

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Miscellaneous Application No. 308 of 2011

Present

Mr. Justice Aqeel Ahmed Abbasi.

Date of hearing : 15.01.2013
Date of order : 18.07.2013
Applicants : Yasmin Gul Khanani and another
through Khawaja Shamsul Islam,
advocate

Versus

Respondent No.1. : Tariq Mehmood through Khawaja
Naveed Ahmed, advocate.
Respondent Nos.2 & 3 : Mr. Saleem Akhter Buriro, APG

ORDER

Aqeel Ahmed Abbasi, J. Through instant Criminal Miscellaneous Application filed under Section 561-A Cr.P.C., the applicants have prayed for quashment of proceedings initiated against the applicants pursuant to FIR No.275/2010 under Section 448/34 PPC, registered at P.S. Clifton, Karachi.

2. Briefly the relevant facts of the case as recorded in the instant Crl. Misc. Application are that the aforesaid FIR was got registered on 19.10.2011 by the complainant i.e. respondent namely Tariq Mehmood against the partners of a unregistered firm M/s.Y.G. Investment and Development including the applicants with the following allegations:-

“ At this time on the oral statement of the above case complainant instant case was registered. Copy of the statement is as under. Statement made by Tariq Mehmood S/o Ch. Allah Ditta R/O Bungalow no:34, Khayaban-e-Shujat, Phase-V, DHA, Karachi that I am

the special Attorney of the Clifton Estate Cooperative Society, I have been sent to get lodge report regarding adverse possession of flat no: 7, 17 constructed on plot no: G-7/8, Block-6, Kekashan, Clifton, Karachi. On the said flat an un-registered firm with the name and style of Y.G. Investment and Development is operating. The partners of said firm are (1) Gul Muhammad Khanani, (2) Shariq Ishaq, (3) Abdul Aziz Essa and (4) Mst. Yasmeen Gul Khanani. The said firm entered into an agreement with 42-flat owners for purchase of the property in total sale consideration of Rupees Two Arab and Ninety Four Crore and paid 10% as advance. The said advance was equally distributed amongst the flat owners. Thereafter, the purchaser filed a case before the Honorable High Court of Sindh, Karachi. During this flat no:7 and 17 were given to the purchaser for use. Now, the purchaser is not interested to purchase the whole property and is in illegally occupation upon flat no: 7 and 17, which is cognizable offence. The occupier in any way not agree to deliver peaceful vacant possession of the said flats. Therefore, against the aforesaid partners of the said firm case under section 448/34 PPC may be registered and by got vacating the said flats legally, the possession whereof may be delivered to this case complainant. This matter is of May 2008. The owner of flat no: 7 is Syed Khawar Ali Shirazi and flat no: 17 is Sultan Ali Akber Allana. This much is my statement, heard and admitted to be correct.”

3. Pursuant to aforesaid FIR the charge sheet under Section 512 Cr.P.C. was prepared by the investigation officer and was submitted before the concerned Magistrate with the request to commence trial against the accused persons nominated therein. However, the learned Magistrate vide order dated 22.02.2011 while dis-agreeing with the police report, ordered for disposal of the case in “C” class. Such order was assailed by the respondents by filing a Crl. Misc. Application No.110/2011, wherein, the order passed by the learned Magistrate for disposal of the case in ‘C’ class was set-aside, and the matter was required to be proceeded in accordance with law by the learned trial Court.
4. Learned counsel for the applicants has vehemently challenged the entire Crl. Proceedings pending before the learned

trial Court pursuant to aforesaid FIR and has prayed for quashment of FIR, charge sheet and subsequent proceedings emanating therefrom for being false, frivolous, vexatious and abuse of the process of law. It has been contended by the learned counsel that the applicants are in lawful possession of apartment Nos.7 and 17 since 2008 pursuant to purchase agreement in writing and after having made payment of huge amount of Rs.396,012,000/- as advance towards purchase of 42 flats including apartment Nos.7 and 17. It has been further contended that as per terms of the purchase agreement between the applicants, owners of 42 apartments and M/s.Clifton Estate Cooperative Society, on payment of Rs.2 crores as part payment, M/s.Clifton Estate Cooperative Society was required to handover physical possession of two apartments before 31.05.2008. Per learned counsel, the same was accordingly handed over to the applicants through the owners, namely, Khawar Wajid Sheerazi and Sultan Ali Akber Allana respectively, whereas an amount of Rs.396,012,000/- was already paid by the applicants towards purchase of 42 apartments. It has been contended by the learned counsel that M/s.Clifton Estate Cooperative Society Ltd. from time to time sought extension of time for materializing the execution of aforesaid agreement, whereas, possession of the remaining apartments, except apartments No.2, 7 and 17 was not being handed over to the applicants. In view of default on the part of respondent/owners, the applicants filed a Civil Suit No.1486/2008 for direction, cancellation and injunction before this Court with a prayer to direct the defendants not to disturb the peaceful possession of the applicants as tenant in respect of apartment No.2, and as occupant of apartment Nos.7 and 17, wherein, on 20.01.2010 the Hon'ble Judge of this Court was pleased to pass following order:-

