

IN THE HIGH COURT OF SINDH AT KARACHI

Cr. Misc. Application No. 255 of 2018

Cr. Misc. Application No. 53 of 2018

Applicant Mst. Ameer Jehan : In person
@ Bisma Noureen

The State : Through Mr. Hussain Bux Baloch
Respondent : Addl. Prosecutor General, Sindh,
for the State.

Dates of hearing : 03.02.2020

Date of Order : 03.02.2020

ORDER

Muhammad Saleem Jessar, J:- By this single order I intend to dispose of above-noted two Cr. Misc. Applications as in both the cases, the applicant; the factual as well as legal aspects of the cases are almost same.

Brief facts of the case are that the applicant is an accused in FIR No.621/2017 of P.S Preedy, under Section 186/353/506/504/337-A(i)/337-F(i)/337-L(ii) PPC, which was pending for trial before the Court of XVth Judicial Magistrate, Karachi (South) against whom applicant showed her mistrust. She, therefore, filed Criminal Transfer Application No.04/2018 before learned Sessions Judge, Karachi (South), which by means of order dated 13.02.2018 was allowed and case was withdrawn from the file of XVth Judicial Magistrate Karachi (South) and was transferred to the Court of learned IIIrd Judicial Magistrate, Karachi (South), where charge against her was framed on 27.03.2018. Again her case was withdrawn from the Court of XVth Judicial Magistrate, Karachi (South) and was made over to XXIIInd Judicial Magistrate, Karachi (South) vide Criminal Case No.1414/2018 (re-the State Versus Ameer Jehan@ Bisma Noureen).

Applicant, who was present in person, submitted that the Judicial Magistrates / proposed accused have wrongly framed charge against her in terms of the offence mentioned in FIR No.621/2017 and by doing so

Presiding Officer(s)/Judicial Officer(s) have committed offence. She; however, is not in a position to pinpoint under what provision of the PPC, Judicial Officer(s)/Presiding Officer(s) have committed offence even she could not point out the illegality committed by Ex-Officio Justice of Peace by declining her prayer with regard to registration of her case against Judicial Officer(s).

Learned Additional Prosecutor General, Sindh has opposed the application and submitted that learned Judicial Magistrate(s)/ trial Court, after taking cognizance of the case, in which applicant is facing trial, had framed formal charge against the applicant subsequently her signature was obtained upon the plea, therefore, no offence was committed by the Judicial Officer(s). He further submitted that if a Judge or Judicial Officer acts in his official capacity, it is no offence. He further pointed out that such act on the part of proposed accused is protected by the law of the Land as well as Constitution of Pakistan and if the applicant was aggrieved by the order of trial Court whereby they have taken cognizance of the case against her, legal course available to the applicant was to challenge such order through proper application at appropriate forum instead to making them accused or to file complaint against Judicial officer(s) in their personal capacity, which is not warranted by the law.

Before discussing the issue involved in the matter at length, I deem it proper to reproduce hereunder concluding para of the impugned order;_

"It may be noted that before accepting charge sheet Judicial Magistrate was not required to issue notice to accused and surety was required from her for assuring her presence in Court during trial and similarly charge was framed on her to commence trial on her. Thus, above judicial officers had acted in case of applicant in exercise of their judicial powers and their acts were part of criminal procedure but applicant being ignorant of law and procedure of criminal trial and to provisions of section 77 of Pakistan Penal Code 1860 which states that nothing was an offence which is done by a Judge when acting judicially in the exercise of any power given to him by law, was feeling aggrieved apparently under wrong assumption that trial was to be held as per her understanding of law.

At the outset, it may also be observed that by virtue of "The Judicial Officers' Protection Act, 1850 (Act No.XVIII of 1850)", Judicial Officers have been protected from any civil liability on the basis of any **official acts done in good faith**. It would be

advantageous to reproduce hereunder Section 1 of the said Act No.XVIII of 1850:

“1. Non-liability to suit of officers acting judicially, for official acts done in good faith and of officers executing warrants and orders: No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within jurisdiction of the person issuing the same.”

Since, the *civil action* is not in question before me, therefore, I would not go in further details but important to add that every action and omission is protected only if same is in *good faith* as well within belief of having competence, even by mistake of fact.

