

IN THE HIGH COURT OF SINDH, KARACHI

Constitutional Petition No.D-3503 of 2016.

PRESENT:

Mr. Justice Nadeem Akhtar.
Mr. Justice Arshad Hussain Khan.

1. For hearing of CMA No.17646/16
2. For hearing of main case

Date of hearing 20.10.2016

Mr. Shahzad Qammar Abbas, Advocate for
Petitioners.

Mr. Miran Muhammad Shah Addl. A.G. Sindh,
Mr. Zahoor Shah, A.P.G. Sindh..

JUDGMENT

ARSHAD HUSSAIN KHAN,J. The petitioners through the instant petition have challenged the Orders dated 14.04.2016 and 30.05.2016 passed by the learned VIIth Additional District & Sessions Judge, Karachi (South), acting as Ex-Officio Justice of Peace, in Criminal Misc. Application No. 514 of 2016, and has sought following relief:

1. *That the said acts and conduct of respondents causing damage harassment to the petitioners may be declared as without lawful authority ultra virus of constitution and proper legal action may please be taken against the respondent No.1.*
2. *That this Honorable court may be pleased to call for the R&P in the Criminal Miscellaneous Application No.514/2016 and after hearing the parties to the Petitioners, set aside the impugned orders dated 14.04.2016 & 30.05.2016 passed by the learned VII Additional District & Session Judge South Karachi in Criminal Miscellaneous Application No.514/2016.*
3. *That respondent No.1 and any person acting on his behalf of their agent may be restrained from causing harassment, mental torture, agony and pain by extending threats to the petitioners.*
4. *That the respondents may be directed to allow the petitioners to enjoy the right, guaranteed to them by the Constitution of Islamic Republic of Pakistan in terms of Article 2A, 4, 9, 10 and 14 and the other law of the land/country.*

5. *That any other relief(s) deemed fit and necessary in the circumstances of the case may also allowed.*

It is prayed in the interest of justice.

2. The brief facts leading to the filing of instant petition as averred therein are that the petitioners are employees of the Cantonment Board Clifton [CBC]. Pursuant to the order dated 05.04.2016 passed by the Cantonment Executive Officer for removal of unauthorized encroachment from the cantonment land in Pak Jamhoria Colony, Bazar at Plot No.J-8/1, Karachi, the officials of CBC including some of the petitioners along with police party visited the site on 08.04.2016 and removed illegal construction. Consequent upon the said removal of encroachment, one Muhammad Yaqoob son of Muhammad Dawood (respondent No.1 in the present proceedings) claiming to be the resident of the said plot, approached to District & Sessions Judge, Ex-Officio Justice of Peace, Karachi (South) and filed Cr. Miscellaneous Application No. 514 of 2016, under Section 22-A (6) (i) of Cr.P.C wherein directions were sought to the SHO., Police Station Frere, Karachi to record statement and register FIR against the petitioners. On 14.04.2016, the Ex-Officio Justice of Peace, while disposing of the said application, directed the SHO of Police Station Frere to record statement of the applicant (respondents No.1 in the present proceedings) in verbatim, if cognizable offence is made out, to register FIR and act according to law. The present petitioners after being aggrieved by the said order filed application under Section 21 of General Clauses Act, in the disposed of Criminal Miscellaneous Application No. 514 of 2016, for recalling of the order dated 14.04.2016. The Ex-Officio Justice of Peace on 30.05.2016, dismissed the said application. The petitioners challenged orders 14.04.2016 and 30.05.2016 in the present petition.

3. Upon notice respondent No.1 and 2 have filed their respective objections/comments.

The respondent No.1, in his objections, while defending the orders impugned in the present proceedings, challenged the maintainability of the petition, and also denied the allegations

leveled in the petition. The para-wise comments filed by respondent No.2 are formal in nature. Whereas the learned Additional Advocate General Sindh, through his statement filed photocopies of the judgment viz., (1) PLD 2014 SC 753, (2) 1993 SCMR 550 and (3) PLD 2005 Karachi 621, and relied upon the same in support of his stance in the case.

4. We have heard learned counsel for the parties, Addl. Advocate General Sindh, Assistant Prosecutor General and with their assistance perused the record as well as the law on the point. The respondent No.1 despite having notice of the case chose to remain absent.

5. The case of the petitioners precisely is that the learned Additional District and Sessions Judge/Ex-Officio Justice Peace, Karachi (South) while passing the impugned orders failed to ascertain the actual facts from record that the application filed by respondent No.1 before him was merely a counter blast to the action taken by the officials of CBC in line of their duties to remove the illegal and unauthorized encroachment on the CBC/Government land. It is also the case of the petitioners that the learned judge while passing the impugned orders failed to take into account the documents available on the record and the law applicable to the case.

6. The record reveals that the present petition has been directed against the orders passed on the application under Section 22-A (6) (i), filed by respondent No.1, by the learned VIIth Additional District and Sessions Judge, Karachi (South), in the capacity of, Ex-Officio Justice of Peace, and not as District and Sessions Judge.