“The plaintiff’s (applicants) possession as tenant of flat No.2 and occupant of flat Nos.7 and 17 shall not be disturbed by the defendants No.1 to 42 or any of them except in due process of law.”

5. Learned counsel for the applicants has argued that inspite of pendency of Civil Suit No.1486 of 2008 in respect of the subject apartments and the interim order passed in favour of the applicants as referred to hereinabove, the applicants have been falsely involved in the instant frivolous criminal proceedings by one Tariq Mehmood, who is admittedly, neither the owner or the occupant of the subject apartments nor a party to the purchase agreement or the suit pending between the applicants and the owners of the subject apartments. Per learned counsel, the complainant in the instant FIR, who claims himself to be Special Attorney of Clifton Estate Cooperative Society is complete stranger to the dispute between the applicants and the owners of subject apartments, as he has neither placed on record any Power of Attorney in his favour nor he has any privity of contract either with the applicants or the owners of the subject apartments. Learned counsel for the applicants has referred to the contents of the plaint in Suit No.1486 of 2008 and the documents filed therewith including purchase agreements, payments receipts in respect of 42 apartments, including Apartments Nos. 2, 7 and 17, to show that after having made payment of huge amounts to the respondents, the applicants acquired possession of the aforesaid apartments lawfully and cannot be regarded as trespasser as alleged in the FIR. Per learned counsel, the agreements for purchase of 42 apartments were executed between the applicants and the respective owners of 42 apartments in the year 2007, whereafter, part payments were made by the applicants in respect of 42

apartments, including Apartments Nos.2, 7 and 17 and possession of such apartments was also acquired by consent of the parties in the year 2008 and since then, the applicants are in lawful possession of such apartments which was never disputed by the respondents whereafter, suit was filed by the applicants seeking direction, cancellation and injunction against the respondent in respect of agreements regarding purchase of 42 apartments as the respondents did not hand over the possession of remaining apartments inspite of considerable lapse of time. Per learned counsel, in the suit, nothing has been disputed by the respondents including, execution of the agreements, payments made by the applicants to the respondents and acquiring of possession of the aforesaid apartments, whereas, such lawful possession of the applicants over subject apartments has also duly been verified through inspection conducted by the Nazir of this Court in suit filed by the applicants, whereas, restraining orders have already been passed in favour of the applicants to the effect that the defendants will not dis-possess the applicants from the subject apartments except in due process of law. Learned counsel further submits that no allegation was either raised by the defendants/owners of the subject apartments regarding trespass by the applicants nor any FIR was got registered to this effect when the applicants got the lawful possession of subject apartments. However, in order to exert pressure and to blackmail the applicants, the complainant Tariq Mahmood, who is in fact junior advocate of Mr. Khawaja Naveed Ahmed, the learned counsel for the respondent, got instant frivolous FIR registered with malafide intention against the applicants in total disregard of the civil proceedings and the stay operating in the suit pending this Court

relating to entitlement and possession of the subject apartments. Per learned counsel, the complainant is neither a competent person to lodge an FIR against the applicants for alleged trespass over the subject apartments, as admittedly, he is neither owner or occupant of such apartments, nor he is an aggrieved person, whose right or entitlement has been disturbed by the applicants. Per learned counsel, the complainant is a stranger to the entire proceedings pending before this Court in the aforesaid suit whereas, no cognizable offence was reported by him to the police. In support of his arguments, learned counsel for the applicants has also referred to the order dated 22.2.2011 passed by the learned Judicial Magistrate-I Karachi South on police report furnished in FIR No.275/2010 under Section 448/34 PPC registered at P.S. Clifton, whereby the learned Judicial Magistrate did not agree with the police report and ordered for disposal of the case under "C-Class". It has been further contended by the learned counsel for the applicants that the respondent assailed the order of the Judicial Magistrate by filing Criminal Miscellaneous Application No.110 of 2011 and obtained an ex-parte order by misrepresentation of facts, without notice to the applicants, whereby, the order of the learned Judicial Magistrate was set aside and the I.O. of the case was directed to submit challan as per law and the learned Judicial Magistrate was directed to proceed with the matter in accordance with law. Per learned counsel, FIR and the entire proceedings emanating therefrom in the instant case is a classical example of abuse of the process of Court, whereas, gross injustice, humiliation and injury will be caused to the applicants, who are husband and wife and highly respectable citizen of Pakistan and belong to a known business community, if the FIR

