

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Crl. Rev. Application No. 202 of 2017.

Date

Order with signature of Judge

For hearing of main case.

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22.02.2019.

Mr. Ahmed Ali Ghumro, advocate for applicant.

Mr. Siraj Ali Chandio, Addl. P.G. Sindh.

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Salahuddin Panhwar, J:- Through instant revision application, applicant has challenged the order dated 26.09.2017 passed by learned Special Judge Anti-Corruption (Provincial), Karachi whereby his Direct Complaint No.46 of 2016 was dismissed under Section 203 Cr.P.C.

2. Precisely, relevant facts of the case are that applicant is recovery officer of company i.e. N.J. Auto Industries (Private) Limited, such company entered into sale of 35 Super Power Motorcycle and 25 Rickshaws with one private dealer i.e respondent No. 2 (accused No.1); as per applicant original papers are yet lying with company whereas official respondents manipulated documents of title in favour of respondent No.2.

3. It is revealed that before this complaint applicant filed earlier complaint against the present officers including private person which was withdrawn by order dated 13.05.2015, such order is reproduced herewith:

“Complainant has filed application in hand wherein prayed to allow him for withdrawal of complaint as the Director General Excise & Taxation Department and Incharge Motor Registration Wing have assured the complainant to take legal action against the respondent No.1 therefore complainant is satisfied with the assurance of the respondent No.2 and 3, hence does not want to proceed further with this complainant.

Heard, and perused the documents available on record which shows that complainant has compromised with

respondents outside of Court, as such in the larger interest of justice, case in hand is disposed of u/s 248 Cr.P.C as withdrawn.”

Subsequently, he filed present complaint wherein inquiry was conducted. The conclusion whereof is available at page 49 of the file, which is that:

“In view of the above facts and circumstances, that Azad Tanveer has committed fraud/cheating with the NJ. Autos regarding purchase of Motorcycles and Rickshaws and liable to be booked under relevant sections of law. Nothing illegal appears on the part of Excise & Taxation Department.”

4. The above referral to facts makes it undisputed that the earlier complaint was disposed of under section 248 Cr.PC and later instant complaint is filed on **same facts** and against same **‘accused’** persons. The filing of instant **second** complaint is being claimed maintainable on plea that law does recognize filing of **‘second complaint’** even after dismissal of first complaint under section 203 Cr.P.C. I am conscious that law does permit filing of **second complaint** but only as **exceptions**. Before proceeding further, it is necessary to make it clear that effects and consequences of a disposal / dismissal of a complaint during **preliminary proceedings** (Chapter XVI of Code) is completely different from that of **disposal** after taking cognizance of the offences on a complaint (Chapter XVII of the Code). In former, the matter remains between the Court and the complainant where the complainant is required to *prima facie* make out a case of taking cognizance wherein (*process*) the accused has no right of participation while in *later* the Court not only takes cognizance but summons the accused to face the **trial**. Here, referral to relevant portion of the case of *Azmat Bibi v. Asifa Riaz* PLD 2002 SC 687 is made hereunder:-

“7.It is in fact relate4s to the preliminary proceedings under sections 200 and 202 of the Code and according to the provisions the person complained against has no right of participation, until a cognizance is taken into the matter and is summoned. The purpose behind this exercise is to find out truth or falsehood of the accusation made in the complaint to be examined on the basis of evidence to be adduced by the

complainant. In the instant case, the learned Magistrate has examined the victim-complainant Mst. Asifa Riaz under section 200 of the Code then finding prima facie case examined her witnesses, namely, Jamshed Ahmed, Mst. Bashir Begum, Mst. Sardar Begum alias Sughra Bibi and thereafter, took the cognizance of the matter and issued process against the petitioners. It is thereafter the provisions of Chapter XVII would come into effect and under this Chapter, the cognizance of offence is taken and the accused are summoned to face the trial. Chapter XX deals with the trial of the accused so summoned.

5. Now, it can safely be said that the moment the Court takes cognizance (Chapter-XVII) and issues process to the accused to face the *trial* (Chapter-XX), the accused stands involved in such proceedings therefore protection provided by Article 13 of Constitution of Islamic Republic of Pakistan and that provided by Section 403 of the Code becomes functional. This appears to be the sole reason that even a withdrawal under section 248 of the Code is not dependant upon a **mere** withdrawal statement of complainant but requires him (complainant) to satisfy conscious of the Court that there are grounds for permitting him (complainant) to withdraw. The provision does not stop here but makes it obligatory that in such eventuality the accused **shall** be acquitted. Here, a direct referral to Section 248 of the Code is made which reads as:-

‘248. Withdrawal of complaint. If a complainant, at any time before a final order is passed in any case under this Chapter, **satisfies the Magistrate** that there are **sufficient grounds for permitting** him to withdraw his complaint the **Magistrate may permit** him to withdraw the same and **shall thereupon acquit the accused**’.

