

HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Misc. Application No.S-837 of 2022

[Iqbal Ahmed Tunio & others versus Hussain Iqbal Hussain Khan & others]

Date of hearing & Order:

05.12.2022

Mr. Khadim Hussain Soomro, advocate for applicants

Mr. Sajjad Ahmed Chandio, advocate for private respondent

Mr. Shawak Rathore, Deputy Prosecutor General Sindh

ORDER

ADNAN-UL-KARIM MEMON, J- This Criminal Miscellaneous Application has been directed against the order dated 01.12.2022 passed by learned Ist Additional Sessions Judge/Ex-Officio Justice of Peace Shaheed Benazirabad, whereby the learned Judge directed S.H.O P.S A-Section Nawabshah to record statement of applicant / private respondent in verbatim, if cognizable offense is made out, then lodge the FIR against proposed accused. However, no arrest shall be made unless some material evidence is brought on record connecting the proposed accused with the commission of crime.

2. Concise facts of the matter are that private respondent had moved an application under Section 22-A (6) (i) Cr. P.C before learned Ex-Officio Justice of Peace Shaheed Benazirabad for registration of FIR against the proposed accused/ applicants with the allegation that on 20.09.2022 at about 03:30 p.m. his daughter namely Zimal aged about 2 ½ years was playing in front of house suddenly fallen in the uncovered main-hole along the roadside at police line and after that she was expired due to cardiac arrest caused by pouring gutter water in chest/lungs due to negligence of proposed accused/applicants. The learned Justice of Peace after hearing the parties directed the SHO concerned as stated above, hence this application.

3. Mr. Khadim Hussain Soomro learned counsel for applicants has mainly contended that without sanction of Provincial Government no F.I.R could be lodged in terms of Section 197 Cr.P.C.; that justice of peace is not bound to issue direction to police in every case to record statement of complainant if no cognizable offense is made out and / or complaint is tainted with malice and based on ulterior motives. Learned counsel heavily relied upon the case of Hon'ble

Supreme Court and submitted that no cognizable offense has been committed by the applicants as the alleged incident took place on 20.09.2022 they were not available at the spot when the victim daughter of private respondent No.1 was suddenly fell in the uncovered main-hole along the roadside at police line; that the District Administration is not responsible for the alleged incident and there was/is no criminal negligence on the part of applicants. He prayed for setting aside the impugned order dated 01.12.2022.

4. Mr. Sajjad Ahmed Chandio learned counsel representing respondent No.1 has supported the order passed by learned Ex-Officio Justice of Peace and submitted that it is for the police to look into the matter and if a cognizable offense is made out F.I.R is liable to be registered. He prayed for dismissal of instant Criminal Miscellaneous Application.

5. I have heard learned counsel for the parties and perused the record with their assistance.

6. The incident of death of daughter of private respondent due to fall in open sewerage manhole is admitted. The petition before the trial court contains a prayer to register a complaint for culpable homicide. Learned counsel for private respondent contends that it was the responsibility of local body/administration of Nawabshah City to maintain the sewerage lines for the safety of public at large and that the applicants are responsible for the untoward situation occurs if any.

7. There is no denial of the fact that there was an open manhole and death of child has occurred, prima facie on account of negligent attitude of Municipal Corporation Nawabshah including Public Health Engineering Department.

8. Learned counsel for the applicants argues that the applicants were not guilty of contributory negligence all alone and no F.I.R could be registered without sanction from the Provincial Government. I reject the plea as untenable, for the reason that open manhole is indeed a death trap, and the Sindh Local Government Department and its allied municipality ought to own responsibility for the consequences of not properly taking care to ensure that no untoward incident could take place by unwary member of public falling into the hole in unguarded moment. Roads are meant for use by the public and if a user comes to harm, the local government department and / or concerned municipality shall be directly responsible for the consequences of such harm.

9. In principle a local body was bound to make proper arrangements for lighting a street and a lapse that caused damage to the individual was / is held to

be actionable. In principle, local bodies are liable for maintenance of public roads/streets and their failure to result in harm will give rise to claim for damages, including action under criminal law.

10. I am of the view that obligatory duties of Municipal Corporation are to provide basic amenities like water, electricity, and streets; it cannot be absolved of the liability caused due to death of child in an uncovered manhole, within its limits. The liability of Local Government and particularly the Municipality of the area concerned is bound to answer the claim arising out of death of a child.

11. The duty to maintain public service is statutory service and local bodies have the power to establish and maintain them properly and take responsibility for the consequences of any harm caused to the public arising out of such negligence if any occurs.

12. The right of invoking a public law remedy is well established by several decisions of Hon'ble Supreme Court. The power of Court is not merely injunctive in ambit, that is preventing the infringement of fundamental right but it is also remedial in scope and provides relief for the breach by damages. Relief for unfortunate victims of the accident cannot be allowed to be lost in the quagmire or morass of a protracted civil trial, where inter-se liability is to be determined.

13. The civic body does not even have a record of deaths reported due to open manholes. It has been urged that it is high time to impose higher level of responsibility by casting criminal negligence on the Chief Municipal Officer/ Executive of Municipality Nawabshah or local body and / or officials of Public Health Engineering concerned; they emphasized that death by criminal negligence is a cognizable offense under PPC and it shall consequently become possible for any person acquainted with facts to set the law in motion.

14. The questions involved in the present matter are whether there is any cause for registering a case for culpable homicide in the manner sought, in the Criminal Miscellaneous Application at this length of time and whether the provision for compensation would be adequately meet the ends of justice in the present case and the applicants are jointly and severally liable for compensation. Primarily the aforesaid questions and its determination could be heard and decided by the learned Division Bench.

15. To address whether this Court has the power to convert and / or convert one kind of proceeding into another is always existed and can be exercised by the High Court not only at an advance stage to prevent injustice. No fetters or bar

could be placed on the powers of High Court to convert one kind of proceeding into another and to decide the matter either itself in exercise of its jurisdiction or to order its transfer to another Court having jurisdiction or may remit it to the Court/ forum/authority having jurisdiction on merits. The High Court in number of cases converted appeals into revisions or vice versa or Constitution Petitions into appeals or revision and vice versa. Reference is made in the case of Mian Asghar Ali v. Government of Punjab and others (2017 SCMR 118).

16. In this case, the incident has taken place in which a small child has lost her life. However I do think that this matter requires to be heard and decided by the learned Division Bench of this Court, therefore the office is directed to place this case before Division Bench of this Court for appropriate order including maintainability and other ancillary issues. The applicant is directed to file another set of pleadings accordingly.

JUDGE