ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Miscellaneous Application No.104 of 2019

Date	Order with signature of Judge

Present: Mr. Justice Nazar Akbar

Applicant No.1 : Shaukat Ali Khatian
Applicant No.2 : Imran Bhatti
Applicant No.3 : Zohaib Hussain Baloch
through Mr. Abbas Rasheed Razvi, Advocate.

Versus

Respondent No.1 : Additional District & Sessions Judge 1st, South Karachi.

Respondent No.2 : S.H.O Artillery Maidan, Karachi
Ms. Seema Zaidi, D.P.G.

Respondent No.3 : Naheed Azhar D/O Muhammad Azhar.

Date of hearing : **13.05.2019**

Date of Decision : **13.05.2019**

JUDGMENT

NAZAR AKBAR, J. This Criminal Miscellaneous Application is directed against the order dated **17.11.2015** passed by the Ist Additional Sessions Judge, South Karachi in Criminal Miscellaneous Application No.1568/2015, whereby an application under **Section 22-A** of the Cr.P.C filed by Respondent No.3 viz Naheed Azhar was allowed and Respondent No.2 (S.H.O) was directed to register the case in accordance with law.

2. The background of this Criminal Miscellaneous Application is that the applicants on being aggrieved by the impugned direction to the S.H.O to register FIR challenged the said direction through constitutional petition before a Division Bench of this Court in C.P No.D-7289/2015 with the following prayer:-

i) To suspend the impugned order dated 17.11.2015 passed by Learned 1st Additional Sessions Judge Karachi, South.

ii) A direction to the S.H.O P.S Artilary Maidan, Karachi not to lodge F.I.R against the petitioner and other proposed accused till final decision of the court;

iii) Any other or additional relief or relief(s) as this Hon'ble Court may deem fit and proper in the circumstances of the case.

iv) Cost of proceedings.

3. On **20.11.2015** they got the impugned order suspended. Then after more than three years by order dated **11.3.2019** said Constitution Petition was converted into Criminal Miscellaneous Application and the office was directed to assign new number to it and place it before single bench as per roster. On **08.05.2019** it was listed before me when I passed the following order:-

> *Stay was granted on **20.11.2015** and since then case is being adjourned. Learned Addl. P.G claims copy, learned counsel holding brief undertakes to supply the same during course of the day. This matter will be taken up on Monday i.e **13.5.2019** since counsel for the applicant is out of station.*

4. Mr. Abbas Rasheed Rizvi, learned counsel for the applicants has contended that the impugned order has been passed without giving an opportunity of hearing to the advocate for the applicants. However, he was unable to explain that at the relevant time his clients had any right of audience before the learned Court who has not even issued notice to his clients. It has been categorically observed by the trial Court that applicants had no right of audience in the following terms:-

> ***"It may be mentioned at very outset that Syed Anwar Shah, Advocate intended to file power on behalf of proposed accused Tashfeen Khalid Naz and requested to be heard before***

> ***passing any order on this petition.*** *Learned DDPP for the State also requested to accept his assistance before deciding the instant petition. It has been made clear to both of them that no notice has been issued to any of the proposed accused and only comments were called from the concerned PS., who had initially submitted that the petitioner did not approach them. On such comments the petitioner was asked to approach the concerned P.S so that her statement may be recorded. It is, however, submitted by learned counsel for the petitioner that the petitioner approached the concerned P.S. even after order dated 07.11.2015, but he did not receive any positive response and respondent No.1 (S.H.O) flatly refused to register a case saying that all the offences are non-cognizable.* ***It has, however, been made clear to Syed Anwar Shah, Advocate and learned DDPP for the State that this forum is not bound to hear them before passing order with regards to registration of a criminal case or otherwise."***

