

ORDER SHEET
**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.**

C.P No. D-658 of 2023

C.P No. D-803 of 2023

C.P No. D-844 of 2023

<u>DATE</u>	<u>ORDER WITH SIGNATURE OF JUDGE(s)</u>
-------------	---

30.05.2023

These petitions have been placed before the Court pursuant orders passed on an office note dated 25.05.2023, wherein certain orders passed in various petitions were referred and was placed before the Senior Sitting Judge at Circuit Court Hyderabad, by stating that despite clear directions in the aforesaid orders / judgments not to entertain any such petitions falling in the categories so mentioned in the said orders, the counsel as well as litigants are continuously approaching the office and at time heated arguments are exchanged with a request to place the same before the Court for appropriate orders. It was also noted that on daily basis various counsel are seeking permission in such matters in open Court causing disturbance and inconvenience to the Bench as well; therefore, a Special Bench was constituted for today notice was ordered and Mr. Muhammad Yousuf Leghari as President High Court Bar Association, Hyderabad on Court notice, Muhammad Sachal R. Awan and Mumtaz Alam Lashari Advocate(s) have appeared on behalf of the petitioner as well as the Bar and have assisted the Court.

They have jointly contended that insofar as the directions of the learned Division Benches in the said orders are concerned regarding non-entertaining the petitions, the same are against the Rules as well as the Law; and could not have been passed. According to them, office can raise any such objections, but they are bound to place the same before respective Benches for appropriate orders as to maintainability or otherwise. Mr. Yousuf Laghari, Learned Senior Advocate who is also Member, Pakistan Bar Council, has even gone to the extent that not only these directions to the office; but so also other observations in the aforesaid judgments are in violation of Article 199 of the Constitution of

Islamic Republic of Pakistan, 1973 as the bar of alternate remedy is never absolute and therefore, these judgments are not even binding on this Court. He has also argued that time and again Senior Sitting Judges at this Court have given directions verbally to the office to entertain such petitions and after entertaining them, appropriate orders on merits of the cases have also been passed, therefore, even otherwise these judgments are no more a binding precedent. Mr. Sachal Awan also argued that since passing of these orders, the respective government departments have started delaying tactics and are creating unnecessary hurdles in availing the alternate remedy and are even blackmailing and harassing the genuine litigants.

Heard learned counsel(s) as above and perused the record. Insofar as the office note and orders passed by different Benches at this Court are concerned, they are as follows:

(1) C.P No.D-32 of 2018 & others / Judgment Dated 27.11.2019
(FotiKhata/Mutation/Demarcation/Partition/Sale Certificate)

Therefore, office is directed not to entertain such petitions for Foti-KhataBadal / mutation / demarcation / partition / issuance of sale certificate wherein (a) petitioner has not approached the competent forum in accordance with law; and, (c) any factual controversy with regard to the ownership or possession of the subject land and / or legal heirs is involved, or any litigation in respect thereof is sub-judice before any forum.

(2) C.P No.D-1578 of 2017 & others / Order Dated 26.11.2019
(Measurement / Demarcation / Partition / Mutation)

Office is directed not to entertain such petitions for measurement / demarcation / partition, mutation of land wherein (a) petitioner has not approached the competent forum in accordance with law ; (b) petitioner's application for such purpose is pending before the competent forum ; and / or (c) any factual controversy with regard to the subject land and / or khatedars is involved, or any litigation in respect thereof is sub judice before any forum".

(3) C.P No.D-721 of 2010 & others / Judgment Dated 10.12.2019
(Irrigation Matters)

Office is, therefore, directed to entertain only such petitions in future wherein all remedies, including remedies provided under the Irrigation Act and /or litigation before any forum, have been fully exhausted by the person before approaching this Court.