and the proceedings emanating therefrom are not quashed. It has been contended by the learned counsel for the applicants that since the matter was remanded by this Court in Criminal Miscellaneous Application No.110 of 2011 vide order dated 3.5.2011 to the Judicial Magistrate with the directions to proceed with the matter in accordance law, therefore, no useful purpose was likely to be served if an application under Section 249-A or 265-K Cr.P.C would have been filed by the applicants before the Judicial Magistrate. Learned counsel for the applicants while concluding his arguments has submitted that under Section 561-A Cr.P.C this Court has wide powers to take necessary action for preventing injustice to any party and to avoid abuse of the process of law, including quashment of FIR and the proceedings emanating therefrom, at any stage. Per learned counsel, this matter is of purely civil nature, whereas acquiring of lawful possession of the applicants in respect of subject apartments has duly been recognized and no material or evidence has been produced in the instant proceedings which may connect the applicants with the alleged offence as reported in the FIR. It has been prayed by the learned counsel that this is a fit case where this Hon'ble Court may exercise inherent powers under Section 561-A Cr.P.C. and quash the FIR No.275 of 2010 and the proceedings emanating therefrom including proceedings under Section 512 Cr.P.C in Criminal Case No.1841 of 2011 pending before the 1st Civil Judge/Judicial Magistrate. In support of his contention, learned counsel for the applicants has placed reliance in the following judgments:

1. Shah Nawaz and 2 others Vs. Birjlal and others (2011 MLD 956)

2. Saddaqt Ali Khan through L.Rs. and others Vs. Collector Land Acquisition and others (PLD 2010 SC 878)
3. The State Vs. Asif Ali Zardari and another (1994 SCMR 798)
4. Muhammad Khalid Mukhtar Vs. The State through Deputy Director, FIA (CBA), Lahore (PLD 1997 SC 275)
5. Muhammad Amin vs. Master Bashir Ahmed and others (2006 SCMR 969)
6. Shah Muhammad Vs. Haq Nawaz and another (PLD 1970 SC 470)
7. Mohammad Ashraf Vs. Faiz Ali and 11 others (PLD 1975 SC 556)
8. Abdul Razzaq Vs. S.H.O. and others (2008 P.Cr.L.J 812)
9. Abdul Rashid and another Vs. The State (1983 P.Cr.L.J 42)
10. Senator Asif Ali Zardari and another Vs. The State (PLD 2008 Karachi 381)
11. Miraj Khan Vs. Gul Ahmed (2000 SCMR 122)
12. Khursheed Ahmed Vs. The State (2011 YLR 2368)
13. Muhammad Aslam Baig Vs. The State (NLR 1994 Cr.L.J 549)
14. Quaid Johar Vs. Murtaza Ali and another (PLD 2008 Karachi 342)

6. Conversely, Mr. Khawaja Naveed Ahmed, learned counsel for the respondent No.1/complainant has objected to the maintainability of the instant criminal miscellaneous application and submitted that the provisions of Section 561-A Cr.P.C cannot be used as alternate of appeal and revision, whereas, the inherent powers under section 561-A Cr.P.C can be invoked in exceptional circumstances to prevent abuse of the process of law. It has been contended by the learned counsel for the respondent that a

cognizable offence under Section 448/34 PPC has been reported by the complainant in the aforesaid FIR, therefore, the police was justified to register the case against the persons nominated therein and to submit challan before the learned trial Court. It has been further contended by learned counsel that the police in the instant matter furnished the challan before the learned Judicial Magistrate-I Karachi South, which was not accepted, whereas, the learned Judicial Magistrate was pleased to dispose of the case under "C-Class" vide order dated 22.2.2011, which order was assailed by the respondent through Criminal Miscellaneous Application No.110 of 2011. Learned Judge of this Court vide order dated 3.5.2011 was pleased to set aside the order of the Judicial Magistrate and directed the I.O. to submit challan as per law, whereas, the learned Magistrate was also directed to proceed with the matter in accordance with law. Per learned counsel, the said order was not assailed by the applicants which has attained finality, therefore, the applicants cannot be allowed any relief in the instant matter as the same will amount to setting aside or/and to modify the order already passed by this Court as referred to hereinabove in respect of the same FIR. Learned counsel has further submitted that the complainant has sought the remedy through registration of FIR against the applicants, which according to learned counsel, is available in Criminal Law, whereas, there is no bar regarding registration of a criminal case during pendency of civil suit in respect of same subject controversy. It has been contended by the learned counsel for the respondent that instant criminal miscellaneous application is devoid of any merits which may be dismissed.