The learned counsel for the applicant on the above findings has not disputed that this finding is wrong nor he has relied on any case law to claim that his client had a right of audience through a counsel before the learned Additional Sessions Judge when he was performing his duty as "Ex-officio Justice of Peace being quasi-judicial in nature". To the contrary the above observations of the learned Additional Sessions Judge is precisely in obedience to judgment of Hon'ble Supreme Court in the case of **Brig. (Retd.) Imtiaz Ahmad** vs. Government of Pakistan through Secretary, Interior Division Islamabad and 2 others (**1994 SCMR 2142**). The relevant observations of Hon'ble Supreme Court from the said judgment at page-2153 in para-14 side note, E, F & G are reproduced below:-

> 14. *The starting point of the examination of the legal questions canvassed by the petitioner's counsel must be the important fact that* ***the stage at which the petitioner thought it proper to invoke the High Court's jurisdiction under Article 199 of the Constitution was the stage of registration of criminal cases against him.***

> *The effect of the registration of a case is to set in train an investigation by the police in. accordance with law . As was said in "Norwest Holst Ltd. v. Department of Trade and others (1978) 3 All ER 280 at 290):*
>
> *"In every investigation ----there are ---by and large three different phases. First of all, the administrative phase; next, the, judicial phase; and, finally, the executive phase when the orders of the Court or the Tribunal are, if necessary, executed or promulgated. Quite plainly fairness to the suspect ....demands that he S.H.Ould be given a chance of stating his case before the final period: the execution Equally fairness demands that the suspect shall be given a chance of putting his side of the case before the judicial inquiry is over.--- But on the other side, -and the other side are entitled to fairness just -as the suspect is, fairness to the inquirer demands that during the administrative period he S.H.Ould be able to investigate without having at every stage to inquire from the suspect what his side of the matter may be. Of course it may be difficult to find out the particular point at which the administrative phase ends and the judicial phase begins ....*
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> *To quote a passage from Lord Reid's speech in "Wiseman.v. Borneman" ((1971) AC 297., at 308):--*
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> *"Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but* ***no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party****."*

In view of the above, the contention of the learned counsel for the applicants that he was not heard is misconceived and has no legal basis. Nor it is violation of **Article 10-A** of the Constitution of Pakistan, 1973.

5. The learned counsel for the applicants next contended that this Court may quash the proceedings in exercise of powers under **Section 561-A** of the Cr.P.C. Again the question is where are the proceedings which are to be quashed. The order for registration of

FIR by a quasi-judicial officer is not "abuse of the process of any Court" against the applicants. In my humble view criminal proceedings starts only on registration of an FIR, if at all, and not before it. It is not expected from S.H.O to call anyone before recording an statement of a complainant and hear him/her. The duty of the S.H.O is to verbatim record statement of the complainant and get it signed from the complainant after reading it. Thereafter it is for the S.H.O to decide whether a prima-facie case is made out or not and that exercise would still not be judicial proceedings against the applicants/ suspects unless after the inquiry, if any, the S.H.O proposes that a case is made out for furnishing the challan against the suspects. Even after inquiry and investigation it will not be sole discretion of the S.H.O to decide that the FIR is to be disposed of in class A, B or C or a challan is to be filed before the competent Court. The S.H.O cannot unilaterally decide to file a challan, he is supposed to seek approval for filing report under **Section 173** of the Cr.P.C. before the Magistrate/Court and then under **Section 190** of the Cr.P.C it is for the Court to take cognizance without recording any evidence. None of these actions of the S.H.O on the information received by him fall within the definition of "**trial**" to be quashed at the request of the suspect. Mere direction of the Ex-officio Justice of Peace to the S.H.O to register a criminal case is not any judicial pronouncement about the guilt or innocence of accused. Therefore, when even FIR has not been registered by the concerned Station House Officer, the Court cannot exercise its inherent power under **Section 561-A** of the Cr.P.C to restrain the SHO from recording statement of complainant and at the same time assume the role of an inquiry officer itself by examining possible defence of suspects, if any. The plea of quashment can be raised only when

there is at least FIR before the Court. The learned Additional Sessions Judge after going through the material placed before him has come to the conclusion that prima-facie the case for registration of FIR was made out and I again quote the relevant observations of the trial Court from para-4 and 5 of the impugned order as follows:-

