IN THE HIGH COURT OF SINDH AT KARACHI

Crl. Misc. Application No. 204 of 2017.

Applicants : Dr. Ehsan Bari & another
through Hasan Arif, Advocate.

Respondent No.1 : The State,
through Ms. Shahbana Ali, Advocate.

Respondent No.2 : The State,
through Mr. Abrar Ali Khichi, DPG.

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Date of hearing : 24.04.2018.
Date of announcement: 25.05.2018

O R D E R

SALAHUDDIN PANHWAR,J: Through captioned Miscellaneous application, applicants seek quashment of Private Complainant No. 1235 of 2014 pending before the IVth Additional District & Sessions Judge, Karachi East.

2. Precisely, relevant facts are that complainant/ Respondent No.1 husband of Tehseen Waseem (deceased) filed application under Section 22-A Cr.P.C. for lodging of FIR with regard to negligence of applicants while treating her ailment of *Leukaemiain* Aga Khan Hospital, such application was dismissed vide order dated 25.05.2013 by Sessions Judge/Ex-Officio, Justice of Peace, District-East, Karachi, respondent No.1/Complainant challenged that order in writ petition, however, while dismissing such petition this Court observed that complainant would be at liberty to file direct complaint. Such order was also challenged in Hon'ble apex court but they failed to succeed, hence, the respondent No. 1 preferred direct complaint, same was brought on file by the

learned IVth Additional Sessions Judge, Karachi, East through order dated 30.10.2017 after conduction preliminary inquiry.

3. Learned counsel for the applicants has argued that complainant has filed Civil Suit against the applicants, which is pending for adjudication, however, with the delay of years he has availed criminal remedy which is unwarranted under the law. Learned counsel while relying upon case laws reported as AIR 2010 SC 1050, 2011 CLC 463, PLD 2010 Karachi 134, AIR 2005 SC 3180, 1985 SCMR 257, 2016 PTD 365, 1984 P Cr L J 354, 2009 CLD 237 and 2015 PCr.LJ 1329 has contended that ingredients of criminal negligence are missing in this case, hence, this is a fit case of quashment.

4. Learned counsel for the respondent No.1 in assistance of learned DPG while relying upon case law reported as PLD 2010 Karachi 134, (2004) 6 Supreme Court Cases 422, 2014 P.Cr.L.J. 1361, PLD 2016 Supreme court 55, PLD 2009 Karachi 24, 2010 P.Cr.L.J. 351, 2000 P.Cr.L.J. 1180 and PLD 2013 Peshawar 117 has contended that instant petition is not maintainable; applicants have failed to avail the remedy under Section 265-K Cr.P.C., hence, their petition/application is not maintainable and this is a clear case of Section 319/34 PPC.

5. Heard and perused the record.

6. At this juncture, it would be conducive to refer paragraph 4 of order passed by Hon'ble apex court, which is that:

> *"4. We have heard the Petitioner and have perused the record. No details have been provided by the Petitioner either in the proceedings or before this Court to establish that he did approach the police at times after unfortunate death of his wife. It is a matter of record that suit for Damages was filed promptly by him but there is no*

> *material to establish that he approached the appropriate forum for registration of the case against respondents No.2 to 4. The inordinate delay in approaching the Sessions Court under section 22-A for lodging the FIR is unexplained. Under these circumstances the learned Division Bench of High Court in the impugned judgment has observed that petitioner could have approached the appropriate forum by filing private complaint, instead the petitioner has approached the Sessions Court, which in the circumstances was found to be not justifiable."*

7. Without dilating upon the merits of the case, suffice to say that quashment by this Court while exercising power under Section 561-A Cr.P.C., is extra-ordinary remedy, however, sections 249-A and 265-K Cr.P.C. also provide speedy remedy for an accused to agitate his case before the trial Court if he is of the view that further proceedings would be an abuse of the process of law, hence, normal course provides a remedy to the applicants which is efficacious remedy. Normally, the ***normal*** procedure cannot be bypassed else it would amount to frustrating the procedural law which *approach* legally cannot be allowed. I would add that even if the *two* forums have got concurrent/co-extensive jurisdiction yet the demand of law would be to approach the *lower* forum first. A deviation may *however* be made if the circumstances justify so which exception shall always be an *exception* not sufficient for allowing departure from normal procedure without existence of exceptional circumstances. Reference may be made to the case of *Director General, Anti-Corruption Estt. V. Muhammad Akram Khan* PLD 2013 SC 401 wherein it is held as:-

> "2. ... The law is quite settled by now that after taking of cognizance of a case by a trial court the F.I.R. registered in that case cannot be quashed and the fate of the case and of the accused persons challaned therein is to be determined by the trial court itself. It goes without saying that if after taking of cognizance of a case by the trial court an accused person deems himself to be

> innocent and falsely implicated and he wishes to avoid the rigours of a trial then the law has provided him a remedy under section 249-A/265-K Cr.PC to seek his premature acquittal if the charge against him is groundless or there is no probability of his conviction".

8. Admittedly, extra-ordinary circumstances are not demonstrated by the applicants which could be taken a *justification* for direct approach of the applicants to this Court without first availing the *equal* and *efficacious* remedy available with them in shape of an application under section 249-A/265-K Cr.PC, if they believe the charge against them to be *groundless* and continuity thereof to be an *abuse to process of law*. Even, it is also not the case of the applicants that they cannot approach to the trial Court. Under these circumstances, it would be appropriate for applicants to follow the normal procedure i.e to approach the trial Court. Needless to mention that mere taking cognizance on any complaint is not a ground that such court would not consider the plea of applicants. Trial Court would be competent to decide the fate of application under Section 265-K Cr.PC. after hearing the parties and section itself provides that such powers can be exercised at any stage. Accordingly, instant Misc. Application is dismissed.

JUDGE

Sajid