7. Learned Additional Prosecutor General Sindh did not argue the merits of the case, however, opposed the maintainability of instant criminal misc. application on the grounds that the applicants have approached this Court directly, without approaching the learned trial Court by filing an application either under Section 249-A and 265-K Cr.P.C. as the case may be, hence can not be granted any relief by this Court.

8. I have heard both the learned counsel for the parties as well as learned APG and also perused the record. Before examining the merits of the instant criminal miscellaneous application, whereby the applicants have sought quashment of FIR No.275 of 2010 under Section 448/34 PPC and the proceedings emanating therefrom, I would dilate upon the objection raised by the learned counsel for the respondent and the learned APG with regard to maintainability of the instant Criminal Miscellaneous Application. It is pertinent to note that through Criminal Miscellaneous Application No.110 of 2011, the complainant in fact had impugned the order dated 22.2.2011 passed by the learned Judicial Magistrate-I, Karachi (South) in Criminal Miscellaneous Application No. Nil of 2011 arising out of FIR No.275 of 2010, registered under Section 448/34 PPC at P.S. Clifton, whereby the learned Magistrate did not agree with the police report and disposed of the case under "C-Class". It may be observed that the order of the learned Magistrate passed on a Report under Section 173 Cr.P.C was an administrative order against which no appeal or revision would lie, and the same could be impugned by filing Criminal Miscellaneous Application under Section 561-A Cr.P.C. in

appropriate cases. While hearing the aforesaid criminal miscellaneous application, a query was made by this Court as to whether a notice may be issued to the proposed accused to provide them an opportunity of being heard, as any order, under the circumstances would adversely effect them. In response to such query, learned counsel for the complainant submitted that since the order passed by the Magistrate on a Report under Section 173 Cr.P.C is an administrative order and not a judicial order, therefore, no notice is required, whereas, the learned APG, while responding to such query, referred to the principle of natural justice and the maxim “audi alteram partem” and also placed reliance in the case of Hazara (Hill Tract) Improvement Trust through Chairman and others v. Mst. Qaisra Elahi and others 2005 SCMR 678 and has submitted that the notice is required to be issued to the proposed accused persons as any order passed by this Court is likely to adversely effect the interest of such proposed accused persons. Such contention of the learned APG was rebutted by the learned counsel for the complainant, who submitted that no notice may be issued to the proposed accused persons in the instant case as they have already been shown as absconder under Section 512 Cr.P.C. in the proposed challan, hence no useful purpose will be served by issuing any notice to them. It was further contended that the learned Magistrate, while passing the order on a Report under Section 173 Cr.P.C. did not examine the relevant provisions of Section 441 PPC, which reads as follows:

“or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence.”

9. In view of hereinabove facts, as represented by the learned counsel for the complainant and the reported abscontion of the proposed accused persons, without issuing notice to proposed accused persons, the order of the learned Magistrate for disposal of the case under "C-Class" was set aside and the I.O. was directed to submit challan and to proceed with the matter in accordance with law.

10. However, through instant Criminal Misc. Application filed under Section 561-A Cr.P.C., the applicants have not impugned any administrative or judicial order passed by the learned Magistrate, on the contrary, they have sought quashment of the FIR and the proceedings emanating therefrom after having brought on record the entire back ground of the case and material facts which were not disclosed by the complainant in Criminal Misc. Application No. 110/2011. It has been asserted by the learned counsel that the controversy is purely of civil nature, whereas, the complainant is not even the competent person to lodge an FIR against the applicants regarding alleged trespass of the subject apartments, which are admittedly neither owned by the complainant nor he has ever remained in possession of such apartments. It has been further asserted that the acquiring of lawful possession by the applicants of subject apartments has duly been admitted by the owners as well as the complainant in the instant case, whereas there is no allegation of use of force or causing any intimidation, insult or annoyance by the applicants while acquiring or retaining such possession. The owners of the apartments or the complainant have not filed any suit for possession etc. in respect of subject apartments, on the contrary a suit for direction, cancellation and injunction has been filed by the applicants against all the owners as well as M/s Clifton Estate Cooperative Housing Society, in respect of 42 apartments, wherein