(4) C.P No.D-2149 of 2018 & others / Order Dated 30.05.2018
(Harrasment/Quashment of FIR/Free Will Marriage)

As an interim measure till the reasons of this short order are handed down office is directed to entertain only such petitions in which:

- i. The petitioner has already approached Ex-Officio Justice of Peace and his application / complaint has been finally decided by Ex-Officio Justice of Peace, provided certified true copy of the final order is filed with the petition ; and
- ii. F.I.R has been lodged against the husband in case of free will marriage, provided true copy of the F.I.R is filed with the petition.
- iii. Learned Ex-Officio Justice of Peace of all districts are directed that if any order of protection etc. is passed by them in future on an application / complaint of a party, the S.H.O concerned should be directed by them to submit compliance report to them within seven (07) days.

**(5) C.P No.D-1589 of 2013 & others / Order Dated 05.12.2019
(Matters under Electricity Act 1910)**

In view of the above, office is directed to not entertain any petition falling under any of the above categories i.e. under Sections 26(6) and 26-A of the Electricity Act, 1910. Office is further directed to communicate this order to the Chief Secretary, Government of Sindh, and also to all Electric Inspectors in the Province of Sindh for information and compliance.

(7) C.P No.D-1703 of 2019 / Judgment Dated 23.07.2019 (Free Will Marriage)

Office shall not entertain any petition regarding free will marriage, if girl is claiming adult but not having CNIC. Her counsel will be bound to file family tree certificate and certificate of marriage as well affidavit by NikahKhwan showing therein that bride and groom are adult and he has examined such evidence. Affidavit shall also show consequences in case of false affidavit as such provided under the Sindh Child Marriage Rules, 2016. Besides, office shall not accept any petition if the bride is minor and raise serious objection. All Deputy Commissioners shall be directed to ensure that NikahKhwan are registered and proforma affidavits shall be provided to NikahKhwan as stated above.

**(9) "C.P No.D-1007 & others / Judgment Dated 28.05.2018
(Ramzan Ordinance Matters)**

Office is further directed not to entertain any such petition in future wherein exemption is sought in respect of a place which is not covered / exempted under Section 5 of the Ordinance. Let this Judgment be communicated to the learned Registrar of this Court and learned Additional / Deputy Registrars of Circuit Courts Hyderabad and Larkana for information and compliance.

(Note: matters listed at Serial Nos. 6 and 8 have no such specific directions to the office; hence, need not be referred)

From perusal of the aforesaid orders / judgments of the Court, it appears that invariably in all these orders / judgments there are certain directions to the office not to entertain such petitions in any manner; or even wherein they could be entertained, there are certain pre-

requisites and requirements which are to be met by the litigants before such petitions could be entertained.

Insofar as the conduct and the procedure which requires to be adopted by the Additional Registrar and his office at this Circuit Court at Hyderabad in respect of institution and receiving of cases is concerned, the same are governed by the Lahore High Court Rules and Orders (Volume 5, Chapter 1 Rule 9¹). However, such Rules are applicable as they were adopted and made applicable at each stage, i.e. in 1970 and then in 1975, (at least on the appellate side) and since this Court has not yet exercised the powers vested in it under Article 202 of the Constitution to frame new rules (The draft Rules of 2012 still to be notified), the said Rules continue to be applicable; however, the said Rules apply to this Court as they stood on 1-7-1970, which was the day on which the erstwhile High Court of West Pakistan ceased to exist, and any changes subsequently made in or to the said Rules by the Lahore High Court apply only to the latter Court².

From perusal of the above, it appears that though the office through its Additional Registrar or Deputy Registrar or even an Assistant Registrar, can refuse to entertain petitions / cases; however, this could be due to some deficiency in filing such cases and once the deficiency so pointed out is cured, the matter has to be placed before the Court. In cases, wherein the deficiency is not met within the stipulated time, even then the office on its own cannot refuse to entertain the petitions / cases and is bound to place the same before the appropriate Court for orders as to the very maintainability of such cases. Lastly, the matter is appealable before a Judge as per Rule 9(ii) *Ibid*; hence, even by the Rules itself, neither a verbal order can be passed; nor for that matter, a case can be returned without a remedy of Appeal. The said Rule, though not in its entirety and the manner so prescribed is being followed in this Court; as with certain self-created practice, after raising objections, it is invariably placed before the

¹9. (i) The Deputy Registrar (Judicial) is authorized to return memorandum of any suit, appeal, or petition, or application, etc., -a) if it is not maintainable under any law; or b) if it is not properly constituted; or c) if it contains scandalous or objectionable language or material; or d) if it is not drawn up in conformity with the foregoing directions; or e) for amendment, making up of the deficiency or for filing requisite documents, within the time to be specified in the Objection Memorandum Appendix I(a), I(b) & I(c).

