

**JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD.**

Criminal Appeal No. S-24 of 2019

Muhammad Sohail.....v/s.....The State

Criminal Appeal No.S-34 of 2019

Syed Aijaz Ali Shah.....v/s.....The State

Criminal Appeal No.S-35 of 2019

Raza Muhammad Shaikh.....v/s.....The State

Present:-

Mr. Justice Fahim Ahmed Siddiqui

Date of hearing: 29.04.2019

Date of Decision: 29.04.2019

Mr. Muhammad Hassan Jakhro, advocate for appellant in Criminal Appeal No.S-24 of 2019.

Syed Shazad Ali Shah, advocate for appellant in Criminal Appeal No.S-34 of 2019.

Mr. Riazat Ali Sahar, advocate for appellant in Criminal Appeal No.S-35 of 2019.

Mr. Aslam Pervaiz, A.A.G for Federal Government.

Mr. Shaihd Ahmed Shaikh, Deputy Prosecutor General Sindh.

J U D G M E N T

Fahim Ahmed Siddiqui, J. Since all the above three appeals are filed against the one and the same judgment; therefore, it will be appropriate to decide the same with this single judgment.

2. The appellants in all the three appeals have challenged the impugned judgment dated 28th February 2019, whereby the appellants have been convicted and sentenced in a case tried before the learned Special Judge, Anti-corruption in Cr. Case No. 12/2016 emanating from Crime No.08/2016 for the offences under sections 462-C, 462-E, 109, 161 PPC read with section 5 (2) Act-II of 1947 and after

trial the appellants were convicted and sentenced as per the impugned judgment.

The operative part of the impugned judgment is as under:-

"Taking into consideration, the finding on point No. 1 facts and circumstances of the case, as enumerating above, I am of the considered view that the prosecution has successfully established its case against the accused (1) Raza Mohammad Shaikh, (2) Mohammad Sohail and (3) Syed Aijaz Shah; therefore, I convict and sentence official accused Raza Mohammad Shaikh and Mohammad Sohail under section 245 (2) CrPC to suffer RI for three years and fine of Rs. 10,00,000/- (Ten Lakhs) for committing an offence under section 161 PPC r/w section 5 (2) Act -II of 1947 (The fine amount is to be deposited jointly in the account of treasury of the state). In case of default of the said fine, both accused shall suffer Six months each more. I also convict accused 1) Syed Aijaz Shah, 2) Raza Mohammad Shaikh and 3) Mohammad Sohail under section 245 (2) CrPC to suffer RI for Ten Year and a fine of Rs. 18,55,58,313/- for committing an offence under section 462-C (2) (a) PPC read with section 109 PPC (The fine amount is to be deposited jointly in the account of SSGCL Hyderabad). In case of default of the said fine, each accused shall suffer Six months more. Both sentences shall run concurrently. The benefit u/s 382 (B) is extended to all accused. Accused Raza Muhammad Shaikh is present on bail, therefore, he is taken into custody to serve out the above sentences while his surety is discharged. Accused Syed Aijaz Shah, and Mohammad Sohial are produced in custody therefore they remanded back to jail to serve their sentences. Since the above named accused have caused huge loss to the exchequer therefore no lenient view has been taken for awarding lesser punishment. The prosecution has failed to prove its case against the accused namely Syed Ghulam Shabbir Shah,

therefore, he is acquitted under section 245 (1) CrPC by giving him benefit of doubt. He is present on bail therefore his bail bond stands cancelled and his surety is discharged. The case of proclaimed offender Bashir Ahmed Laghari be kept on DF till his arrest while the case of accused Abid Hussain Gaho has been bifurcated today due to his willful absence after issuance a NBW against him and notice to his surety."

3. The prosecution case in a nutshell is that the officials of SSGCL came to know that theft being committed in Shahbaz CNG Station by directly consuming the natural gas from the main distribution gas pipeline. The officials of SSGCL along with FIA team conducted a raid and found that the gas was being consumed for considerable time at the said CNG station. It was revealed that appellants Muhammad Sohail, Syed Aijaz Ali Shah along with the absconding accused were responsible for such gas theft. It is also revealed that one of the officials of SSGCL namely Raza Muhammad Shaikh has direct nexus in such gas theft under some monetary benefit as illegal gratification. Nevertheless, F.I.R. was lodged and the trial was conducted which was culminated in conviction and sentence awarded as mentioned above.