Needless to emphasize that a criminal action, on the face of it, seems to be more miserable, depressing and woeful than a civil liability / action, therefore, in my humble view, if a person has exceptions from *civil actions* then how could he be left unprotected towards such acts and omissions for a criminal action.

For *criminal action*, it is needful to add that *bona fide* and *mens rea* are those *elements* which plays a *decisive* role in bringing or excluding an act or omission in or out from meaning of an *offence*. This has been the *reason* that Chapter-IV of the *Code* (PPC) *itself* provides *general exception* to certain acts and omission as not ‘*offence*’ which includes the Section 77 whereby all acts of a Judge, when acting judicially in exercise of any power given to him by the law, is no offence. I would prefer to refer the Section 77 of Pakistan Panel Code, 1860, which reads as under;_

“77. Act of Judge when acting judicially.- Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.”

From plain reading of above, it appears that all *judicial acts*, if are performed in exercise of power, shall not be **offences** even if the judge mistaken believes to have power to act so. This protection / exception is only provided to a **judicial act** and not to an **individual** personal act or omission. While defining the word '*bona fide*', a three members Bench of Federal Shariat Court, in a suo motu case being Shariat Suo Motu No.120 of 1987, reported in 2010 P. Cr. L.J. 206, held as under;_

“The word “bona fide” occupied great significance in Western as well as Islamic Jurisprudence. According to Section 52 of P.P.C. “Good faith” means that nothing is said to be done or believed in “good faith” which is done and believed without due care and attention”. However, according to 1989 SCMR 1366, a thing shall be done in ‘good faith’ when it is in fact done honestly, whether it is done negligently or not.”

It was further held in the said case by Federal Shariat Court:

“.....In order to constitute an act in good faith, such act must have been done judicially and honestly within the framework of law subject however to the general exceptions as envisaged in sections 76 to 79 of P.P.C. If it is not so, the aggrieved party has to show that in any act these elements were missing which indeed will give rise to action in law. These provisions of law are in line with the high principles of justice and equity as enunciated in Islam.”

Here, it is worth mentioning that the inclusion of Section 77 in Chapter-IV of the Code is *itself* an acknowledgment that if a Judicial Officer, even, while performing his official / judicial function, commits any act which is defined as a 'cognizable offence' under the law, he could be prosecuted in accordance with the law but only if the challenger *prima facie* establishes that:

- i) *“the judge never had such authority to act or pass an order”* and
- ii) *‘it was not in good faith;*

The above would *only* operate as a remover to said *bar* thereby opening a door for an **action** against **doer** of such act or omission. The *first* ingredient is the root and *absence* thereof alone would always double the burden upon challenger to prove the act as **mala fide** (absence of good faith) because a *wrong* conclusion in consequence to discretionary power is never open to an **action** unless it is proved that it was result of **mala fide**.

Reference may be made to case of **Government of Sindh v. Saiful Haq Hashmi 1993 SCMR 956** wherein it is observed as:-

“11-A. It is well settled that as long as the jurisdiction is exercised in good faith free from ulterior motives, contamination or taint of dishonesty or corruption a judicial officer cannot render himself liable to disciplinary action for mistakes committed in the course of decisions made by him honestly and bona fide.

In the case of **Shabbir Hussain v. Registrar, Lahore High Court PLD 2004 SC 191** at P-215, it is observed;_

“It is by now firmly settled that the allegation of mala fide requires proof of a high order owing to its serious nature and the burden of proof lies heavily on the person who makes it. In this context the observations made in Federation of Pakistan v. Saeed Ahmed Khan (PLD 1974 SC 151) may be reproduced hereunder:-

“Mala fides is one of the most difficult things to prove and the onus is entirely upon the person alleging mala fides to establish it, because, there is, to start with, a presumption of regularity with regard to all officials acts, and until that presumption is rebutted, the action cannot be challenged merely upon a vague allegation of mala fides.”

Now, would revert to merits of the instant case. Applicant is an accused of FIR No. 621/2017 of P.S Preedy, under Section 186/353/506/504/337-A(i)/337-F(i)/337-L(ii) PPC. The case after thorough investigation was challaned by the police on 25.11.2018 which is now pending for trial before the Court of XXIIth Judicial Magistrate, Karachi (South) vide Criminal Case No.1414/2018 re-the State Versus Ameer Jahan Bisma Noureen (present applicant). It is matter of record that the applicant did not challenge the pendency of criminal case against her but challenges framing of charge against her as an ‘**offence**’; to get an FIR against the Judge for act of framing charge, the applicant filed application under Section 22-A (6)(i) of Criminal Procedure Code 1898.