(ii) **The order of the Deputy Registrar (Judicial) returning the memorandum of any suit, appeal, petition or application may be challenged before the Chief Justice or Judge nominated by the Chief Justice on administrative side whose decision shall be final and shall not be assailed in any other proceeding before the High Court**

²See the cases reported as Sindh High Court Bar Association v Federation of Pakistan (PLD 2009 Karachi 408); followed in Roshni Television v PEMRA (PLD 2011 Karachi 1)

concerned Court under the category for “Orders as to Non-prosecution” in the daily cause list.

The Honorable Supreme Court in the case of *Farman Ali*³ had the occasion to examine the deal with identical facts wherein the Deputy Registrar of the learned Lahore High Court had refused to entertain such petition in terms of Rule 9 and Rule 9(A) of the Lahore High Court Rules as the deficiency pointed out by the Deputy Registrar’s office was not met within the stipulated time; however, the Supreme Court was pleased to hold as under:-

“.....It is, thus, clearly mandated, that it is for the Court to decide as to what should be done with such a deficient petition, because the ministerial and administrative staff of the High Court cannot be empowered and allowed to decide about the fate of the revision petition (even deficient), which in fact is a complaint against the Court, subordinate to the High Court, to that Court, and not subordinate to DR; this is not permissible in the exercise of DR's ministerial/administrative function at all. In such an event, it is for the Court alone to take a decision as to what should be the fate of such a petition. And in the facts and circumstances of each case, the Court may have more than one options in this behalf, some are elucidated as (a) grant the delinquent party with a further chance within a specified period to meet the office objection and re-file the petition within that time (b) While recording reasons, to overrule the office objections and to consider the petition as it is, deeming it ,having been properly instituted and to hear it on merits the same day or some further day fixed for hearing (c) By upholding the objection to dismiss the petition as having been invalidly filed or being not maintainable, or to dismiss the same for non-prosecution, depending upon the nature of the deficiency involved in a particular case; but the last option should be resorted to an acute matter, where the defect/deficiency is absolutely inherent and incurable. However, all these actions are within the exclusive authority of the High Court, which cannot and have not been delegated to the office and the office (DR) has no authority and the empowerment that of his own to declare a petition, which has been filed within prescribed period of limitation as time barred, only because the office objection has not been met in time; the D.R. also in such a situation cannot require the petitioner to file an application for the condonation of delay. It may be emphatically held that such a revision petition, which was filed within time prescribed by law, but was deficient in some respect, and such deficiencies were not supplied and made up in the given time, cannot be termed to be barred by time. It may be pertinent to mention here that where the revision petition is beyond limitation, the DR can point out to the petitioner this aspect and caution him, but has to fix the matter before the Court for its decision on the question of limitation leaving it for the petitioner to seek the indulgence of the court on the question of limitation or otherwise.”

From perusal of the aforesaid observations of the Hon’ble Supreme Court it is clear that that it is for the Court to decide as to what should be done with such a deficient petition, because the ministerial and administrative staff of the High Court cannot be empowered and allowed to decide about the fate of a case, and in such an event, it is for the Court alone to take a decision as to what

³Farman Ali v. Muhammad Ishaq& others (PLD 2013 Supreme Court 392)

should be the fate of such a petition as this falls within the exclusive authority of the High Court, which cannot and have not been delegated to the office which has no authority and the empowerment that of his own to declare a petition, which has been filed within prescribed period of limitation as time barred.

This case has been recently followed by a learned Judge of the Supreme Court while hearing an Appeal in Chambers in the case of *Qausain Faisal*⁴ wherein the Registrar of the Supreme Court had refused to entertain a petition under Article 184(3) of the Constitution and various objections were raised, whereas, the following objection is relevant and is identical to the one raised by the office of this Court and reads as under;

- a. That the petitioner is invoking the extraordinary jurisdiction of the Supreme Court under Article 184(3) of the Constitution for the redressal of an individual grievance, which is not permissible in terms of judgment reported as 1998 SCMR 793 titled as "Zulfiqar Mehdi v. PIA, etc."

