

IN THE HIGH COURT OF SINDH AT KARACHI

CR. MISC. APPLICATION NO.496/2019

Applicant : Abdul Rehman,
through Mr. Muhammad Ayub Chanhio,
advocate.

Respondent : Fazal Haq,
Mr. Tariq Mehmood A. Khan advocate.

Mr. Hussain Bukhsh Baloch, APG, for State.

Date of hearing : 22.01.2021

Date of order : 22.01.2021

J U D G M E N T

SALAHUDDIN PANHWAR, J. Through this criminal miscellaneous application, applicant seeks quashment of FIR No.181/2011, under section 395 PPC, PS Soldier Bazar in Sessions Case No.144/2012.

2. Prosecution case is that applicant/accused alongwith other co-accused duly armed with weapons entered into the house of complainant after scaling the wall and by confining inmates in a room, looted away gold ornaments worth Rs.10,00,000/- to Rs.15,00,000/- and prize bond worth Rs.250,000/-, laptop, computer, 2 sewing machines and electric items and fled away in Honda Civic car bearing registration No.2332, crime was also abetted by the owner of complainant's opposite side flat. Applications filed by applicant under section 265-K CrPC were declined by orders dated 04.09.2012/16.12.2013 and 12.10.2019.

3. Learned counsel for applicant has argued that applicant has been falsely implicated; there is no independent witness of the alleged incident; there is unexplained delay of 13 days in lodging the

FIR; nothing has been recovered from their possession; that earlier FIR Nos.106/2007 and 230/2011 were lodged, FIR No.230/2011 was disposed of under B-class; moreover, applicant's sister had also lodged FIR No.63/2006 u/s 471, 467, 448, 420, 34 PPC against Mir Abdul Sattar Baloch who had made false sale agreement of applicant's house; that civil litigation between the parties is pending before this court in Suit No.994/2005 filed for specific performance of the contract, another suit No.405/2012 is pending adjudication relating to illegal possession of bungalow No.97/5, Garden, Karachi belonging to applicant; present criminal proceedings were falsely initiated by complainant side to pressurize the applicant to withdraw from his claim over the property aforementioned; after framing of charge there is no prosecution only examined complainant and failed to produce other witnesses inspite of several chances, applicant is facing agony of protracted trial without any fault on his part.

4. Learned counsel for complainant has argued that applicant has been named in FIR with specific role, earlier as well applicant filed applications under section 265-K CrPC before the trial court which were dismissed, likewise co-accused Saleem Sachwani's application for same relief was also dismissed by the trial court; order of the trial court is well reasoned hence applicant is not entitled for claimed relief. These contentions were adopted by learned APG.

5. I have heard the respective parties and have also examined the record *carefully*.

6. At the outset, it is worth mentioning here that provision (s) of section 249-A or 265-K Cr.PC are provided by the *Code* itself therefore the same *legally* can't be brushed aside as '*non-existent*', however, since the same, being in departure to normal course, shall

only be exercised when exceptional circumstances justifying the charge to be groundless or that there is no probability of the accused, being guilty of any offence, even if trial is concluded. The dismissal of an application of co-accused shall not be a *sufficient* ground for dismissal of such like application by other accused of the same case rather criterion of dismissal of such application must always be non-existent of required ingredients i.e **'charge being groundless'** and **'non-existent of possibility of accused being guilty of any offence even if case is taken as correct'**. Guidance is taken from the case of *The State through advocate-General v. Raja Abdul Rehman* 2005 SCMR 1544 wherein it is held as:-

“13. ... there can be no dispute that an application under section 249-A Cr.P.C. can be filed, taken up for hearing and decided at any time or stage of the proceedings and the words “at any stage” denote that **the application under section 249-A Cr.P.C. can be filed even before prosecution evidence had been recorded or while the exercise of recording of evidence is going or when the exercise is over.** It is, however, to be noted that though there is no bar for an accused person to file application under section 249-A Cr.P.C. at any stage of the proceedings of the case yet the facts and circumstances of the prosecution case will have to be kept in mind and considered in deciding the viability or feasibility of filing an application at any particular stage. The special or peculiar facts and circumstances of a prosecution case may not warrant filing of an application at a stage when the entire prosecution evidence had been recorded and the case was fixed for recording of statement of the accused under section 342 Cr.P.C.