restraining orders have been passed in favour of the applicants whereby the defendants therein have been restrained from dispossessing the applicants from the subject apartments. It is pertinent to mention that all these undisputed facts were not brought to the notice of this Court by the complainant while obtaining orders in Criminal Miscellaneous Application No.110 of 2011, which was otherwise passed without notice to the proposed accused persons. Moreover, the applicants through instant proceedings have neither challenged the legality of the order passed in Criminal Miscellaneous Application No.110 of 2011 nor have sought any modification in this regard, on the contrary, quashment of FIR in the proceedings pending before the learned Magistrate has been sought on separate grounds as referred to hereinabove. Prima-facie there seems no bar in filing an application under Section 561-A Cr.P.C seeking quashment of the FIR and the proceedings emanating therefrom at any stage provided the aggrieved party is able to demonstrate by furnishing sufficient material that the entire proceedings are false, frivolous, vexatious and have been initiated to abuse the process of law, and if such proceedings are not quashed, gross injustice, harm and injury will be caused to the accused persons nominated therein. Accordingly, I am of the view that instant Criminal Miscellaneous Application can be entertained and decided on its own merits irrespective of an order whereby the I.O. has been directed to submit challan before the learned trial Court and to proceed with the case in accordance with law. The objection in this regard raised by the learned counsel for the respondent is not sustainable in law, hence overruled.

11. Reverting back to the facts of the instant criminal miscellaneous application, it may be observed that after remand of the matter to the learned Judicial Magistrate with the directions to

proceed with the case in accordance with law vide order dated 3.5.2001 in Criminal Miscellaneous Application No.110 of 2011, no material progress appears to have been made by the prosecution, whereas proceedings under Section 512 Cr.P.C have been initiated against the applicants. Perusal of the FIR No.275 of 2010 got registered on 19.10.2010 at P.S. Clifton under Section 448/34 PPC on the complaint of respondent Tariq Mahmood shows the date of the alleged occurrence of the offence as May 2008, whereas no explanation regarding delay of more than 2 ½ years has been given. Complainant, Tariq Mahmood has shown himself as Special Attorney of Clifton Estate Cooperative Society, whereas no such Power of Attorney has been placed on record nor even filed before this Court inspite of specific objection by the learned counsel for the applicants in this regard. From perusal of the contents of FIR it may be seen that the facts regarding execution of purchase agreement between the applicants and the owners of the 42 apartments including Apartment No.7 and 17, payment of huge amount towards advance by the applicants and acquiring of lawful possession of Apartment No.7 and 17 by the applicants, have duly been acknowledged. Complainant has merely alleged that since the applicants are no more interested to purchase the whole property, therefore, they are in illegal occupation of Apartment No.7 and 17, hence a case under Section 448/34 PPC may be registered against firm and his partners and possession may be delivered to the complainant. Admittedly, complainant is neither the owner of the subject apartments nor was ever in possession of the subject apartments, whereas, he is not even a party to the agreement executed between Clifton Estate Cooperative Housing Society Limited and the owners of the subject apartments and the

applicants. His claim of being Special Attorney of M/s Clift Estate Cooperative Housing Society Limited, in the absence of any Power of Attorney or Boards' Resolution, appears to be bogus. The allegations as contained in the FIR, prima-facie do not suggest any criminal intention to intimidate, injure or to humiliate complainant. An offence of criminal trespass by the applicants is not made out against the applicants as the ingredients of Section 441 are not attracted to the facts of the instant case. Moreover, there is no allegation of intimidation, insult or annoyance to any one by the applicants with intent to commit an offence of trespass. It has also come on record that dispute between the relevant parties in respect of subject apartments which is purely a civil dispute, is also pending before this Court in Suit No.1486 of 2008, wherein restraining orders have been passed in favour of the applicants whereby it has been directed that possession of the applicants over subject apartments may not be disturbed except in due process of law. Such interim order is still operative, which fact itself, prima-facie justifies the lawful possession of the applicants over subject apartments. It may be observed that a civil dispute between the parties, in the absence of any criminal act, intention or mens rea to commit an offence, can not be allowed to be converted into a criminal dispute by mere allegations couched in such a manner to bring a civil dispute within the domain of criminal offence.