The learned Judge in Chambers has been pleased to overrule the same and it has been held as under;

2. I have heard the learned counsel for the appellant and have carefully examined the impugned order and the Rules. Under the Rules, the Registrar is to perform certain functions that are mostly administrative and ministerial in nature. In performing the administrative function of "registration of petitions, appeals, suits and other matters" under Rule 1(6) of Order V of the Rules, the Registrar has been conferred: (i) the power under Rule 10(a) of Order III "to require any plaint, petition of appeal, petition for leave to appeal or other matters" presented to the Court, to be amended in accordance with the practice and procedure of the Court, and (ii) the power under Rule 7 of Order VII to "decline to receive any document" which is presented otherwise than in accordance with the Rules. It is in exercise of these powers that the Registrar has made the impugned order. The powers of the Registrar under Rule 10 of Order III along with Rule 7 of Order VII of the Rules are purely administrative in character, which allow him to enforce the practice and procedure of the Court in relation to presentation of cases and ensure that the form of the pleadings and the documents filed therewith is as per the Rules. The justiciability of the legal and factual questions raised in the petitions is a matter for the Court to deal with and decide upon. Registrar enjoying administrative powers under the Rules cannot assume the core adjudicatory role of the Court under the Constitution of the Islamic Republic of Pakistan, 1973. There is no provision in the Rules that empowers the Registrar to touch upon the maintainability of a petition, other than ensuring its proper form and presentation as per the practice and procedure of the Court provided in the Rules. The maintainability and the merits of a petition are justiciable issues, and fall within the domain of the Court.

Though the above findings of the learned Judge of the Supreme Court in chambers are in respect of an Appeal filed under Order V, Rule 3 of the Supreme Court Rules, 1980 ("**Rules**"), against an order of the

⁴Qausain Faisal v. Federation of Pakistan (PLD 2022 Supreme Court 675)

Registrar of that Court under Rule 10 of Order III along with Rule 7 of Order VII of the Rules but such Rule(s) in all fours and to the maximum similarity are also found in the Lahore High Court Rules Volume V (being applicable to this Court⁵). In that when the relevant Rules applicable to this Court, whereby, certain powers have been conferred upon the Registrar or Additional or Deputy Registrar(s), are looked into, it appears that in fact the powers conferred upon the Registrar of the Supreme Court are much wider as compared to the same which are found in the High Court Rules. Therefore, the said observations of the learned Judge of the Supreme Court in chambers are fully attracted to a case or petition filed under Article 199 of the Constitution inasmuch as the same cannot be dismissed or deemed to be dismissed by the Registrar or Additional Registrar of this Court; by way of an objection and that too without any formal order being issued to the Petitioner. In the case of Qausain Faisal (Supra) before the Supreme Court there was even an order of the Registrar under the relevant Rules, but even then it was held that the powers being exercised are purely administrative in nature and his office cannot decide and hold that a case is not maintainable. It was held that this function is judicial in nature and can only be finally decided by the Court. The Registrar's office is bound to; or required to, raise any such objections, which may have been based on some binding precedent; but even then it is the judicial functions of the Judge and the Court to decide it finally. We may also add that even if there were no such rules applicable to the High Court, even then the judicial functions could not have been performed by the Additional Registrar or any other officer of the Court.

