

**ORDER SHEET****IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR**

Criminal Miscellaneous Application No.S- 681 of 2011

**Before:- Mr.Justice Salahuddin Panhwar, J.**

**Applicant:** Bashir Ahmed Kambho, through  
Mr.Zubair Ahmed Rajput, Advocate.

**Respondent:** The State through Mr. Syed Sardar Ali Shah,  
A.P.G.

**Date of hearing:** 01<sup>st</sup>. March, 2013.

**ORDER**

**SALAHUDDIN PANHWAR, J:-** Through instant Criminal Miscellaneous Application, the applicant/accused has assailed the order dated 19.10.2011 passed by learned Special Judge, Anti-Corruption, Sukkur in Special Case No. 247 of 1998 (Re- St.Vs. Bashir Ahmed Kamboh) for offences punishable under sections 409 P.P.C R/w Section 5(2) Act-II of 1947, whereby the application U/s 249-A, Cr.P.C filed by the applicant was dismissed.

02 The relevant facts are that the applicant/accused was arraigned in the above said case by charge dated 16.5.1999 and thereafter to prove the charge, prosecution examined P.W-1 Fateh Muhammad Samo, P.W-2 Abdul Kairm Memon, P.W-3 Abdul Rehman Dharejo; prosecution side was closed; arguments were heard and matter went for Judgment. Further, it is revealed that learned Judge reopened the case on the ground that F.I.R was not brought on record. Subsequently, P.W-4 Syed Rafique

Muhammad Shah and P.W-5 Abu Bakar Memon were examined; during pendency of the case the applicant/accused filed an application U/s 249-A, Cr.P.C but same was declined.

03. Learned counsel for the applicant/accused inter-alia argued that allegations of misappropriation in instant case cannot be proved against the applicant/accused, as applicant being in charge handed over the charge with all formalities to other responsible officer and at time of handing over charge such allegations were not alleged against him; no proper inquiry was conducted; no date and time of incident is evident in the record, therefore, this is a case in which extra ordinary jurisdiction can be enforced. He has placed certified copy of adjournment applications filed by applicant and order passed thereon, which reflects that applicant, has apprehension of injustice by the trial Judge. He has relied upon 2000 SCMR 122, 1994 SCMR 798, 1998 P.Cr.L.J 2042.

04. Conversely Mr.Sardar Ali Shah, A.P.G states that delay in trial is no ground for acquittal of the accused U/s 249-A, Cr.P.C; evidence of all the witnesses have been recorded and delay in trial is at the part of the applicant counsel; only last witness remained and his examination-in-chief is also recorded by trial court but since 06 months counsel for the applicant/accused is not appearing; therefore, trial court may be directed to conclude the trial within one month. He has relied upon 2005 SCMR 1544.

05. Heard the counsels and perused the record.

06. Before dilating upon the facts of the case, it is important to examine the scope of Section 249-A, Cr.P.C. *From plain reading of*

*Section 249 A, Cr.P.C, it is manifest that insertion of this provision by legislature is that trial Court in cases, where on available evidence there is no likelihood of conviction, in such circumstances the trial court can exercise extra ordinary powers of Section 249 A, Cr.P.C and burry the case in its inception; while exercising such special powers, the trial Court has to examine the record available and if such available evidence will be treated as correct and true, in that eventuality, if the trial Court comes to the conclusion that whatever material is in possession of the prosecution, is not sufficient to prove the case against accused and further trial will be abuse of the process of law, in such circumstances courts must exert, such remedy.*

07. Since it is manifest that all material witnesses have been examined and only one witness is remaining, his examination-in-chief has also been recorded. The adjournment application and order passed thereon reflects that counsel for the applicant/accused is avoiding to cross-examine the witness on one or other pretext, therefore, admittedly delay is not part of the applicant/accused counsel. Even otherwise I can safely add that on ground of delay alone the court cannot be asked to exercise jurisdiction, created by Section 249-A Cr.P.C; because the objective whereof is entirely different and cannot be equated with that of Section 249 Cr.P.C. Since it is settled proposition of law that normal course provided under the law should not be curtailed or bye-passed and the procedure provided under the code should be followed. Such principle is governed by “maxim acumeni abserventia non est recendenum,” ( a thing is to be done in particular manner, it is to be done in that manner, if not so, would be unwarranted

under the law). Thus, it is a matter of record that trial court has yet to appreciate the available evidence hence it would not be in fairness to discuss the evidence in inherent jurisdiction of this court which is limited in purpose and objective which cannot be equated to that of the trial, within meaning of Section 367 Cr.P.C, where the trial court is legally required to appraise the entire available evidence to reach a judicial conclusion. Even otherwise any finding on available evidence may result in prejudicing the case of either side.

8. Keeping in view the above facts and principles as discussed above, applicant has failed to make out his case for exercise of inherent powers consequently instant application is devoid of merits.

These are the detailed reasons of short order dated 01<sup>st</sup>. March, 2013, whereby instant application was dismissed.

JUDGE

A.R.BROHI