The use of word **‘may’** for permitting a withdrawal while use of word **‘shall’** towards consequence of such permission needs to be given their due weight i.e in former the *discretion* remains with Magistrate to permit or decline such request but once agrees it shall be obligation of the Court to acquit the accused. I would add that even where there is a disposal under section 248 of the Code without making an ***acquittal*** which omission, I insist, would not be sufficient to deprive

the accused from any right / privilege which he (accused) may be entitled on getting an **acquittal**.

6. The above had been the legal reasons and exceptions because of which there is a view of competence of **second complaint** in cases the disposal whereof is made in *former* cases. Here, I would also add that a disposal/dismissal of complaint before reaching to section 203 Cr.PC would, *even*, not operate as that of dismissal under section 203 Cr.PC because there can be no dismissal under section 203 Cr.PC without consideration of all material came to surface during preliminary investigation/inquiry process commencing from Section 200 to 202 Cr.PC. Therefore, dismissal for any reason before exercise of Section 203 Cr.PC would not stand as a **bar** to filing of second complaint on same facts.

7. I am conscious that filing of second complaint after dismissal of earlier under section 203 Cr.PC, being on **same facts** and against **same accused**, is permissible only in exceptions which, being detailed in the case of *Zaboor & another v. Said-ul-Ibrar & another* 2003 SCMR 59, needs no discussion rather reproduction thereof would be sufficient. The same reads as:-

“9. Before arriving at a definite conclusion, we first refer to the contents of section 200 to 203 Cr.PC that exclusively deal with the matter of private complaints. Section 203 Cr.P.C clearly lays down that a Court which is seized of a matter under section 200 Cr.P.C. may dismiss the complaint, if, after considering the statement on oath of the complainant and the result of investigation or inquiry under section 202 Cr.P.C., there is in its judgment no sufficient ground for proceeding further. The Court, in these circumstances, is bound to give reasons as well for such dismissal. The section categorically provides the application of mind by the Court to the statement on oath of the complainant as well as to the result of the investigation or inquiry ordered to be conducted under section 202 Cr.P.C. Meaning thereby, that the dismissal is not in routine but with the positive application of mind to the facts and circumstances of the case. This is further highlighted by the words “in his judgment’ appearing at the end of section 203 Cr.P.C. The Court is required to evaluate the evidence and to make a judgment thereon in order to hold whether or not sufficient grounds exist for proceeding further. **We hold a tentative view that when once a matter is dismissed after appreciation of statement on oath and the result of**

inquiries etc, the complainant should not be allowed to vex, the respondent time and again particularly when such judgment of the trial Court contains the narration of sufficient grounds for not proceeding further.

“10. On the other hand, we are also alive to the fact that at times extremely perverse orders are passed by the trial Courts which are apparently without jurisdiction. In such rare and extraordinary circumstances, strictly adhered to by the Courts below, the complainant should be allowed to file a fresh complaint after dismissal of one under section 203 Cr.P.C. Such circumstances are aptly laid down by the Indian Supreme Court as reproduced above. We feel that in the given circumstances, the filing of fresh complaint should not be a bar for the complainant. This is particularly so because in the sections concerned there is no specific bar as observed by the Indian Supreme Court also. It is also pertinent to note that upto the state of section Cr.P.C, the accused is not yet summoned. Taking analogy from such section as well as from observations with reference to section 203 Cr.P.C, we hold that in the extraordinary circumstances referred to above a fresh complaint should not be barred if the one already filed is dismissed under section 247 Cr.P.C.

8. Keeping in view the above legal positions, I have examined the case and am of the clear view that impugned order does not suffer from any illegality. It is an admitted position that instant complaint is on **‘same facts’** and against **same accused** which, as already discussed, is not competent because disposal of the earlier complaint was within meaning of section 248 Cr.P.C.

9. There is another aspect which makes the complaint not tenable. Respondent No.3 and 4, in this criminal proceedings, are Director General and Incharge Motor Registration Wings and their names are not mentioned. No criminal case can be registered against the designation because a trial cannot take place against a **‘designata’** but against a **‘person’**. The *official designata*, I shall safely say, does not fall within meaning of **‘person’**, as defined by Section 11 of the PPC. Needless to mention that offence can be committed by the person and not by *designata*. The complaint is also incompetent for another legal reason that such complaint, as rightly opined by trial Court, filed by attorney.

10. In consequence to what has been discussed above, I am of the clear view that instant revision petition is devoid of substance and impugned order is rightly passed hence the same is hereby dismissed.

JUDGE

Sajid