



ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Crl. Misc. Appln. No.S-264 of 2011.

DATE OF HEARING	ORDER WITH SIGNATURE OF HON'BLE JUDGE
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29.01.2013.

1. For orders on office objection.
2. For Katcha Peshi.
3. For orders on M. A. No.2394/2011.

Mr. Habibullah G. Ghouri, advocate for the applicants.

Mr. Altaf Hussain Surahio, advocate for respondent No.1.

Mr. Naimatullah Bhurgri, State Counsel.

In these proceedings, the applicants have challenged the orders dated 24.9.^{for}~~2008~~²⁰¹¹, 28.9.^{for}~~2008~~²⁰¹¹ and 02.11.2011, passed by the learned VII-Civil Judge & Judicial Magistrate, Shikarpur in Crl. Misc. Application No.55/2011 and in Crl. Revision Application No.17/2011 (by the learned IV-Additional Sessions Judge, Shikarpur) respectively, in terms whereof the application filed by respondent for return of the buffaloes was allowed after the enquiry was conducted pursuant to the order of the Judicial Magistrate, Shikarpur. Such orders of Judicial Magistrate, Shikarpur were challenged in Criminal Revision Application No.17/2011 as referred above, which was filed under Sections 435 and 439-A, Cr.P.C and the orders of the VII-Civil Judge and Judicial Magistrate, Shikarpur were maintained.

2/- Learned Counsel for the applicants has impugned these orders by way of instant proceedings and has submitted that in terms of the seizure memo the cattles were impounded/seized from the possession of the applicants. Learned Counsel for the applicants further submitted that there was no reason/occasion to impound the said buffaloes as the concerned police officials in pursuance of an earlier F.I.R bearing No.204/2011 had raided the place of incident where they found these buffaloes grazing. Perusal of seizure report reveals that after the raid was made, the inhabitants including the applicants left the premises.



on account of harassment and fear and the custody of these buffaloes were taken on 13.9.2011 by officials. It is submitted that these applicants subsequently filed application before the Judicial Magistrate for the release of the buffaloes and some of the cattles were restored to them while other than those were released to the respondents on their application. According to the learned Counsel, the respondents No.1 and 2 filed separate applications claiming 16 and 1 buffaloes respectively seized from the custody of applicants, claiming to be their stolen property and vide orders dated 24.9.2011 and 28.9.2011 the learned VII-Civil Judge and Judicial Magistrate, Shikarpur allowed the same.

3/- The applicants challenged said orders of the learned Magistrate by way of filing criminal revision application before the learned Sessions Judge, Shikarpur, which was dismissed by the learned 4th Additional Sessions Judge, Shikarpur vide order dated 02.11.2011. The reasons for allowing the said applications by Judicial Magistrate was that the enquiry was conducted by Deputy Superintendent of Police and in terms of the conclusion drawn by him it came out as a fact that about one and half year ago from the date of the incident i.e., 13.9.2011 some thieves forcibly taken away 25 cattle heads from respondent Muhammad Khan Ghumro and his father Abdul Sami alias Zafar Ghumro, when they were grazing their cattles in jungle. Out of them 9 cattle heads slipped away from the culprits and returned to their parent house. It was further observed in the concluding paras that the respondents approached the respectable persons of both tribes for return of those buffaloes, but they kept them on false hopes. The investigating/enquiry officer claimed to have taken evidence from different persons, such as Arshad Ali Ghumro, Buland Khan Ghumro and the respondent No.1 himself alongwith other witnesses, who are one way or the other



interested parties and belongs to Ghumro caste and as such their evidence could not be believed.

