

IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No.D-6526 of 2016
Afaq Shafqat Vs. The State and others

Present:
Mr. Justice Zafar Ahmed Rajput &
Mr. Justice Muhammad Saleem Jessar

Dated of hearing : 02.1.2017
Date of decision : 02.01.2017
Petitioner : Afaq Shafqat through Mr. Muhammad Akbar Khan, Advocate.
Respondent No.1 : The State through Mr. Abrar Ali Khichi, Assistant Prosecutor General Sindh.
Respondents No.2 and 3: Nemo

ORDER

Muhammad Saleem Jessar, J: - By means of instant petition, the petitioner / accused (*hereinafter to be referred as the petitioner*) has challenged the order dated 05.11.2016 (*impugned order*) passed by learned Judge, Anti-Terrorism Court No.V, Karachi (*hereinafter to be referred as the trial Court*), whereby an application under Section 23 of Anti-Terrorism Act, 1997 preferred by the petitioner for getting his case transferred from the trial Court to an ordinary Court has been dismissed. The petitioner, per averments of the case, stands booked in FIR No.201 of 2001, under Section 365, 342, 34 PPC read with Section 7 of ATA, 1997 (*hereinafter to be referred as the Act*) registered with PS Korangi, Karachi being Special Case No.104 of 2015 Re- State v. Afaq Ahmed and others.

2. Mr. Muhammad Akbar, learned counsel for the petitioner has mainly contended that the aforementioned crime / offence, with which the petitioner stands charged, being not a scheduled offence is not triable by the ATA Court and, therefore, it was liable to be sent back to the ordinary Court for disposal according to law. He while referring the order of the then

trial Court, i.e. Anti-Terrorism Court No. II, Karachi, dated 30.5.2005, whereby the case was transferred to District & Sessions Judge, Karachi (East) by the Anti-Terrorism Court No. II, Karachi for assigning it to Magistrate concerned for disposal in accordance with law, has further contended that earlier order since had attained finality, only the High Court was competent to set aside the same. He has further submitted that after remitting the case to ordinary Court, it remained pending before learned XII-Judicial Magistrate, Karachi (East) and then again it was sent back to said Anti-Terrorism Court for trial from where the case was transferred to trial Court under administrative order, where the petitioner filed an application under Section 23 of the Act, and since it was pending adjudication and the matter was fixed for final arguments, the petitioner filed Const. Petition No. D-4671 of 2016 before this Court seeking directions to the trial Court to decide the point of jurisdiction first before final arguments, which was disposed of by this Court vide order dated 18.10.2016 directing the trial Court to decide the application within two weeks, but the trial Court instead of deciding the point of jurisdiction dismissed the application holding that the point of jurisdiction shall be taken first at the time of hearing final arguments and it is against this order, the instant petition has been preferred by the petitioner as the same being illegal is liable to be set aside. In support of his contentions, the learned counsel for the petitioner has placed his reliance upon the following cases:

1. *Clifton and Defence Traders Welfare Association Vs. President, Clifton Cantonment board, Karachi & others* (P L D 2003 Karachi 495)
2. *Ramdas Vs. Mst. Bernadat* (PLJ 1998 Karachi 273)
3. *Muhammad Saleem vs. The State and others* (2002 P. Cr. L J 216)
4. *Syed Azizullah vs. Haji Muhammad Akbar & others* (2008 SBLR Quetta 38)
5. *Tariq Mahmood vs. The State and others* (2008 S C M R 1632)

3. On the other hand, Mr. Abrar Ali Khichi, learned Assistant Prosecutor General appearing for the State while supporting the impugned order, has maintained that there is no illegality in the order as learned trial Court has discussed the relevant facts elaborately and he prays for dismissal of the instant petition.