This view has been reiterated by the same learned Judge while hearing another Chamber Appeal in the case of Muhammad Ahsan Abid⁶ by holding as under;

4.....The Registrar does not enjoy any power under the Rules to decide upon the maintainability of a petition or an appeal. The question of maintainability of a petition or an appeal is a justiciable issue that calls for adjudication¹, which is solely the prerogative of the Court in the exercise of its judicial power.² A limited exception is, however, provided under Order V Rule 1 of the Rules where the Registrar enjoys the powers of the Court in deciding certain applications, etc., in pending cases. The power

⁵ See the cases reported as Sindh High Court Bar Association v Federation of Pakistan (PLD 2009 Karachi 408); followed in Roshni Television v PEMRA (PLD 2011 Karachi 1)

⁶ Order dated 10.8.2022 in C.M. Appeals No.39 & 41 of 2021 in Civil Appeals No. Nil of 2021

to deal with these applications, which though not under examination in the present cases, also appears to be procedural in nature and prima facie do not impinge upon the judicial power of the Court so as to decide upon the substantive justiciable issue(s) involved in the petitions or appeals.

7. It is underlined that even if a petition or an appeal is prima facie non-maintainable under the provisions of the Constitution, a law or the Rules referred to by the petitioner or appellant for filing the same, still the question of maintainability of the petition or the appeal under the referred provisions is to be adjudicated by the Court on the judicial side and not by the Registrar on the administrative side. Mere, prima facie non-maintainability of a petition or an appeal does not vest the jurisdiction in the Registrar to adjudicate upon the question of maintainability of such a petition or an appeal. Nor can the administrative powers of the Registrar under the Rules be employed to refuse receiving and registering such petitions or appeals which appear to him as non-maintainable. However, the Court can discourage the filing of outright non-maintainable, frivolous and vexatious, petitions or appeals by imposing costs on the unscrupulous petitioners or appellants under Order XVII Rule 12 of the Rules.

We may add that our observations as above and thereafter are not to be misunderstood as an order to discard any directions issued by the Court from time to time. Under the Rules, the Additional Registrar or his office is bound to act as per directions of the Court recorded by way of a judicial order. However, neither he; nor any officer of the Court on its Administrative side, can refuse to entertain a petition verbally or even by an endorsement on memo of petition as being not maintainable or as dismissed; by citing some order or even a binding precedent of the Court. At most, the office can raise such an objection; rather including, but not limited to the directions made earlier; that the petition is not maintainable; however, office is bound to place the same in the Court for a final judicial order to that effect. And then it is for the Court to either entertain the same or dismiss it by following the earlier precedent and even impose cost(s) upon the litigant.

Insofar as the judgments referred to in the office note are concerned, we may note that they are a binding precedent insofar as the law which has been settled as we have not been assisted in any manner regarding the same being challenged before the Supreme Court or for that matter having been suspended or stayed or set-aside. It is also not a case of review before us for that matter and they have attained finality to that effect. Therefore, the argument of Mr. Yousuf Leghari, Advocate, that the said judgments in totality are to be ignored and they should not be treated as a binding precedent even to the extent of facts, law and merits of the cases individually, would not be a correct approach. However, insofar as the directions to the office of the

Court not to entertain any such petition or even put up the same in Court is concerned, we are of the view that it is *per-incuriam* and is not a binding precedent. We while respectfully disagreeing with such observations, would like to observe that in no manner a litigant can be left at the mercy of the Administrative staff of the Court; or for that matter, the Executive to decide that whether his case is maintainable or not before the Court in terms of Article 199 of the Constitution or for that matter under any other law. This aspect has to be decided by the Court in a case after considering the facts so stated, and if at all, a case of any exception is made out, then it can be entertained as deemed fit by the Court and or dismissed out rightly or with cost(s).

Per settled law nobody can be condemned unheard, whereas, no order can be sustained if it is not a speaking order and is without any reasons. Here, the litigants are being verbally informed by the office that their petition is not maintainable for the reason that it has already been held so in the earlier judgment. They are not even being provided any opportunity of hearing to make out their case and put forth their point of view regarding the very maintainability or otherwise. This function is of the Court and not of the Additional Registrar or for that matter any other officer of the Court.

It is also pertinent to point out that insofar as the Principal Seat of this Court is concerned, as informed through report of the Junior Associate / Reader to the Additional Registrar dated 26.5.2023, on query made by him from the Principal Seat, Karachi, Sukkur Bench and Circuit Court Larkana, he has been informed that fresh matters of these categories are being instituted / entertained after raising relevant objections thereon except *Harassment matters*. This appears to the correct practice and procedure and the same ought to have been adopted over here at this Circuit Court as well. Therefore, the directions under discussion also amount to discriminate the litigants and lawyers at this Circuit Court.