4/- Learned Counsel for the applicants contended that in all fairness since this is an admitted fact that the buffaloes were taken into custody from the possession of the applicants, therefore, it ought to have been returned to them unless these facts are unearthed through impartial evidence that infact the buffaloes were stolen or belonged to respondents. Learned Counsel further submits that in terms of Section 550 and 523, Cr.P.C the property could only be seized if it is suspected to have been stolen or which may be found under circumstances which create suspicion of the commission of any offence. Learned Counsel submits that there was no material, reason or occasion to seize the said buffaloes on 13.9.2011 when in fact they have raided pursuant to the F.I.R No.204/2011 in respect of the murder of a police constable and they found these buffaloes grazing at site from where they were taken into custody in revenge and retaliation. Learned Counsel also relied upon Section 523, Cr.P.C, which prescribes procedure upon seizure of the property taken under Section 51 or stolen. In terms of Section 523, it is contended that the property suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property to the person entitled to possession thereof or if such person cannot be ascertained, respecting the custody and production of such property. In terms of subsection (2) of Section 523, Cr.P.C, the procedure is provided where the owner of the property seized is unknown. For the sake of convenience subsection (2) of Section 523, Cr.P.C is reproduced as under:-

"(2) Procedure where owner of property seized unknown. If the person so entitled is known, the Magistrate



may order the property to be delivered to him on such condition (if any) as the Magistrate thinks fit. If such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

5/- Learned Counsel further submitted that until the seizure was made on 13.9.2011, there was no claim, F.I.R or complaint with regard to the subject cattles/buffaloes on behalf of the respondents. It was only after the buffaloes were seized on 13.9.2011, the respondent No.1 lodged F.I.R on 20.9.2011 with regard to the alleged incident that took place one and half year before lodging F.I.R. Learned Counsel further submits that even in the belated F.I.R by one and a half year there was no identification, breed or mark shown to distinguish the buffaloes as claimed by the respondents. Learned Counsel lastly argued that the enquiry report of the officer cannot be relied upon or become basis of the orders whereby the property was handed over to the respondents, as it smacks malafide on account of the fact that the witnesses from whom the evidence was taken are from the same caste Ghumro and that the respondent No.2, who earlier claimed one buffalo, has also sworn an affidavit that all buffaloes in question belongs to the applicants and he by mistake had taken one buffalo. Learned Counsel submits that on this score the enquiry report loses its credibility.

6/- On the other hand, Mr. Altaf Hussain Surahio, learned Counsel for respondent No.1, submitted that the orders of the Judicial Magistrate as well as that of the revisional Court are based on the enquiry report. It is urged that the enquiry was conducted by Mr. Anwar Ali Gopang, DSP Headquarters, Shikarpur, who is an honest person and on so many occasions this Court has appointed him to conduct an impartial enquiry, therefore, per submissions of the learned Counsel



such report can be relied upon in the letter and spirit as gospel truth. Learned Counsel for the respondent No.1 submitted that the report is based on a number of witnesses from whom the evidence was collected and as such this report is not based on his personal knowledge, but it is supported by the evidence of witnesses. Learned Counsel for the respondent further submitted that these stolen properties cannot be handed over to the person to whom the allegations have been leveled that they have stolen such properties or has purchased such properties from a culprit who has stolen the same, therefore, in terms of case of *Qaisar Shafeeq Vohra v. The State*, reported in **1991 MLD 2590** and the case of *Zulfiqar Ali v. The State*, reported in **2011 P.Cr.L.J. 1729**, such properties cannot be handed over to these suspects and has supported the orders of the trial Court as well as that of the revisional Court.

7/- Similarly, the learned State Counsel has supported the orders passed by the Judicial Magistrate as well as that of the revisional Court.

8/- I have heard the learned Counsel and perused the record.

9/- It is a matter of fact that in terms of the seizure memo, which is available as annexure "A" to the memo of the main application, the disputed buffaloes were taken from the grass field/grazing area of the applicant. It prima facie shows that at relevant point of time the applicants lawfully or unlawfully were in custody or in control or in possession of these buffaloes when they were taken from their grazing field. The point that has been raised by the learned Counsel for the respondent that the buffaloes cannot be handed over to the applicants as the applicants have stolen these properties or at-least have purchased these properties from a thief, who had stolen these buffaloes, is far-stretched. These questions are yet to be determined as to whether the



applicants have stolen these properties or purchased these properties from a thief who has stolen these animals. Without making any comments regarding the ownership of these buffaloes, prima facie it appears that the impugned orders are based on the enquiry report of DSP Anwar Ali Gopang, who himself based his report on certain evidence taken from the individuals, some of them are Ghumro by caste.