4. We have heard the counsel for petitioner as well as learned Assistant Prosecutor General for the State and perused the material made available before us. It appears that prior to this co-accused Salman Younus, Ejaz Babu, Athar Usmani, Shahzad Bihari, Bubli alias Kala, Zafar and Jameel Ahmed were tried by Anti-Terrorism Court No.II, Karachi Division and after full dressed trial the co-accused Athar Usmani, Jameel Ahmed and Zafar were convicted for the said offences in terms of Section 348 read with Section 34, PPC and sentenced to three years with fine of Rs.10,000/- each and Rs.15,000/- as compensation to the victim in terms of Section 544-A, Cr.P.C., and co-accused Salman Younus and Ejaz Babu were acquitted vide judgment dated 08.11.2001, while cognizance was not taken against the petitioner by the trial Court as his name was shown in column No.2 of the charge sheet with blue ink. It was thereafter on 06.10.2011 at the request of SHO of PS Korangi Karachi the learned Anti-Terrorism Court No.II, Karachi issued NBWs against the petitioner so also the production order as at that time the petitioner was in judicial custody in some other case, as such, he joined the trial. Later on the case was transferred on 10.11.2015 from Anti-Terrorism Court No.II, Karachi to Anti-Terrorism Court No.V, Karachi on administrative ground.

5. It also appears from the record that the prosecution side for evidence was closed on 15.01.2015; thereafter, the statement of petitioner / accused was recorded in terms of Section 342, Cr.P.C on 30.04.2015 and then matter was adjourned to 13.5.2015 for final arguments, but due to absence

of Investigating Officer of the case, it was adjourned to 20.5.2015 for final arguments on which date matter was adjourned at the request of petitioner's counsel to 27.5.2015 for final arguments. Again on said date, counsel for the petitioner moved an application for adjournment which was consequently allowed and the matter was adjourned to 18.6.2015 for final arguments. But again at the request of petitioner's counsel, the case was adjourned to 09.7.2015 for final arguments, on which date the petitioner was called absent, therefore, his counsel moved an application for condonation of his absence, which was allowed and the case was adjourned to 28.7.2015 for final arguments, but the matter again could not be proceeded as another counsel filed his Vakalatnama on behalf of the petitioner and the matter was adjourned to 15.8.2015 for final arguments, on which date again an application for adjournment was filed by the counsel of the petitioner, therefore, case was adjourned to 08.9.2015 for final arguments. Again on 08.9.2015, petitioner's counsel sought adjournment and the matter was adjourned to 01.10.2015 for final arguments. On 01.10.2015, the petitioner filed an application under Section 23 of the Act and, therefore, matter was adjourned to 17.10.2015 for hearing of said application. On 17.10.2015, petitioner remained absent under intimation, the matter then was adjourned to 19.11.2015 for final arguments and arguments on application. The case, by way of transfer, was withdrawn and made over to present trial Court vide diary dated 10.11.2015 and was adjourned to same date viz. 19.11.2015. On 19.11.2015, the petitioner was called absent and his counsel moved condonation application which was dismissed, however, the petitioner was directed to appear in person on next date viz. 11.12.2015. The counsel for the petitioner insisted for hearing of the application only, therefore, matter was adjourned to 11.12.2015 for final arguments. On 11.12.2015, at the joint request of all parties' counsel, case was adjourned to 12.1.2016 for final arguments.

6. It may be pertinent to mention here that the petitioner instead of arguing the matter finally before the trial Court filed CP No.D-4671 of 2016 before this Court seeking direction for disposal of his application under Section 23 of the Act, pending since October, 2015, before the trial Court, therefore, by the order dated 18.10.2016, Division Bench of this Court comprising one of us (Muhammad Saleem Jessar, J.) disposed of the petition with directions to trial Court to decide the aforementioned application within two weeks. In compliance thereof, the trial Court decided the application vide impugned order dated 05.11.2016. The operative part thereof is reproduced here for convenience sake.