> 4. *Learned counsel for the petitioner submitted that the facts alleged constitute offences of criminal trespass and causing of obstruction of a public servant in discharge of her duties and wrongful restraint. He has therefore, requested for an order for registration of a criminal case accordingly.*
>
> *5. I have given due consideration to the submission made and have* ***carefully gone through contents of the petition as also application addressed to the Inspector General of Police Sindh Karachi dated 21.09.2015.*** *In my humble opinion certain offences as argued by learned counsel for the petitioner has been made out which include both cognizable and non-cognizable offences. The petitioner has, therefore, succeeded to make out a case for an order to direct respondent No.10 to register a criminal case.*

The above findings of learned Additional Sessions Judge are not questionable before any Court of law since it is only a direction to a delinquent Station House Officer who has refused to register complaint of Respondent No.3. It is settled law that even if there is no direction of the Court, the S.H.O has no authority to refuse to record the statement of complainant in the relevant register irrespective of its authenticity/correctness or falsity of such statement. In this context the Hon'ble Supreme Court in the case of Muhammad Bashir vs. Station House Officer, Okara Cantt. and others (**PLD 2007 Supreme Court 539**) in para-25 and 26 has categorically held that S.H.O has no authority to refuse to register FIR under any circumstances. He may refuse to investigate a case but he cannot refuse to record FIR. The relevant observations of Supreme Court are reproduced below:-

25. As has been mentioned above, ***no provisions exists in the' Code of Criminal Procedure or in any other law which permitted a S.H.O. to refuse to record an F.I.R. provided the information conveyed to him disclosed the commission of a cognizable offence****. However, we have come across some cases wherein it was said that the provisions of section 157(1)(b) of the Cr.P.C. or the provisions of Rule 24.4 of the Police Rules of 1934 were the kind of provisions which did allow the S.H.O. to do so.* ***The impression is misconceived and fallacious****. The said provisions of section 157(1), Cr.P.C. read as under:--*

> *"157. Procedure where cognizable offence suspected.--(1) If, from information received or otherwise an Officer Incharge of a Police Station has reason to suspect the commission of an offence which he is empowered under section 165 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report, and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the Provincial Government may, by general or special order, prescribe in this behalf to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary to take measures for the discovery and arrest of the offender. Provided as follows:*
>
> *(a) Where local investigation dispensed with.--When any information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the Officer Incharge of a Police Station need not proceed in person or depute a subordinate officer to make an investigation on the spot;*
>
> *(b) Where Police Officer Incharge sees no sufficient ground for investigation.--If it appears to the Officer Incharge of a Police Station that there is no sufficient ground for entering on an investigation, he shall not investigate the case."*

What transpires from a bare reading of these provisions contained in the main body of subsection (1) of section 157, Cr.P.C. is that whenever an Officer Incharge of a Police Station, from information received i.e. F.I.R. or otherwise, even suspects the commission of a cognizable offence, he is obliged , to commence, immediately, the investigation of such a case and further that such an investigation had to be done at the spot i.e. at the place of occurrence and not while sitting in his office or elsewhere. The provisions of clauses (a) and (b) of the said subsection (1) are exceptions to the said command of the said subsection (1). Clause (a) mentions the exceptional

> *situation where an Investigating Officer needs not carry out the investigation at the place of occurrence and clause (b) envisages a situation where the S.H.O. was permitted to refuse to investigate a case which discretion, is however, exercisable subject to the conditions mentioned in subsection (2) of section 157, Cr.P.C. and is subject to the control of a superior police officer 'under section 158, Cr.P.C. and a magisterial check under section 159 of the said Code.*
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> *26. It will thus be noticed that the provisions of section 157, 'Cr.P.C. equip a police officer only with a discretion to refuse to investigate a case and no where do these provisions,* ***even remotely indicate, any power vesting in the S.H.O. to REFUSE TO RECORD AN F.I.R****. if the information conveyed to him disclosed the commission of a cognizable offence. Needless to add that rules are always subordinate to the statutory provisions and no rule can permit what was not allowed by a statutory provision.*