12. In the case of Muhammad Ashraf v. Faiz Ali and 11 others PLD 1975 Supreme Court 556, the Hon'ble Supreme Court while defining the distinction between civil and criminal trespass has held as follows:

“The expression “criminal trespass” has been defined in section 441 of the Code. But in section 97, the

expression appears to have been used in contradiction with civil trespass, and on the facts of the case, referred to in the beginning, there can be no manner of doubt that encroachment by Abdul Khaliq over the strip of land measuring 1 kanal 9 marlas forming part of Khasra No.4145 was civil trespass.

.....

It is well established proposition that section 97, P.P.C. gives the right to a person to maintain his existing peaceful possession of property even by use of force, if necessary, regardless of the question whether or not he had the lawful right to possess. In other words the object of the section is not to protect title, but to maintain peace by protecting peaceful possession irrespective of title. This principle was brought out with succinctly in a recent judgment of this Court in Sardarai and another v. The State (1) in which after a review of a number of cases the following propositions relevant to the instant case were laid down:-

- (i) The possession of a party in possession of a property should not be disturbed unless he is evicted by due process of law.
- (ii)
- (iii) If a trespasser is in settled possession of the land which means that he has been in possession of the property for a pretty long time without resistance he is entitled to defend his possession even against the rightful owner and he can be evicted only in due course of law.
- (iv)”

Similarly, in the case of Muhammad Ameen v. Bashir Ahmed and others 2006 CMR 969, the Hon’ble Supreme Court has held that in case a civil dispute, criminal proceedings cannot be made a substitute for determination of civil rights.

13. In the case of Abdul Rashid and another v. The State 1983 P.Cr.L.J 42, it has been held as follows:-

“It is, therefore, quite clear from the aforesaid definition that it is not a mere civil trespass by way of

taking possession of property without the consent of the person in possession which would amount to criminal trespass and that it is a condition precedent to constitute the offence of criminal trespass that it should be with intent to commit an offence or to intimidate, insult or to annoy such person in possession of such property. Looking to the wording, mere constructive possession would not be sufficient as a person in absentia cannot be said to be intimidated, insulted or annoyed and such person had to be named by the prosecution in order to sustain the charge of criminal trespass.”

“In the instant case, as already stated, there was a suit pending before a Civil Court in which on an application for interim injunction the order for maintenance of status quo had been passed. It was therefore, hardly a case in which the Criminal Court could even interfere with the possession in proceedings under section 145, Cr.P.C.”

Similar view has also been followed in the case of Abdul Razzak v. SHO and others 2008 P.Cr.L.J 812.

14. In the case of Quaid Johar Vs. Murtaza Ali and another PLD 2008 Karachi 342, it has been held as under:

“The learned counsel for the applicant has vehemently contended that he being the attorney of the Ghulam Nabi Qureshi was competent to retain the possession of the flat in question and he has also filed the present complaint on behalf of the said Ghulam Nabi Qureshi but when query was made to him by the Court to show any law which empowers an attorney to proceed with the criminal case on behalf of the complainant or the accused but he completely failed to point out any law to show that an attorney can prosecute any person on behalf of the attorney. In my humble opinion also in criminal administration of justice, a criminal lis or complaint could not be agitated or defended through the attorney.

After appraisal of the whole evidence available on record, I am of the firm opinion that the applicant is not the owner of the property in question nor his possession over the said premises has been established through any cogent evidence or that he rented out the said premises to his relative Shabbir Hussain and in absence of any evidence or the affidavit from Shabbir Hussain, the claim of the applicant could not be acceded. The controversy in between the parties seems to be a dispute of civil nature for which the parties may approach to the civil Court, if so advised.

15. Keeping in view hereinabove facts, it appears that complainant Tariq Mahmood has no locus-standi to lodge an FIR regarding alleged criminal trespass of the subject apartments, which are neither owned by him nor he has ever remained in possession of such apartments. He is not even signatory of the agreement of purchase executed between the applicants and the owners of the subject apartments, whereas no Special Power of Attorney as alleged by the complainant issued by M/s Clifton Estate Cooperative Housing Society Limited in his favour has been placed on record. No Board's Resolution in favour of the applicants by M/s Clifton Estate Cooperative Housing Society Limited, has also been placed on record to show that the complainant was duly authorized to get an FIR registered against the applicants regarding alleged trespass of subject apartments by applicants.

16. In view of hereinabove undisputed facts and from perusal of the material available on record, it appears that the registration of FIR No.275 of 2010 against the applicants is based on malafides, whereas, public machinery has been moved to abuse the process of Court and to exert pressure upon the applicants to prevent them from pursuing civil remedy pending before this Court in Suit No.1486/2008 in respect of same dispute. Facts and circumstances of this case further reveal that the complainant has initiated instant criminal proceedings against the applicants without having any locus-standi or cause of action which never accrued to him. Moreover, no cognizable offence is reported in the FIR as none of the ingredients of criminal trespass are attracted in the instant matter, hence there is no possibility of conviction of the applicants even if the allegations may not be disputed.