As discussed above, the applicant was / is, *prima facie*, required to show that “**act of framing of charge**” was not within his/her power, provided by law and that it was *mala fide* (absence of good faith/bona fide). One, sent up to face a criminal trial, can’t restrain the procedural law to take its course which leaves a Court with no option but to make the accused (sent up person) explained of the allegations against him. It may also be said as a ‘**notice**’. This course, in legal terms, is known as “**framing of charge**”. No trial, necessary to add, can commence without framing of

charge. In short, a Court is left with no option but to frame the charge which shall stand evident from direct referral to section 242 of the Cr.PC.

The same reads as:-

“242. Charge to be framed. When the accused appears or is brought before the Magistrate, a formal charge shall be framed relating to the offence of which he is accused and he shall be asked whether he admits that he has committed the offence with which he is charged”.

Therefore, such act (*framing of charge*) was always towards compliance of a **mandatory** provision of law hence the complained judge had authority to frame the charge against the applicant who, *otherwise*, does not challenge pendency of criminal case against her. Such legal position is sufficient to *outrightly* reject the allegation.

Be that as it may, there has come nothing on record that framing of charge (following mandatory provision of law) was / is *mala fide* when the applicant has nothing to *prima facie* show that complained act was for some other collateral or ulterior purpose. Reference may be made to the case of Said Zaman Khan & Ors v. Federation of Pakistan through Secretary Ministry of Defence & Others 2017 SCMR 1249 at Rel. P-1277 as:-

“In the case, reported as Abdul Rauf and others v. Abdul Hamid Khan & others (PLD 1965 SC 671), this Court observed as follows:-

“... A mala fide act is by its nature an act without jurisdiction. No Legislature when it grants power to take action or pass an order contemplates a mala fide exercise of power. A mala fide order is a fraud on the statute. It may be explained that a mala fide order means one which is passed not for the purpose contemplated by the enactment granted the power to pass the order, but for some other collateral or ulterior purpose.”

In the instant case, the applicant has miserably failed to establish that the actions of the Judicial Magistrates / proposed accused were against the commandment of procedural law nor she has been in a position to prove compliance of procedural law to have been *for some other collateral or ulterior purpose*. Such prayer of the applicant was/is apparently not tenable and cannot be entertained, thus was rightly declined by the lower Court. It is settled law that order passed by the Judicial Officer(s) are required to be challenged before proper forum by filing appropriate application etc and no one can claim or malign the position of the Judicial Officer with regard to

their *judicial* acts unless the *legal bar* , provided by Section 77 of the Code, is established to be not existing.

The applicant has not been able to show that while proceeding with the case and framing charge against her, the Judicial Magistrates / proposed accused acted with malice and that their actions were *mala fide* in nature. Rather, the same seem to be '*bona fide*' and to have been taken in 'good faith' while performing their judicial function.

Even otherwise, if such practice of involving the Judicial Officers on the ground of any bona fide mistake committed by them in good faith while proceeding with any case or passing any judicial order therein is allowed to continue, then no Judicial Officer would be able to proceed with any case and / or pass any judicial order with impartial and peaceful mind.

In the instant case, complaint filed by the applicant under Section 22-A(6)(i) Cr.P.C, did not disclose any 'cognizable offence', therefore, impugned order does not suffer from any illegality or infirmity requiring interference by this Court. Accordingly, instant Cr. Misc. Application being devoid of merits, is hereby dismissed along with pending application(s) with cost of Rs.10,000/- (Rupees Ten Thousand Only) for keeping such allegation against *judicial officers* rolling from one forum to other without having any substance in support thereof.

Consequently, connected Criminal Misc. Application No. S-53/2018 is also hereby dismissed. Office to place copy of this order in the file of connected Criminal Misc. Application No.53/2018.

The cost after recovery shall be deposited in Employees Benevolent Fund of this Court. In case, applicant may fail to deposit the cost, same shall be recovered from her in terms of Land Revenue Act, 1967.

Approved for reporting.

JUDGE