7. Before going into any discussion, it would be advantageous to refer to the provisions of Section 22-A and 22-B of Cr.P.C, which read as under:-

"22-A. Powers of Justice of the Peace.--(1) A Justice of the Peace for any local area shall, for the purposes of making an arrest, have within such area all the powers of a Police Officer referred to in section 54 and an officer in-charge of a police-station referred to in section 55.

- (2) A Justice of the Peace making an arrest in exercise of any powers under subsection (1) shall, forthwith, take or cause to be taken the person arrested before the officer in-charge of the nearest police-station and furnish such officer with a report as to the circumstances of the arrest and such officer shall thereupon re-arrest the person.
- (3) A Justice of the Peace for any local area shall have powers, within such area, to call upon any member of the police force on duty to aid him:
 - (a) in taking or preventing the escape of any person who has participated in the commission of any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having so participated; and
 - (b) in the prevention of crime in general and, in particular, in the prevention of a breach of the peace or a disturbance of the public tranquility.
- (4) Where a member of the police force on duty has been called upon to render aid under subsection (3), such call shall be deemed to have been made by a competent authority.
- (5) A Justice of the Peace for any local area may, in accordance with such rules as may be made by the Provincial Government:
 - (a) issue a certificate as to the identity of any person residing within such area, or
 - (b) verify any document brought before him by any such person, or
 - (c) attest any such document required by or under any law for the time being in force to be attested by a Magistrate, and until the contrary is proved, any certificate so issued shall be presumed to be correct and any document so verified shall be deemed to be duly verified, and any document so attested shall be deemed to have been as fully attested as if he had been a Magistrate.
- (6) **An ex-officio Justice of the Peace may issue appropriate directions to the police authorities concerned on a complaint regarding-**
 - (i) non-registration of a criminal case;

- (ii) transfer of investigation from one police officer to another; and
- (iii) neglect, failure or excess committed by a police authority in relation to its functions and duties.

22-B. Duties of Justices of the Peace.-- Subject to such rules as may be made by the Provincial Government, every Justice of the Peace for any local area shall-

- (a) on receipt of information of the occurrence of any incident involving a breach of the peace, or of the commission of any offence within such local area, forthwith make inquiries into the matter and report in writing the result of his inquiries to the nearest Magistrate and to officer in charge of the nearest police-station.
- (b) if the offence referred to in clause (a) is a cognizable offence, also prevent the removal of anything from, or the interference in any way with, the place of occurrence of the offence;
- (c) when so required in writing by a police-officer making an investigation under Chapter XIV in respect of any offence committed within such local area.
 - (i) render all assistance to the police-officer in making such an investigation.
 - (ii) record any statement made under expectation of death by a person in respect of whom a crime is believed to have been committed".

08. The insertion of subsection (6) in Section 22-A and Section 25 of the Cr.P.C. whereby Sessions Judges and on nomination by them the Additional Sessions Judges became the Ex-officio Justices of Peace, has advanced and hastened the dispensation of justice. The object of insertion of subsection (6) was that an aggrieved person could get remedy in time at his doorstep, earlier what he could not get despite approaching the High Court. The grievance of a person having no means and resources went unattended and un-redressed altogether. Wealthy, well off and well connected people exploited this situation. They committed the crime and yet went scot-free. But ever since the day the Sessions Judges and on nomination by them the Additional Sessions Judges became the Ex-officio Justices of

Peace, no rich and well off person could break the law with impunity or obstruct the person oppressed and assaulted from seeking remedy at his doorstep. If the SHO of a Police Station, owing to the influence and affluence of any, refused to register a case, resort could be had by moving a simple application to the Ex-officio Justice of Peace for issuance of an appropriate order or direction. Aggrieved person, who could not afford the luxury of engaging a lawyer in the past for filing a writ petition in a High Court to get the desired relief, could seek an order or direction from the Ex-officio Justice of Peace without spending much. He could complain against the neglect, failure or excess committed by the Police Authorities in relation to its functions and duties which in the past was no less than living in Rome and fighting with the Pope. Reliance is placed on the most recent larger Bench case of *Younus Abbas and others v. Additional Sessions Judge, Chakwal and others* (PLD 2016 Supreme Court 581.)

09. The larger Bench of the Hon'ble Supreme Court in *Younus Abbas and others* (supra) while discussing powers of the Ex-officio justice of peace under Section 22-A and 22-B has held as follows:

“The duties, the Justice of Peace performs, are executive, administrative, preventive and ministerial as is evident from sub-sections (1), (2), (3), (4) and (5) of Sections 22-A and 22-B of the Cr.P.C. Such duties have not been a subject matter of controversy nor have they ever been caviled at by anybody. Controversy emerged with the insertion of subsection (6) in Section 22-A and Section 25 of the Cr.P.C. when Sessions Judges and on nomination by them the Additional Sessions Judges became the Ex-officio Justices of Peace. The functions, the Ex-officio Justice of Peace performs, are not executive, administrative or ministerial inasmuch as he does not carry out, manage or deal with things mechanically. His functions as described in Clauses (i), (ii) and (iii) of subsection (6) of Section 22-A, Cr.P.C., are quasi-judicial as he entertains applications, examines the record, hears the parties, passes orders and issues directions with due application of mind. Every lis before him demands discretion and judgment. Functions so performed cannot be termed as executive, administrative or ministerial on any account. We thus don't agree with the ratio of the judgments rendered in the cases of *Khizar Hayat and others v. Inspector General of Police (Punjab), Lahore and others* (PLD 2005 Lah.