17. There is no cavil to the proposition that the inherent powers vested in High Court under Section 561-A Cr.P.C are to be exercised in exceptional cases, whereas, an application under Section 561-A Cr.P.C may not be treated as an alternate of an appeal or revision. However, this Court is also cognizant of the legal position that the powers conferred under Section 561-A Cr.P.C on the High Court are very wide and can be exercised at any stage of the proceedings. Under Article 203 of the Constitution of Islamic Republic of Pakistan, 1973, High Court is responsible for the entire administration of justice, and being charged with responsibility of supervising all Courts subordinate to it, this Court is competent to take all appropriate measures for preventing mal-administration of justice and abuse of the process of law in appropriate cases. When the case is of no evidence or very registration of the case is proved to be malafide or the case is of purely civil nature or when there is unexceptional delay in the disposal of the case causing deplorable mental, physical and financial torture to the person proceeded against, this Court is competent to take cognizance of the matter and by exercising inherent powers under Section 561-A Cr.P.C, to correct a wrong by ordering quashment of FIR and proceedings emanating therefrom. Powers vested in High Court under section 561-A Cr.P.C. are co-extensive with the powers vested in trial Court under section 249-A and 265-K Cr.P.C, and in appropriate cases, can be invoked directly without resorting to decision by the trial Court under section 249-A and 265-K Cr.P.C to void abuse of process of Court. This Court is also cognizant of the legal position that in appropriate cases, an aggrieved person can seek redressal of his grievance by filing criminal proceedings and civil proceedings

simultaneously if provided under the relevant statute, however, where the dispute is purely of civil nature and the element of mens-rea and criminal intention is missing, a party cannot be allowed to be dragged in criminal proceedings by converting a civil dispute into a criminal dispute.

18. In the case of *The State v. Asif Ali Zardari & another* 1994 SCMR 798, the Hon'ble Supreme Court while examining the scope of inherent powers under Section 561-A Cr.P.C vested in High Court has held as under:

“9. Section 561-A, Cr.P.C. confers upon High Court inherent powers to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of process of any Court or otherwise to secure the ends of justice. These powers are very wide and can be exercised by the High Court at any time. Ordinarily High Court does not quash proceedings under section 561-A, Cr.P.C. unless trial Court exercises its power under section 249-A or 265-K, Cr.P.C. which are incidentally of the same nature and in a way akin to and co-related with quashment of proceedings as envisaged under section 561-A, Cr.P.C. In exceptional cases High Court can exercise its jurisdiction under section 561-A, Cr.P.C. without waiting for trial Court to pass orders under section 249-A or 265-K, Cr.P.C. if the facts of the case so warrant to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

This judgment was also followed in the case of *Muhammad Khalid Mukhtar v. The State* PLD 1997 275.

19. In the case of *Miraj Khan v. Gul Ahmed and 3 others* 2000 SCMR 122, the Hon'ble Supreme Court has held as under:

“There is no absolute bar on the power of the High Court to quash an F.I.R. and it is not always necessary to direct the aggrieved person to first exhaust the remedy available to him under section 249-A, Cr.P.C. It is cordinal principle of law that every criminal case should be adjudged on its own facts. The facts of one case differ from the other and, therefore, no rule of universal application can be laid in a certain case so as to be made applicable to other cases. Even in the case reported in PLD 1997 SC 275, relied on by the

learned counsel for the petitioner this principle has been recognized that the High Court in exceptional cases can exercise jurisdiction under section 561-A, Cr.P.C. without waiting for trial Court to pass orders under section 249-A or 265-K, Cr.P.C., if the facts of the case so warrant. The main consideration to be kept in view would be whether the continuance of the proceedings before the trial forum would be futile exercise, wastage of time and abuse of process of Court or not. It on the basis of facts admitted and patent on record no offence can be made out then it would amount to abuse of process of law to allow the prosecution to continue with the trial.

20. In the case of *Maqbool Rehman v. The State and others* 2002 SCMR 1076, it has been held as follows:

“9. In law, there is no warrant for the argument that since the charge had been framed by the trial Court, proceedings could not be buried by way of quashment. The petitioner appears to be laboring under a misconception of law that in all cases where the accused persons are summoned by a Court of law, it is incumbent upon the Court to record the evidence. There is no invariable rule of law and it will depend on the facts of each case whether to allow the prosecution to continue or to nip in the bud.”