14. In the aforesaid cases, the principle laid down by this Court while dealing with the powers of the Courts under section 561-A Cr.P.C. in quashing criminal proceedings pending before the trial Court is that when the law provides a detailed inquiry into offences for which an accused has been sent up for trial then ordinarily and normally the procedure prescribed by law for doing the fate of a criminal case should be followed **unless some extraordinary circumstances are shown to exist to abandon the regular course and follow the exceptional routes...**”

Allegation (s) have been that of house-trespass and that of stealing away house hold articles etc; normally such allegation (s) would require *due* trial but if the alleged accused, on the other hand, have

been on litigation in respect of same *premises*, with claim of purchase then such case would be an *exception* because no offence of trespass could be made against **occupant** (as claimed purchaser or tenant) even if such claim is under litigation.

7. Perusal of the record shows that Accused Abdur-Rehman claims ownership of the house where incident happened, such litigations are pending through suit No.995/2005 between accused and Abdul Sattar whereas complainant is claiming to be tenant of Abdul Sattar. Complainant in his examination in chief has deposed that:-

“applicant/accused Abdur-Rehman and Nilufer also entered alongwith co-accused persons in their house and directed **them to vacate the bungalow as same is owned by them.**”

The above charge against the applicant (s), even if is believed, does not constitute an act of **‘trespass’** particularly when the same is with reference to claimed direction for ***vacating their own house***. The evidence of the complainant further shows that he admitted in his cross-examination as:-

“It is correct that civil litigation is pending **between me and accused Abdur-Rehman**. It is correct that accused has lodged FIR No.63/2006 at PS Soldier Bazar **against me for offence under section 448, 468, 471, 420 PPC.**”

Be that as it may, the perusal of the record further shows that report under section 173 CrPC was submitted in A-class; it also reflects that independent witness *Chowkidar* did not support the version of complainant. Accused Abdul Sattar earlier lodged FIR No.106/2007 wherein he also nominated accused Abdur-Rehman and Nilufer almost on same allegation, in that case after full-fledged trial present

applicant and other accused persons were acquitted. Present complainant claims to be *tenant* of said Abdul Sattar hence *possibility* of false allegation by replacing the *informant* shall always be a factor for consideration; admittedly civil litigation is pending between the parties over the same subject matter i.e place where alleged trespass is made, therefore, *prima facie*, disputes appears to be that of ***property***. It has also come on record that Abdul Sattar lodged FIR No.30/2011 contending therein that Fazal-e-Haq (present complainant) is his tenant, accused persons including present applicant entered into his house and he witnessed the incident whereby five persons were removing chattels of his tenant from the bungalow. That FIR was investigated and report under false class ("B" class) was submitted and same was approved as "B" class by Magistrate through order dated 15.05.2012 hence version of complainant in present case with *similar* allegation (s) are not sufficient to hold conviction even if taken as true.

8. Now, it is the time to refer the *impugned* order dated 09.09.2011 which is that:-

"..... After completing investigation I/O submitted present report under "A" class on the ground that on relevant date and time accused Abdul Rehman and Saleem were busy at some other places. **I/O also mentioned in his report that chowkidar's who were performing duties at nearby bungalows have not supported the case.** Moreover, Mst. Zarlish, complainant as well as the eye witnesses in their statements under section 161 CrPC have fully implicated the accused persons for commission of offence as alleged in FIR. Accused persons have taken plea of alibi which could only be considered at the trial. Thus I am of the humble view that sufficient material is available on record against accused persons to establish *prima facie* triable case against accused persons."

I would add that though the Court of Magistrate is always competent to take cognizance on a ***negative report*** even but this act never

absolves the Court (s) from examining the **undeniable** or **undisputed** documents / facts while deciding an application Under Section 249-A/265-K Cr.P.C., as the case may be. If **undeniable facts** of earlier litigation (s) by same set of witnesses by changing the **informant** alone; pending civil litigation; and allegation of direction by applicant for vacation of their **own house**; if is considered with reference to report under A-Class (discharge of nominated accused), do reflect upon charge against the applicant as well possibility that prosecution would not be able to prove charge for **any offence** against the applicant / accused even if trial is allowed to continue. This is a case of extraordinary circumstances hence by order dated 22.01.2021 proceedings of trial court were quashed against present applicant.

J U D G E

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