

ORDER SHEET

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

**Criminal Misc. Application No. S – 301 of 2013**

Date	Order with signature of Judge
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For Katcha Peshi.

30-08-2013 :

Mr. Muhammad Asim Malak, advocate for the applicant.

Mr. Zulifqar Ali Jatoy, DPG for the State.

Proposed accused No.1 to 3 present in person.

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Mr. Abdul Sattar Mahesar, advocate files power on behalf of proposed accused Nos.1 to 3, which is taken on record.

1. Through this criminal miscellaneous application, the applicant has impugned the order passed on 23.05.2013 by the Justice of Peace / Sessions Judge Khairpur, in Criminal Miscellaneous Application No. 1031/2013 filed by the present applicant under Sections 22-A and 22-B Cr.P.C, whereby the applicant's said application was dismissed on the grounds that the report received by the Justice of Peace from the SHO concerned reflected that the applicant wanted to implicate the proposed accused due to an earlier enmity ; the applicant had concealed the fact that there was civil litigation between the parties wherein it was alleged that the applicant had encroached upon a street between his own house and the house of accused No.1 ; the proposed accused were father and sons which suggested that false implication could not be ruled out ; and, after submission of the report, police will not change its stance. The learned counsel for the applicant submits that the impugned order is illegal and is liable to be set aside on the grounds *inter alia* that the Justice of Peace could not have relied upon the report submitted by the SHO ; proper investigation could have been conducted by police even after lodging of F.I.R ; the alleged private dispute between the parties could not have been made the ground for dismissal of the applicant's application ; and, the proposed accused

were at liberty to initiate appropriate legal action before the competent forum against the applicant in case of the alleged encroachment.

2. On the other hand, the learned counsel for the proposed accused submits that the report submitted by the SHO clearly indicated that the incident alleged by the applicant never took place ; no cognizable offence was made out by the applicant for recording of his statement or for lodging of F.I.R ; the dispute between the parties was purely of civil nature as the street between the house of the applicant and proposed accused No.1 was a common thoroughfare, but the same was illegally encroached upon by the applicant ; accused No.1 filed the Suit No. 19/2011 against the present applicant, his brother Abdul Majeed and one Abdul Khaliq ; prior to the filing of the application before the Justice of Peace ; the applicant's brother Abdul Majeed filed a criminal miscellaneous application before the Justice of Peace in June 2011, which was dismissed ; and, after dismissal of the said application, the second application filed by the applicant was not maintainable.

3. The learned DPG has supported the impugned order by submitting that the findings of the learned Justice of Peace about existence of an old enmity between the parties, is correct. In his rebuttal, the learned counsel for the applicant reiterated the submissions made by him.

4. A perusal of the impugned order shows that report was called by the Justice of Peace from the SHO concerned, and on the basis of such report, the application filed by the applicant was dismissed. It is to be noted that the SHO had confirmed that a fire took place at the premises of the applicant, but it was stated to have taken place accidentally. Thus it was an admitted position on record that a fire did take place. The question as to whether the fire took place accidentally or was caused intentionally by the proposed accused, as alleged by the applicant, could not be decided without proper investigation, and proper investigation could not be done without first recording the statement of the complainant and then lodging of an F.I.R. This aspect has not been appreciated by the learned Justice of Peace. As far as the alleged civil dispute between the parties is concerned, it is to be noted that parties may have a private or civil dispute, and at the same time or during the pendency of such dispute, one or both of the parties commit an offence against the other party. In such a situation, parties shall have both the remedies, one before the competent civil court and the other before the proper forum prescribed under the Criminal Procedure Code. Both the said remedies and jurisdictions are

separate and distinct from each other, and parties cannot be compelled to seek their remedy before a wrong forum.

5. In the impugned order, the learned Justice of Peace while dismissing the applicant's application, has relied upon 2005 SCMR 951. In my humble opinion, the authority relied upon by the Justice of Peace was not applicable in the instant case ; firstly, as the case before the Hon'ble Supreme Court was an outcome of a matter pertaining to the Constitutional jurisdiction of High Court ; and secondly, the Hon'ble Supreme Court was pleased to hold that the learned Lahore High Court was under no obligation to issue directions for registration of F.I.R as the matter with the regard to the issuance of directions for registration of case entirely rests with the court. In the instant case, the prayer of the applicant before the Justice of Peace was for a direction to the SHO concerned to record his statement, and not for registration of F.I.R against the proposed accused. Sections 22-A and 22-B Cr.P.C empower the Justice of Peace to give directions to the SHO concerned to record the statement of the complainant if a cognizable offence is made out by the complainant before the Justice of Peace. Even after such a direction from the Justice of Peace, the SHO still has to see as to whether the complainant has made out a cognizable offence or not, and only if cognizable offence is made out, an F.I.R is registered.

6. In view of the above discussion, it is my considered opinion that the applicant's application was decided / dismissed on the basis of the report filed by the SHO, and not on the basis of the incident narrated and allegations made specifically by the applicant in his application. This clearly shows that the contents of the application were not examined by Justice of Peace in order to determine whether any cognizable offence had been made out or not from the facts narrated before him by the applicant in his application. The Justice of Peace was duty-bound to determine the question of existence or non existence of cognizable offence without going into the veracity of information in question in view of the law laid down by the Hon'ble Supreme Court in the case of Muhammad Bashir V/S Station House Officer, Okara Cantt. and others, **PLD 2007 Supreme Court 539**. This criminal miscellaneous application is, therefore, allowed. The SHO concerned is directed to record the statement of the applicant impartially and without referring to the earlier report filed by him before the Justice of Peace. In case the applicant succeeds in

making out a cognizable offence, the SHO shall then proceed in accordance with law.

J U D G E