4. Mr. Riazat Ali Sahar, advocate for appellant Raza Muhammad Shaikh (Cr. App. No. S-35/2019) opens his arguments by submitting that the trial Court has no jurisdiction to hold the trial against the accused after promulgation the Gas (Theft Control and Recovery) Act, 2016. However, he continues to argue on merit and submit that even charge against the appellants was not proper and even the charge does not meet the requirements of Section 5 (2) of Prevention of Corruption Act-II, 1947. He emphatically submits that the prosecution could not establish the case against his client. After going through some portions of deposition recorded

before the trial Court, he points out that the prosecution has brought on record that only two amounts of Rs. 10,000/-and Rs. 30,000/- were paid on NIC number of the appellant Raza Muhammad Shaikh but the prosecution could not establish that he has received the said amount, as important prosecution witnesses namely Sajid Ali and Zulfiqar became hostile. Since learned Counsel has raised the issue of jurisdiction; therefore, he was directed to argue on the point of jurisdiction first then, he may argue on the merits, if found necessary. As such Mr. Riazat Ali Sahar started addressing on the point of jurisdiction and assailed the jurisdiction of trial Court by submitting that after promulgation of the Gas (Theft Control and Recovery) Act, 2016; the trial of the offences related to natural gas theft can only be carried out before the Gas Utility Court having jurisdiction. He submits that the said law has exclusive jurisdiction and the pending case are required to transfer the Gas Utility Court, as such, after promulgation of the Gas (Theft Control and Recovery) Act, no Court including trial Court was having jurisdiction. He contends that since the trial Court lacks jurisdiction; therefore, trial of appellant Raza Muhammad Shaikh and other appellants was actually *coram non judice*. In response to a query, he frankly admits that in the present case; there will be no other alternate but to remand the case to the Gas Utility Court for trial afresh.

5. Mr. Muhammad Hassan Jakhro, learned Counsel for appellant in Cr. App No. 24/2019 and Syed Shazad Ali Shah, learned Counsel for appellant in Cr. App No. S-34/2019 adopted the arguments as advanced by Mr. Riazat Ali Sahar.

6. Mr. Aslam Pervaiz, learned Assistant Attorney General for Pakistan submits that since the appellant Raza Mohammad Shaikh is an employee of a company in which controlling shares are in possession of Federal Government, as such, appellant Raza Mohammad Shaikh is a public

servant and he can be booked in a case before Special Judge, Anti-corruption (Central) Hyderabad, hence, the trial and conviction both were proper. He further submits that the objection regarding jurisdiction should be raised before the trial Court and since the objection was not raised at the very first instance; therefore, such objection appears to be fanciful and absurd at this belated stage at the time of hearing of appeal. He submits that when the trial Court has pronounced its verdict, it would be appropriate for the appellants to argue the appeal on merits without disputing the jurisdiction.

7. I have heard the arguments advanced and have gone through the scheme of law laid down in the Gas (Theft Control and Recovery) Act, 2016. Although it is least necessary, but I would like to point out that the F.I.R. of the instant matter was lodged on 29-03-2016 and in the same year the Gas (Theft Control and Recovery) Act, 2016 (hereinafter referred as the Gas Act, 2016) was promulgated. As per official Gazette of the federal government, the Gas Act got the presidential assent on 23rd March, 2016 and on the same date it comes into force of operation as the law of land. Meaning thereby that six days prior to lodging of F.I.R., the Gas Act, 2016 was under operation. It reflects from the record that initially the F.I.R. was lodged before the district police, as an ordinary offences of theft but since in the final report, the name of appellant Raza Muhammad, an employee of SSGCL, is mentioned as one of the accused; therefore, the learned Judicial Magistrate returned the charge-sheet to Investigation Officer for producing the same before the Anticorruption Court. In this way, the cognizance of the offence was taken by the learned trial Court. No doubt, one of the appellant is a public servant, as such, in case of illegal gratification and corruption, the trial Court may have jurisdiction and the private persons, involved in such offence, can also be tried with the official appellants before the same Court. Nevertheless, certain aspects of the case require consideration. Firstly, it is

the case of theft of natural gas by the principal accused persons i.e. owners and management of Shahbaz CNG Station in connivance and abetment of some of the employees of SSGCL. Secondly, it is alleged that some illegal gratification was taken by the employees of SSGCL and on the basis of such allegation, the learned Magistrate returned the charge-sheet for presenting before Special Judge, Anti-corruption (Central), Hyderabad. It is noteworthy that after registration of FIR till presenting the Final Report before Special Judge, Anti-corruption; the entire investigation conducted by the FIA is focused on the theft of gas, as such, no credible evidence could be collected regarding taking illegal gratification. It was the reason that during the trial before Special Judge, Anti-corruption (Central), Hyderabad only some broken chains regarding this aspect of the case can be produced. However, it is quite comprehensible that theft of natural gas from main distribution line in such a huge quantity cannot be possible without some assistance, abetment or at least negligence of the staff of SSGCL, as such, it would be more appropriate that all the accused should be tried before the Gas Utility Court.

