was going on for a considerable period. They were having some demands as according to their assumption their career was at stake. In these circumstances it could not be said that their apprehension for the change of Authorized Officer was not reasonable when they all were voicing for the change. They were certainly having apprehension and foundation. In this regard it would be apt to reproduce the determination of the learned Judges reported in Manak Lal, Advocate v. Dr. Prem Chan Singhvi and others (PLD 1957 SC (India) 346) which is in the following terms:-

"It is well-settled that every member of judicial proceedings must be able to act judicially; and it is that Judges should be able to act impartially, objectively and without any bias. In such case the test is not whether in fact bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the Tribunal might have operated against him in the final decision of the Tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done. As C. v. Bath Justices (1926 App. Cases 586 at page 590):

'<u>This rule has been asserted, not only in the case of Courts of Justice and other Judicial Tribunals, but in the case of authorities which, though in no sense to be called Courts, have to act as Judges of the rights of others.</u>'

> *In dealing with cases of bias attributed to members constituting Tribunals, it is necessary to make a distinction between pecuniary interest and prejudice so attributed. It is obvious that pecuniary interest, however, small it may be in a subject-matter of the proceedings, would wholly disqualify a member from acting as a Judge. But where pecuniary interest is not attributed but instead a bias is suggested, it often becomes necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice. It would always be a question of fact to be decided in each case. The principle, says Halsbury, nemo debt esse judex in causa propria sua precludes a justice who is interested in the subject-matter of a dispute, from acting as a justice therein."(Halsbury's Laws of England; Vol.XXI, p.535, para. 952). In our opinion, there is and can be no doubt the validity of this principle and we are prepared to assume that this principle applies not only to the justices as mentioned by Halsbury but to all Tribunals and bodies which are given jurisdiction to determine judicially the rights of parties." (Underlining is ours)."*

15. It is not sufficient to merely allege bias on the part of a learned Judge or restrict the assertion to generalized statements. The issue of bias in a judge is a very serious matter and in the very least cogent and specific particulars thereof must be pleaded by an applicant and the same may be bolstered with plausible corroboration.

16. The phrase *bias in a judge* has been dealt with in detail in the case of *ASIF ALI ZARDARI & ANOTHER V/S. THE STATE,* reported as *PLD 2001 SUPREME COURT 568,* and it stipulates as follows:

> *"18. The foremost question is what is 'bias'. Bias has been described in Corpus Juris Secundum, Volume X, pp. 354 and 355 as under:-*
>
> *"BIAS.--Primarily, a diagonal or slant, especially of a seam, cut, or line across a fabric; and so derivatively, a leaning of the mind; a mental predilection or prejudice; anything which turns a man to a particular course; a particular influential power which sways the judgment; a preconceived opinion; a sort of emotion constituting untrustworthy partiality; bent, inclination, prepossession, propension, or tendency, which sways the mind toward one opinion rather than another; propensity toward an object, not leaving*

mind indifferent. "Bias" has been held synonymous with "partiality", and strictly to be distinguished from "prejudice". Under particular circumstances, the word has been described as a condition of mind; and has been held to refer, not to views entertained regarding a particular subject-matter, but to the mental attitude or disposition toward a particular person and to cover all varieties of personal hostility or prejudice him" (Emphasis provided).

Garner on Administrative Law, 4th Edition at page 122 has also attempted to define bias as a disqualification and in such context observed as follows:

"Not only is a person affected by an administrative decision entitled to have his case heard by the agency seized with its determination, but he may also insist on his case being heard by a fair Judge, one free from bias. Bias in this context has usually meant that the adjudicator must have no financial interest in the matter under dispute, but it is not necessarily so limited and allegations of bias have been upheld in circumstances where there was no question of any financial interest."

19. In this context, the following observations of Lord Denning M.R. in Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon and others (1968) 3 All ER 304) would be relevant:

"A man may be disqualified from sitting in a judicial capacity on one of two grounds. First, a "direct pecuniary interest" in the subject-matter. Second, "bias" in favour of one side against the other.

So far as "pecuniary interest" is concerned, I agree with the Divisional Court that there is no evidence that Mr. John Lannon had any direct pecuniary interest in the suit. He had no interest in any of the flats in Oakwood Court. The only possible interest was his father's interest in having the rent of 55, Regency Lodge reduced. It was put in this way: if the committee reduced the rents of Oakwood Court, those rents would e used as "comparable" for Regency Lodge, and might influence their being put lower than they otherwise would be. Even if we identify the son's interest with the father's. I think that this is too remote. It is neither direct nor certain. It is indirect and uncertain.

So far as bias is concerned, it was acknowledged that there was no actual bias on the part of Mr. Lannon, and no want of good faith. But it was said that there was, albeit unconscious, area of likelihood of bias. This is a matter on which the law is not altogether

> *clear; but I start with the oft-repeated saying of LORD HEWART, C.J., in R.V. Sussex Justices, Ex p. McCarthy:*
>
> *"… it is not merely of some importance, but of fundamental important, that justice should both e done and be manifestly seen to be done"*
>
> *20. In our own context, the Code of Conduct framed by the Supreme Judicial Council under Article 128(4) of the erstwhile Constitution of Pakistan, 1962 for the Judges of the Supreme Court and the High Courts in Pakistan provides in Article IV as under:--*
>
> *"A Judge must decline resolutely to act in a case involving his own interest, including those of persons whom he regards and treats as near relatives or close friends.*
>
> *A Judge must refuse to deal with any case in which he has a connection with one party or its lawyer more than the other, or even with both parties and their lawyers.*
>
> *To ensure that justice is not only done, but is also to be done, a judge must avoid all possibility of his opinion or action in any case being swayed by any consideration of personal advantage, either direct or indirect."*

17. The above decision was also relied upon in the case of *ALL PAKISTAN NEWSPAPERS SOCIETY & OTHERS V/S. FEDERATION OF PAKISTAN & OTHERS,* reported as *PLD 2012 SUPREME COURT 1.*

18. The allegation of improper conduct, vis a vis the applicant herein, appears to be devoid of any merit as the same is neither pleaded with proper particulars nor supported by any corroboration available on the file.

19. In view of the foregoing it is the considered view of this Court that the allegation of bias upon the learned Trial Judge is unfounded.

20. It has been observed that the institution of the present application directly before this Court may also be questionable pursuant to the

provisions of sub-section (2) of Section 25-A of the Family Courts Act, 1964, which reads as follows:

> *"(2) A District Court may, either on the application of any party or of its own accord by an order in writing, transfer any suit or proceeding under this Act from one Family Court to another Family Court in a district or to itself and dispose it of as a Family Court]"*

21. It is well settled law that the statutorily prescribed hierarchy of dispute resolution fori may not be ignored at the whims of an applicant.

22. There is no reason apparent from the record to substantiate the institution of the present application before this Court, instead of the Court of the learned District Judge.

23. It follows from the foregoing that the appropriate forum for institution of the subject transfer application may have been the learned District Court and there appears to be no reason why the subject transfer application was alternatively instituted before this Court.

24. In view of the rationale stipulated herein above, this civil transfer application, along with listed application, is dismissed as there are no cogent grounds available in the pleadings or on the record justifying the grant thereof.

25. The office is directed to communicate this order directly to the learned trial Court for necessary reference and record.

Announced in open Court.

JUDGE

Shahid