6. The learned counsel for the applicants has attempted to refer to certain documents filed with the petition to prove innocence of his clients and tried to argue that the alleged offence is not made out. This Court is not supposed to comment on the possible outcome of the inquiry and investigation which is to be conducted by S.H.O after recording statement of respondent No.3. Whatever is the stance of the applicants, it should first be brought to the notice of S.H.O to falsify the statement of Respondent No.3, if any, incorporated in the FIR. If the statement of respondent No.3 after inquiry & investigation found to be false, the S.H.O can prosecute Respondent No.3 under **Section 182** of the PPC as held by the Hon'ble Supreme Court in the case of Muhammad Bashir (supra) in the following terms:-

> *27. The conclusions that we draw from the above, rather lengthy discussion, on the subject of F.I.R., are asunder:--*
>
> > *(a) no authority vested with an Officer Incharge of a Police Station or with anyone else to refuse to record an F.I.R. where the information conveyed, disclosed the commission of a cognizable offence-*
> >
> > *(b) no authority vested with an Officer Incharge of a Police Station or with any one else to hold any*

> *inquiry into the correctness or otherwise of the information which is conveyed to the S.H.O. for the purposes of recording of an F.I.R.*
>
> *(c) any F.I.R. registered after such an exercise i.e. determination of the truth or falsity of the information conveyed to the S.H.O., would get hit by the provisions of section 162, Cr.P.C.*
>
> *(d) existence of an F.I.R. is no condition precedent for holding of an investigation nor is the same a prerequisite for the arrest of a person concerned with the commission of a cognizable offence;*
>
> *(e) nor does the recording of an F.I.R. mean that the S.H.O. or a police officer deputed by him was obliged to investigate the case or to go through the whole length of investigation of the case mentioned therein or that any accused person nominated therein must be arrested; and finally that,*
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> *(f)* ***the check against lodging of false F.I.Rs. was not refusal to record such F.I.Rs, but punishment of such informants under S.182, P.P.C. etc. which should be, if enforced, a fairly deterrent against misuse of the provisions of S.154, Cr.P.C.***

7. I have extensively quoted two famous judgments of the Hon'ble Supreme Court viz **Muhammad Bashir** and **Brig. (Retc.) Imtiaz** (supra) as both are always in my active memory whenever I am dealing with the cases arising out of the orders passed by the Ex-officio Justice of Peace in terms of **Section 22-A** of the Cr.P.C. In my humble view, the Hon'ble Supreme Court has honestly closed the door of High Court to entertain any grievance against the order of Ex-officio Justice of Peace directing the S.H.O concerned to register FIR. A full bench of the Hon'ble Supreme Court in a recent judgment in the case of Younas Abbas & others vs. Additional Sessions Judge Chakwal and others (**PLD 2016 SC 581**) while dealing with powers of Ex-officio Justice of Peace under **Section 22-A** of the Cr.P.C in para-21 has again approved the findings of these two judgments as below:-

> *21. Having thus considered,* ***we hold that the functions performed by the Ex-officio Justice***

> ***of Peace being quasi judicial in nature*** *cannot be termed as executive, administrative or ministerial; that such functions being complementary to those of the police do not amount to interference in the investigative domain of the latter and* ***thus cannot be held to be violative of the judgments of this Court rendered in the cases of Muhammad Bashir v. Station House Officer, Okara Cantt. and others and Brig. (Retd) Imtiaz Ahmad v. Government of Pakistan through Secretary, Interior Division, Islamabad and 2 others (supra)*** *and that insertion of subsection (6) of Sections 22-A and 25 of the Cr.P.C. through the Code of Criminal Procedure (3rd Amendment Ordinance) CXXXI of 2002 is not ultra vires by any attribute. In this view of the matter, we direct that the cases be listed before the benches for decision in accordance with law. We, while parting with the judgment appreciate the enlightened assistance rendered by Khawaja Haris Ahmad, learned Sr. ASC who despite his heavy pre-occupations honoured the words of this Court.*

