

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

Criminal Miscellaneous Application No.S-137 of 2020

Dost Muhammad Applicant.
Vs
Civil Judge & Judicial Magistrate-III,
and others. Respondents.

Date of hearing: 10.08.2020.

Date of decision: 31.08.2020

Mr. Ali Akbar Lakho, advocate for applicant.

Mian Taj Muhammad Keerio, advocate for respondents No.5,
6 & 8.

Mr. Nazar Muhammad Memon, Addl.P.G. for the State.

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ORDER

RASHIDA ASAD, J:- Through this Criminal Miscellaneous Application, Dost Muhammad, the applicant, has challenged the impugned order dated 20.03.2020, passed by learned Civil Judge / Judicial Magistrate-III, Sanghar, whereby the order passed by learned Judicial Magistrate, whereby the charge sheet submitted under section 173, Cr.P.C., by I.O in a cognizable offence viz. Crime No. 16/2020, under sections 436/ 337-H(ii)/ 149 P.P.C. for disposal of the case crime under 'B' Class has not been accepted and the F.I.R. was disposed of in 'C' class. Being aggrieved and dissatisfied with the impugned order, the complainant preferred the above referred Criminal Miscellaneous Application.

2. Relevant facts narrated in FIR are that, complainant party had a dispute with accused Pathan Khan Shar over a piece of land who threatened his brother Deen Muhammad Shar to vacate the land and the house. On

24.02.2020, complainant along with his son Saeed Ali and nephew Muhammad Bunal went to his brother Deen Muhammad who went outside for some work therefore, they stayed at his house and at 2330 hours, they heard some voices, on which they came out and saw accused Pathan Khan Shar along with his companions duly armed with weapons. Complainant asked them why they came there, on which accused set the Chapra at fire, though complainant party tried to extinguish the fire, but could not succeed, hence the house caught fire and all the house hold articles including cloths and CNICs of ladies were burnt, thereafter, accused went away by making fires in air. Thereafter, complainant lodged the FIR. On conclusion of usual investigation, the police has submitted the report under 'B' class, however, the learned Magistrate disposed of the case in 'C' class, hence the captioned application under section 561-A, Cr.P.C. has been filed.

3. Learned counsel for the applicant submitted that Sessions Court has got exclusive jurisdiction to try the case and the job of Magistrate is to send the case for trial to the Sessions Judge, without discussing the evidence available on the record; that offence is triable by the Sessions Court the Magistrate had no power to cancel the F.I.R.; that the order passed by the learned Magistrate amounts to abuse the process of Court, therefore, this Court has the power under section 561-A, Cr.P.C. to rectify the injustice.

4. On the other hand, learned Counsel for respondents No.5, 6 and 8 as well as learned Additional Prosecutor General Sindh supported the impugned order by arguing that the impugned order is perfect in law and facts.

5. I have gone through the material available on record as well as the arguments advanced by the learned counsel for the parties.

6. There is no cavil with the proposition that the Magistrate cannot record the evidence in Sessions case but it doesn't mean that he has to automatically send the case for trial to the Court of Sessions, simply because a section relating to an offence exclusively triable by Court of Sessions has been mentioned by the police in challan. He is in fact required

on having taken cognizance of such a matter, placed before him by the police send it to the Sessions Court in order to determine whether the allegations made in the police report make out a prima facie case. Under section 190, Cr.P.C., the Magistrate cannot determine the nature of offence as to whether or not the case is one triable exclusively by the Court of Sessions, the Magistrate was not competent to dispose of a Sessions case, while cancelling the F.I.R had acted without jurisdiction. The learned Magistrate may draw the inference and conclusion and then transmit the same to the Sessions Court as it was for that competent Court to decide whether cognizance is to be taken or otherwise, and made an administrative determination, without going in further detail as to the merits and demerits of the case. Suffice is to say that the offence under sections 436 P.P.C., which, according to the Schedule, is exclusively triable by the Court of Sessions, therefore, after receiving the report under section 173, Cr.P.C., the learned Magistrate was required to forward the same to the Sessions Court without recording or discussing any evidence, as provided under section 190, Cr.P.C.

7. The impugned order is thus in the nature of recommendations and/or report or opinion for the competent court it being administrative determination. Therefore, the impugned Order passed by Magistrate is coram non judice to the extent of cancelling the F.I.R in "C" class and is set aside to such an extent. Impugned Order be sent by the Magistrate to the court, competent to try the case and/or deal with it as per law.

8. The instant Criminal Miscellaneous Application is disposed of in the above terms.

JUDGE