470) and *Muhammad Ali v. Additional I. G.* (PLD 2015 SC 753) inasmuch as it holds that the functions performed by the Ex-officio Justice of Peace are executive, administrative or ministerial.”

Underlining is to add emphasis

10. The record of the present case shows that upon the application of respondent No.1 (the complaint/applicant) under Section 22-A, (6) (i), the learned Ex-Officio Justice of Peace passed the order on 14.04.2016, relevant portion whereof is reproduced as under:-

“5. I have given careful consideration to the arguments of the learned counsel for the applicant and report of SHO P.S. Frere so also other relevant documents available before me. The S.H.O of P.S Frere is directed to record statement of the applicant in verbatim, if cognizable offence is made out to register FIR and act According to law, petition stands disposed of.

11. The present petitioners (proposed accused in the said application) after being aggrieved by the said order filed application under Section 21 of General Clauses Act, for recalling of the order dated 14.04.2016. The learned Ex-Officio Justice of Peace on 30.05.2016 dismissed the said application. The relevant portion of the said order is reproduced as under:

“05. It is an admitted fact the order has already been passed in the matter whereby the respondent was directed to record the statement of applicant in verbatim and if any cognizance offence is made out to register FIR and according to law. The said order is passed by the undersigned as Ex-Officio/Justice of Peace and not as Additional Sessions Judge, as such it cannot be recalled. Whereas the fact discussed in the case law so cited by the learned counsel for the aggrieved person are quite distinguishable with the facts of the present case as such it is not applicable. It is the duty of the respondent to record statement of the applicant as and when he appeared before him and thereafter if any cognizance offence is made out to lodge the FIR against the accused persons, whereas the aggrieved persons, if shown in the said FIR as accused persons, they may join the investigation and if during investigation no offence is made out against them the investigation officer may release them under section 169 Cr. P.C.”

12. It is now a well established that Article 199 of the Constitution casts an obligation on the High Court to act in the aid of law and protects the rights within the frame work of Constitution,

and if there is any error on the point of law committed by the Courts below or the tribunal or their decision takes no notice of any pertinent provision of law, then obviously this court may exercise Constitutional jurisdiction subject to the non-availability of any alternate remedy under the law. This extra ordinary jurisdiction of High Court may be invoked to encounter and collide with extraordinary situation. This Constitutional jurisdiction is limited to the exercise of powers in the aid of curing or making correction and rectification in the order of the Courts or Tribunals below passed in violation of any provision of law or as a result of exceeding their authority and jurisdiction or due to exercising jurisdiction not vesting in them or non-exercise of jurisdiction vested in them. The jurisdiction conferred under Article 199 of the Constitution is discretionary with the objects to foster justice in aid of justice and not to perpetuate injustice. However, if it is found that substantial justice has been done between the parties then this discretion may not be exercised. So far as the exercise of the discretionary powers in upsetting the order passed by the court below is concerned, this court has to comprehend what illegality or irregularity and or violation of law has been committed by the courts below which caused miscarriage of justice. Reliance is placed on the case Muslim Commercial Bank Ltd. through Attorney v. Abdul Waheed Abro and 2 others (2015 PLC 259).

13. Adverting to the present case, a careful examination of the orders impugned in the present proceedings and the record shows that the learned court of VIIth Additional District and Sessions Judge, Ex-Officio Justice of Peace, Karachi (South) while passing the impugned orders failed to discharge his duties as per the principles of law enunciated by the Hon'ble Supreme court in the case of *Younus Abbas and others v. Additional Sessions Judge, Chakwal and others* (Supra), and thus, orders impugned are declared as void, illegal and of no legal consequence.

14. The upshot of the above discussion, we dispose of the present constitutional petition in the following manner:

- i) Orders dated 14.04.2016 and 30.05. 2016 passed by the

learned VIIIth Additional District & Sessions Judge, Karachi (South), acting as Ex-Officio Justice of Peace, in Criminal Misc. Application No. 514 of 2016, impugned herein, are set aside.

- ii) The learned Ex-Officio Justice of Peace is directed to decide the application under Section 22-A (6) (1) of Cr. P.C. filed by respondent No.1 and afresh while treating it as pending, without being influenced by the order passed by him earlier, strictly in accordance with law and keeping in view the guidelines set by the Honourable Supreme Court of Pakistan in the case of Younus Abbas and others v. Additional Sessions Judge, Chakwal and others (Supra).

Accordingly, this constitutional petition is disposed of along with listed application with no order as to costs.

JUDGE

JUDGE