8. In view of the above after hearing learned counsel for the applicants I had dismissed the instant Criminal Miscellaneous by short order in the open Court but after hearing the short order of dismissal of the instant Criminal Miscellaneous Application, learned counsel for the applicants innocently stated that he wants that his contention may be recorded which obviously I was supposed to incorporate in the reason to be recorded. However, to dispel any fear in the heart of young counsel even after the order, I allowed him to file written submissions so that in the detailed order on finding treatment to his submission he should be satisfied that I have incorporated his contentions. I hope in the preceding paragraphs I have done my duty to the satisfaction of learned counsel, who at the bar has not referred to any case-law while making his submissions, however, on the next day when he filed written synopsis, he has relied on the following case-laws.

1. *Qudrat Hussain vs. The State (**1996 PCrLJ 735**);*

2. *Mst. Riaz Bibi vs. S.H.O (**2002 PCrLJ 530**);*

3. *Yasmin Gul Khanani and another vs. Tariq Mehmood and 2 others (**2013 YLR 2716**);*

4. *Zaheer Ahmed vs. Directorate General of Intelligence and Investigation-IR and 4 others (**2015 PTD 349**);*

5. *Naheed Azhar vs. Province of Sindh and others (**2016 PLC (CS) 879**).*

6. *Imtiaz Ahmed Cheena vs. S.H.O Police Station Ghotki and others (**2010 YLR 189**);*

7. *Shah Mohammad vs. S.H.O Police Station and another (**2014 YLR 719**);*

8. *Jamil Ahmed Butt and another vs. The State and others (**2014 PCrLJ 1093**);*

9. *Nazir Ahmed vs. S.H.O Adilpur Distt. Ghotki and another (**2015 PCrLJ 846**);*

9. The cases at serial No.1 to 4 are totally irrelevant since in all the four cases this Court has exercised inherent jurisdiction for quashment of the criminal proceedings pending before the Courts of law and in none of these rulings the S.H.O had been restrained from recording statement of complainant. In the cases at serial No.1 (Qudrat Hussain) this High Court has exercised revisional jurisdiction against the order of dismissal of an application under **Section 249-A** of the Cr.P.C. In the case at serial No.2 (Razia Bibi), Lahore High Court has quashed FIR No.70/2000. In the case at serial No.3 (Yasmin Gul), Single bench of this Court has also quashed an FIR under **Section 448** of the Cr.P.C. In the case at serial No.4 (Zaheer Ahmed) a Division Bench of this Court has quashed the proceedings initiated on an FIR registered by Sales Tax Authorities. In the case in hand the applicants want to exercise inherent power of this Court under **Section 561-A** of the Cr.P.C to restrain the concerned S.H.O from registration of the FIR (prayer-ii reproduced in para-2 above) by disregarding the authoritative judgments of

Supreme Court in the cases of Brig. (Retd.) Imtiaz Ahmed and Mohammad Bashir (supra). Irrespective of the Supreme Court order discussed in this judgment the FIR has not been lodged since **20.11.2015** as a consequence of stay granted by this Court against the direction given by Ex-Officio Justice of Peace for registration of the FIR.

10. In the case in hand the offences were made out as rightly observed by the learned Additional Sessions Judge for registration of FIR. The judgment cited as serial No.5 above is in fact against the applicants, Respondents No.3 in para-5 of her application under **Section 22-A** of the Cr.P.C has categorically mentioned that applicant No.1 in an attempt to restrain her from performing her duties have issued an illegal notification contrary to facts. On her petition, Division Bench of this Court on **03.2.2016** has declared that Applicant/suspect No.1 on **08.9.2015** has acted without any lawful authority and it is reported as **2016 PLC (CS) 879** and mentioned at serial No.5 on the list of cases referred by the counsel for applicants. The illegal notification bears name of applicant No.1 & 3. It was besides the other acts of the applicants to physically restrain her from assuming the charge of the office of Chairman Sindh Board of Revenue. The illegally issued notification read with complaint to the IGP, Sindh dated **21.09.2015** by Respondent No.3 (para-9 of application) were enough for the learned Additional Sessions Judge to justify allowing an application under **Section 22-A** of the Cr.P.C.