21. In the case of *Mian Munir Ahmad v. The State* 1985 SCMR 257, it has been held as under:

“that the powers of the trial Court under section 249-A, Cr.P.C. and 265-K, Cr.P.C. are co-extensive with the similar powers of the High Court under section 561-A, Cr.P.C., and both can be resorted to.

It would, of course, be proper to approach the trial Court in the first instance but there is nothing to bar the High Court from entertaining, in appropriate cases, an application under section 561-A, Cr.P.C., directly.”

22. In the case of *Raes Ahmad Khan v. The State* 1991 P.Cr.L.J 1381, it has been held as under

“No doubt the powers of trial Court under section 249-A or 265-K, Cr.P.C, as the case may be, are co-extensive with similar powers of the High Court under section 561-A, Cr.P.C., and both can be resorted to. The case of *Mian Munir Ahmed v. The State*, reported

in 1985 SCMR 257, is a guiding authority on this subject.”

23. In the case of *Ch. Pervez Ellahi v. The Federation of Pakistan* 1995 MLD 615 (Lahore), it has been held as under:

“We have heard the arguments of the learned counsel for number of days, perused the record and evidence collected by the investigating agency besides the documents produced and shown by the learned counsel for the petitioner. In principle, there is no dispute to say that on the following grounds a criminal case can be quashed by the High Court exercising its Constitutional jurisdiction:

- (a) When the case is of no evidence;
- (b) when the very registration of the case is proved to be mala fide on the face of record;
- (c) when the case is of purely civil nature, criminal proceedings are not warranted in law, especially to harass the accused;
- (d) when there is serious jurisdictional defect; and
- (e) when there is unexceptional delay in the disposal of the case causing deplorable mental, physical and financial torture to the person proceeded against.”

24. In the case of *Muhammad Hassan v. Manzoor Ahmad and another* 1991 P.Cr.L.J 2177, it has been held as under:

“Following principles can be concluded from the case-law cited by the learned Advocates for the parties with regard to the exercise of the powers by the trial Court under sections 249-A and 265-K and the High Court under section 561-A:-

- (i) Mere pendency of a civil suit, does not absolve a party from a criminal charge if the facts of the case established the same but if the facts of the case do not disclose mens rea or commission of criminal offence, the criminal proceedings will be an abuse of the process of the Court and cannot be allowed to be used as an instrument of harassment or coercion for attainment of unlawful purpose.
- (ii) The power to quash the criminal proceedings cannot be exercised where the case set up by the complainant prima facie shows a plausible case, unless some evidence is recorded to establish that the

dispute is of a civil nature or where the appraisalment of the evidence by the trial Court is desirable in the first instance looking at the facts and circumstances of the case.

- (iii) The exercise of jurisdiction by the High Court under section 561-A is controlled by the principles and precedents as much as the express statutory powers.
- (iv) The powers under section 561-A cannot be exercised to stifle the proceedings where prima facie case is disclosed but there is no bar in exercise of such powers when the charge on its face does not disclose any offence.
- (v) The powers of the High Court under section 561-A Cr.P.C., and those of the trial Court under sections 249-A and 265-K, Cr.P.C. are co-extensive."

25. In view of hereinabove peculiar facts and circumstances of this case while applying the ratio of the aforesaid judgments, I am of the opinion that registration of FIR No.275/2010 by complainant Tariq Mahmood, who has no locus standi or lawful authority to lodge instant FIR, is based on malafides, whereas, ingredients of criminal trespass even on admitted facts and in view of the allegations as contained in the FIR are lacking in the instant case. The dispute is of purely civil nature, whereas, admittedly, a Suit No.1486 of 2008 filed by the applicants before this Court in respect of subject apartments is also pending wherein restraining orders with regard to possession of the applicants are operative. There is no evidence or material produced by the complainant which may connect the applicants with the alleged offence of criminal trespass. No useful purpose will be served if the proceedings initiated pursuant to registration of aforesaid FIR are allowed to be continued, on the contrary the same is likely to cause gross

injustice, harm and injury to the applicants and also to frustrate lawfully instituted civil proceedings filed by the applicants through Suit No.1486 of 2008 before this Court relating to same subject controversy. Accordingly, F.I.R No.275 of 2010, charge sheet and all the subsequent proceedings pursuant thereto pending before the learned Judicial Magistrate-I are hereby quashed.

Instant Criminal Miscellaneous Application is allowed in the above terms.

JUDGE