Lastly, such directions even amount to restrict or restrain a subsequent Bench from taking any contrary view, not only from the law so settled, but so also in respect of the very maintainability of a case, as such cases will never be placed before any subsequent Bench by the office for any appropriate Judicial Order(s). A subsequent Bench may not necessarily agree or disagree with the entire law so settled

and discussed by an earlier Bench, as is the case in hand; but this can only be deviated or agreed, once the case is put up before a subsequent Bench. We may observe that having a contrary view from an earlier decision is not a new or novel thing in law and in our jurisprudence as well. Though this is subject to the procedure laid down in this regard by the Supreme Court; however, the subsequent Bench may agree partly with an earlier judgment and pass appropriate orders. By dint of the directions as noted above, the doors to develop the law any further on the issue(s) herein has also been closed. This, perhaps is not a correct approach for any Court. Finally, we are also sanguine that it is an arduous task to cut down frivolous litigation and any step for achieving such purpose is always to be encouraged; but come what may, it cannot be done in violation of any law or rules; and least by way of delegating the judicial work of the Court / Judge to the Administrative officers of the Court. The only way, as of today, in absence of specific tailor made law for such purpose, is through imposition of effective cost(s) and its immediate recovery and enforcement.

In view of the above facts and circumstances and the discussion so made, it appears that to the extent of any directions to the office not to entertain any such petition as stated in the aforesaid judgment(s) / order(s), the same is in violation of the very Rules applicable to this Court. Further it also appears to be in violation of the dicta laid down by the Supreme Court in the cases of *Farman Ali; Qausain Faisal & Muhammad Ahsan Abid (Supra)*. Thus, the same is *per-incuriam* and is not a binding precedent to that extent. After holding so, it is though not necessary that the matter be referred to a larger bench; however, since time and again the issue has cropped up and various Benches are regularly passing orders to this effect either at this Court, or at Sukkur Bench and the Circuit Court Larkana, causing concern to the litigants and creating great difficulty for the office of the Court to deal with such directions, we deem it appropriate to refer the matter to the Hon'ble Chief Justice for constitution of a larger Bench for an authoritative judgment following the dicta laid down in the case of *Multiline Associates*⁷ and reiterated in *Amir Khan*⁸ on the question that

⁷Multiline Associates v ArdeshirCawasjee (1995 SCMR 362 / PLD 1995 SC 423) & Province of East Pakistan v Dr. Aziz ul Islam (PLD 1963 SC 296)

⁸Muhammad Amir Khan v Govt. of KPK (2019 SCMR 1021)

“whether, a Bench of the Court can issue any directions to the office to refuse entertaining a case and even not to put up the same before the Court for an appropriate judicial order regarding the objections / maintainability” and “whether such directions are against the pronouncements of the Supreme Court as above”. However, since we have already held that the directions in above orders to the office are *per-incuriam*, in the interregnum till such time the issue is fully resolved by the larger bench we deem it appropriate to pass the following orders by directing the office as follows:

(a) *Insofar as the category of cases as mentioned in the above note of the office are concerned, if any petitions / case pertaining to the same are filed, the office shall entertain the same and raise appropriate objections as directed by the Court; or any objection on its own; and after recording such objections with full particulars, shall place the same before the Court in accordance with the Rules and as per Roster for passing of an appropriate judicial order(s).*

(b) *Insofar as the category harassment of cases is concerned, such petition shall only be entertained as per the practice being followed at the Principal Seat as noted hereinabove in the report of the Court Associate of the Additional Registrar dated 26.5.2023.*

For placing the matter before the Hon'ble Chief Justice, office is further directed to prepare duplicate sets of these petitions along with the office note dated 25.5.2023 and order(s) mentioned in the said note and then send the matter to the learned Registrar of the Court for placing the same before Hon'ble Chief Justice for constitution of a larger Bench or for passing any other appropriate order(s).

J U D G E

J U D G E

Hafiz Fahad