11. Now I take up last four case-laws cited by the learned counsel in which subject matter before Court was orders passed by Additional Sessions Judges under **Section 22-A** of the Cr.P.C. The case of

Imtiaz Ahmed (at serial No.6 above) this Court has observed that the Court is not supposed to act in a mechanical manner while seized of application under **Section 22-A** and **22-B** of the Cr.P.C. The Court should apply its mind as to whether the applicant had approached the Court with clean hands or it is tainted with malice. There can be no cavil to this preposition. The record of the case in hand does not show that there was any malice and Respondent No.3 has approached the Court with clean hands. Her clean hands were even more dry-cleaned by the Division Bench of this Court when her petition against the applicants/accused was allowed and the acts of applicants/accused were declared as unlawful and illegal (**2016 PLC (C.S) 879**). The case of Jamil Ahmed Butt (at serial No.8 above) authored by me is entirely on different facts. In this case, Ex-officio Justice of Peace of **District East** has entertained a complaint filed by a resident of **District South** and alleged place of incident was situated in **District Central** and, therefore, the order of Ex-officio Justice of Peace of District East was held to be without jurisdiction. The provisions of **Section 22** of the Cr.P.C are quite clear on the point of territorial jurisdiction of Ex-officio Justices of Peace. In terms of **Section 22** of the Cr.P.C, each Justice of Peace is assigned territorial jurisdiction to perform his duties within particular local areas. In the case in hand it was not the case of the Petitioners that the Ex-officio Justice of Peace who has directed the S.H.O for registration of the FIR was not from the local area where the alleged incident has taken place. In the cases of **Nazir Ahmed** and **Shah Muhammad** (at serial No.7 and 9) this Hon'ble Court has dismissed petitions against the order of dismissal of an application under **Section 22-A** and **22-B** of the Cr.P.C. In both the cases this Court has held *that* ***"the applicant was at liberty to file private***

complaint to achieve the purpose for which he has approached the Justice of Peace". In the case in hand the situation is otherwise. The Ex-officio Justice of Peace has allowed her application for registration of FIR and, therefore, Respondent No.3 had no other option for redressal of her grievance except to record her statement at the police station to **"enjoy the protection of law"** and set the machinery of law in motion for the applicants **"to be treated in accordance with law"** (Article 4 of the Constitution). Learned counsel has contended that impugned order was in violation of **Article-10** of the Constitution of Islamic Republic of Pakistan, 1973 which guarantees fair trial. I do not think that fair trial is guaranteed by the Constitution only to the suspect / proposed accused. It is equally a fundamental right of the complainant that his grievance against the suspects/accused should be registered and if found triable it should be tried in the Court of law. **Article 10-A** of the Constitution has to be read with **Article 4** of the Constitution whereby all the individuals (without any distinction) have to be dealt with in accordance with law and it is THE INALIENABLE right of every citizen.

12. The above are the reasons for dismissal of this Criminal Miscellaneous Application by short order dated **13.05.2019**. However, while concluding it may be mentioned that the prime suspect/ proposed accused Tashfeem Khalid Niyaz has expired on **02.6.2016** during pendency of this Criminal Miscellaneous Application, however, the other applicants are available and Respondent No.3 may record her statement with the S.H.O and the S.H.O should act in accordance with law. The record further shows that Respondent No.3 was represented through Mr. Ali Safdar Depar,

advocate who has filed power on **23.11.2015**, however, the record does not reflect that he has ever appeared except on **30.11.2015**, therefore, copy of this order may be sent to Respondent No.3 through bailiff.

JUDGE

Karachi, Dated: 22.05.2019

Ayaz Gul