“The background of filing of application under section 23 of Anti-Terrorism Act, 1997 is that this case has been transferred to this court on 10.11.2015 on administrative ground. Before transferor court the case was fixed for final arguments on 13.5.2015 and thereafter it was adjourned for final arguments time to time. Thereafter on 01.10.2015 the application under section 23 of Anti-Terrorism Act, 1997 was filed when the case was already fixed for final arguments after concluding the entire evidence of both the parties. Before this court the learned defence counsel insisted that he will argue first application under section 23 of Anti-Terrorism Act, 1997 and after its disposal he will make the final arguments. This plea was not acceded to by this court vide order dated 12.3.2016. Since the case was already fixed for final argument and the application has been filed subsequently, therefore, there is no justification to hear the application under section 23 of Anti-Terrorism Act, 1997 separately as the point of jurisdiction is to be taken first at the time of hearing final arguments and therefore, this application at this stage is not justifiable to be disposed off first before final arguments. Accordingly the same is hereby dismissed.”

7. It appears that before the case was transferred to the trial Court from the transferee Court, entire evidence led by the prosecution was recorded

and then after closing the side of prosecution, the statement of the petitioner under Section 342, Cr.P.C. was also recorded but the petitioner did not challenge the jurisdiction of trial Court. It further appears that the petitioner made a statement before this Court in CP No.D-4671 of 2016 that his application was not being decided since October, 2015, but it is matter of record that he filed the application at latter stage after about six months of the recording of statement of petitioner under Section 342 Cr.P.C.

8. Since after taking cognizance of the case the learned trial Court has recorded entire evidence of the prosecution so also the statement of petitioner in terms of Section 342, Cr.P.C. and petitioner did not raise his voice even in his statement under Section 342, Cr.P.C. and did not utter single word that the trial proceedings initiated against him in terms of the instant case are illegal as the offences with which he stands charged are not scheduled offences and the same were required to be tried by ordinary Court, the petitioner apparently by owing delaying tactics either in shape of changing his counsel or remaining himself absent from the proceedings has avoided to face the trial and finding nothing fruitful for him he preferred the application at belated stage viz. on 01.10.2015.

9. From above referral, it is quite evident that the petitioner did not question the competence of court at time when it (trial court) took cognizance; at time of framing of charge; during trial and even when the petitioner was being examined by trial court under section 342 Cr.P.C but came up with such plea only when the trial Court insisted for final arguments i.e an opportunity of hearing to either side before announcing the judgment. The scope of Section 23 of the Act is not meant to frustrate or delay the decision but is meant to ask the ATA Court at initial stages to return the file if the offence is not one of the scheduled offences.

10. It is settled principle of law that for the purpose of deciding application under Section 23 of the ATA, 1997, the Court had to see the contents of FIR, the material collected by the Investigating Officer and then the evidence led by the prosecution. *Prima facie*, in the instant case nothing adverse has been brought on record against the prosecution. Therefore, we are of the considered view that the trial Court while dismissing the application under Section 23 of the Act, 1997 did not commit any illegality or irregularity which may require interference by this Court, particularly when it was not preferred before transferee Court where the evidence of prosecution witnesses, so also statement of accused was recorded, but after transferring of case from one Anti-Terrorism Court to another Anti-Terrorism Court the petitioner felt anxiety and filed application, which was rightly dismissed by the learned trial Court observing that ***“Since the case was already fixed for final argument and the application has been filed subsequently, therefore, there is no justification to hear the application under section 23 of Anti-Terrorism Act, 1997 separately as the point of jurisdiction is to be taken first at the time of hearing final arguments”***

11. It may be noted here that when the trial Court is inclined to consider the point of jurisdiction by taking it first, no prejudice shall be caused to petitioner if the arguments are heard finally by the trial Court. The case-law cited by the learned counsel for the petitioner being distinguishable so far the facts of present case is concerned, is not helpful to the case of the petitioner.

12. Consequently, in view of above we find no substance in the petition which being devoid of merits is dismissed accordingly, along with pending application.

JUDGE

JUDGE