8. Now comes to the question raised regarding the jurisdiction in the instant matter. The learned Assistant Attorney General has raised objection that at the belated stage of appeal, an objection regarding jurisdiction cannot be entertained. It is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior Court, and if the Court passed an order or judgment without having jurisdiction over the matter, the same would amount to nullity as the matter goes to the root of the cause. Furthermore, the question of lacking jurisdiction can be raised at any stage of the proceedings and even before the appellate Court. The finding of a Court or tribunal becomes irrelevant, rather

unenforceable/inexecutable once the forum is found to have no jurisdiction over the subject matter. Similarly, if a Court/tribunal inherently lacks jurisdiction, consent of the parties should not equally be permitted to confer and continue jurisdiction by defeating of the legislative animation. The Court cannot derive jurisdiction apart from the statute. An order / judgment and decree without jurisdiction is a nullity. It is a *coram non iudice*; when a special statute gives a right, remedy or punishment for an offence and also provides for a forum for adjudication of such rights, remedy or trial, then it has to be sought only under the provisions of that Act and the common law Court has no jurisdiction. The law does not permit any court/tribunal/authority/forum to usurp jurisdiction on any ground whatsoever in case such an authority does not have jurisdiction on the subject-matter.

9. Mainly, the present case is a natural gas theft case while as discussed above the involvement of the SSGCL employees are quite rational. As per the Gas Act, 2016; the jurisdiction for trial of gas theft case lies with the Gas Utility Courts and as per Section 4 of the Gas Act, 2016, which is reproduced as under:

“4. Exclusive jurisdiction of Gas Utility Court. – (1) A Gas Utility Court shall have exclusive jurisdiction with respect to all matters covered by this Act.

(2) The Court having jurisdiction under this Act shall be a Gas Utility Court having jurisdiction in the place in which the Gas Utility Company, consumer, gas producer or offender, as the case may be, is situated.”

From the above statutory provision, it is clear that the jurisdiction Gas Utility Court is an exclusive jurisdiction to try all cases pertaining to the Gas Act, 2016, which according to its preamble provide for prosecution of cases of gas theft and other offences relating to gas and also provide procedure for recovery of amount due. Now, a question may arise whether the Gas Utility

Court is merely a Court of preferential jurisdiction or purely exclusive jurisdiction, which has deprived other Courts to take cognizance of such cases. In this respect, sub-section (5) and (7) of the Gas Act, 2016 are important, which reads as:

5. Powers of the Gas Utility Court. – (1) *Subject to the provisions of this Act, a Gas Utility Court shall, ---*

(1)

(2)

(5) *Subject to sub-section (6), no court or authority shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of a Gas Utility Court extends under this Act.*

(6)

(7) *All proceedings pending in any other court, including suits for recovery, shall stand transferred to, or be deemed to be transferred to, and heard and disposed of by the Gas Utility Court having jurisdiction under this Act. On transfer of proceedings under this sub-section, the parties shall appear before the Gas Utility Court concerned on the date previously fixed.*

Sub-section (5) of Section 5 of the Gas Act, 2016 has placed an embargo and ousted the jurisdiction of all other courts, and makes it clear that only the Gas Utility Court is having jurisdiction pertaining to the matter of gas theft cases. Similarly, sub-section (7) with a deeming clause further clarifies that all the proceedings pending in any other Court shall stand transferred. I am of the view that bare perusal of the above statutory provisions, makes it clear that the Gas Utility Court is not a court of preferential but exclusive jurisdiction and after promulgation of the Gas Act, 2016 no other Court is having jurisdiction to try any case pertaining to gas theft or recovery of gas dues. In this respect, Section 31 of the Gas Act, 2016 is also important, which provides an overriding effect to other laws. I am of the considered view that a provision which purports to exclude the jurisdiction of other Courts in certain matters should be strictly construed and now it is in the province of

the Gas Utility Court alone to determine whether the matter brought before it falls within one of the two limbs mentioned in the preamble of the Gas Act, 2016 not the learned Judicial Magistrate. I am of the view that the learned Judicial Magistrate has no power to return the charge-sheet to the Investigating Officer to present the same before some other Court.

10. The sequel of the above discussion is that in the instant matter, the impugned judgment pronounced by the Special Judge, Anti-corruption (Central), Hyderabad was a judgment which is the result of a trial *coram non judice*, hence, the same is regarded as a nullity and set-aside. The case is remanded to the Gas Utility Court, Jamshoro for *de novo* trial from the stage of charge. Office shall send the R & Ps of the case to the Gas Utility Court, Jamshoro, who shall decide the case in accordance with law. The accused who have been granted bail either by this Court or the Special Judge, Anti-corruption (Central), Hyderabad shall remain on bail but they have to furnish fresh surety before the Gas Utility Court, Jamshoro within a period of one week's time from the day of pronouncement of the short order. These are the reasons for my short order passed on 27.05.2019.

JUDGE

Abdullah Channa/PS
Hyderabad.
Dated 31.05.2019.