10/- The significant point that smacks malafide is the fact that the respondent No.1 claimed that these buffaloes were stolen one and a half year before the date of the incident i.e., 13.9.2011 (date of seizure). During this one and a half year the respondents did not bother to lodge a single complaint before any concerned authority regarding their buffaloes being stolen. At least none of these complaints/applications were placed on record by any of the two respondents. It is admitted by the respondent's Counsel that for the first time the report was lodged on 20.9.2011 i.e., after one week of the date of incident i.e., date of seizure 13.9.2011. It is also established that in the said F.I.R or even subsequently the marks, caste, breed, race or lineage of these stolen buffaloes were not shown or mentioned. These questions are crucial and goes to the root of the case and require an observation from the trial Court as well as from the revisional Court before handing over these buffaloes to the respondent. If it is claimed that these buffaloes cannot be handed over to the applicants, as there is allegation that these buffaloes were stolen by them, then in the similar way the respondents cannot be benefited by giving them the custody of these buffaloes on mere application that they are the owners of these buffaloes which were stolen one and a half year before, regarding which they did not lodge any complaint whatsoever. It needs further probe and enquiry and investigation.



11/- I would appreciate that in addition to the enquiry report some person who would be an expert with regard to determining the race, lineage, breed and to determine sign of identification on the pointation of parties, shall conduct an investigation in the presence of both the claimants i.e., applicants and the respondents. Such report of DSP Shikarpur has to be supported and supplemented by an expert opinion/report, which will be beneficial for restoring the custody to its deserving party. I am of the tentative view that the sufficient material was not available before the Judicial Magistrate as well as before the revisional Court to handover the custody of the buffaloes to the respondents only on the basis of the enquiry report by disregarding the fact that these respondents did not bother to make hue and cry for about one and a half year and all of a sudden when these buffaloes were recovered or discovered, they lodged F.I.R to take advantage. It is yet to be determined as to how they got such information and who gave them such information of these buffaloes being seized. This needs further expert enquiry and investigation.

12/- In terms of the case of *M/S. Purshottam Das v. State*, reported in **AIR 1952 Allahabad 470**, it is observed that a Magistrate is not authorized to decide which party is rightful owner of the property. A Magistrate is not a civil Court and has no power to decide dispute about title. It was further observed that there is nothing in Section 523 to authorize a Magistrate to decide which party is the rightful owner of the property. The enquiry should only be limited to the findings as to which party is entitled to the possession. Once he ascertains the person from whose possession the property was seized, he must hold him to be entitled to its possession unless his possession was unlawful. It was further observed as under :-

"(13) There are several authorities laying down that the person from whose possession the property was seized and



who is not found to have committed any offence such as would render his possession unlawful, is the person entitled to its possession see; *Laxmi Chand v. Gopikisan Balmukund*, 60 Bom. 183; *V. K. Vaiyapuri Chetti v. Sinniah Chetty*, A. I. R. (18) 1931 Mad. 17, *Devidan Socar v. Janaki Ammal* A. I. R. (19) 1932 Mad. 428; *Sattar Ali v. Afzal Mohammad*; A.I.R (14) 1927 Cal. 532, *In re Kuppammal*, 4 Cr.L.J. 233 (Mad.) and *U. Ba Hla'ng v. Balabux Sodani*, A.I.R. (24) 1937 Rang. 42."

13/- I, therefore, in view of the above reasoning and findings set aside the two orders of the trial Court dated 24.9.^{2011/SH}~~2008~~ and 28.9.^{2011/SH}~~2008~~ passed by VII-Civil Judge & Judicial Magistrate, Shaikarpur as well as of the revisional Court dated 2.11.2011 passed by IV-Additional Sessions Judge, Shikarpur and direct the Judicial Magistrate to conduct an enquiry based on expert opinion and also probe such facts as to how and in what manner respondents came to know about such seizure and when such application was moved by respondents for release of buffaloes. The investigation shall also be made through experts in order to determine the caste, ~~the~~ breed, race and lineage and an identification parade should be carried out so that such lacunas may not be available ultimately either to the applicants or to the respondents. The exercise shall be carried out within one month.

14/- The observations made hereinabove are only tentative and shall not influence the case of either party during the subsequent proceedings before the trial Court. This criminal miscellaneous application is disposed of.

JUDGE