

ORDER SHEET
LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

W.P. No. 18236-2015

Javed Iqbal. Vs. ASJ, etc.

<i>Sr. No. of order of proceeding</i>	<i>Date of order of proceeding</i>	<i>Order with signature of Judge, and that of Parties or counsel, where necessary</i>
<i>1</i>	<i>2</i>	<i>3</i>

07.04.2017

*Mian Mehmood Ahmed, Advocate for the petitioner.
Ms. Shazia Ashraf Khan, AAG along with Gulzar Hussain,
A.S.I.
Mr. Irshad ullah Chatha, Advocate for respondent No.3.*

Through the instant petition moved under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 read with section 561-A Cr.P.C., Javed Iqbal (petitioner) has called in question the vires of the order dated 09.03.2015, passed by learned Judicial Magistrate (whereby he dismissed the application of the petitioner moved u/s 249-A Cr.P.C.) and the order dated 14.5.2015 passed by learned Additional Sessions Judge, Hafizabad, (whereby he proceeded to dismiss the application of the petitioner moved u/s 435 Cr.P.C.).

2. *Briefly, the facts, which led to the filing of the instant petition are to the effect that Malik Qaiser Ayub (respondent No.3) purchased a piece of land from Shaukat Iqbal through a sale deed dated 24.09.2009, in lieu of consideration of an amount of Rs.1,50,000/-. Malik Qaiser Ayub got registered a criminal case vide FIR No.480/11 u/s 406, 420 PPC registered at P.S. City Hafizabad alleging therein that the petitioner and his co-accused are operating as bunch of cheaters, who deprived him in an organized manner of his life saving; that the accused persons allured him to purchase a plot measuring 20-marlas for an amount of one million;*

that since the government scheduled rate was on much lower side, hence the price of the plot was shown in the registered sale deed as Rs.1,50,000/-; that subsequent to the above transaction the accused persons in connivance with each other, in order to deprive him of his hard earned money managed the institution of a pre-emption suit through the petitioner; that they entered into negotiation through the respectable persons, whereby a cheque No. 1854222 of HBL, Railway Road Brach was handed over to Haji Muhammad Khokhar by Adeel Shaukat (co-accused) for an amount of Rs.4,28,000/-; that the cheque was got dishonoured by Haji Muhammad and with dishonest intention returned the same to the accused persons; that subsequently Haji Muhammad, acting as an Arbitrator gave an award on a stamp paper. Subsequent to the registration of crime report, the matter was investigated by the police and feeling dissatisfied from the conclusion drawn by the Investigating Officer, respondent No.3 opted to file a private complaint on 12.09.2014 against the petitioner and his co-accused. During the pendency of the private complaint, the learned trial court proceeded to charge sheet the petitioner and his co-accused on 21.03.2015 u/s 420, 468, 471 PPC. Before framing of charge, the petitioner invoked the jurisdiction of learned Magistrate through an application u/s 249-A Cr.P.C., which was dismissed vide order dated 09.03.2015. It would be appropriate to reproduce the relevant extract from the order dated 09.03.2015, which is as under:-

“The charge has not been framed against the accused person and just after the delivery of copies of complaint to the accused persons, the application in hand was moved by the petitioner/accused Javed Iqbal. In that sense, the prosecution has not been provided with sufficient opportunity to produce its evidence, therefore,

guilt or innocence of the accused/petitioner can only be determined after recording of the prosecution evidence. No doubt the accused/petitioner has a right to move application u/s 249-A Cr.P.C. at any stage of the trial, but it is now at very much premature stage when no opportunity has been given to prosecution to prove its case”.

Feeling dissatisfied, from the order of the learned Magistrate, the petitioner approached the learned Sessions Judge through petition moved u/s 439-A Cr.P.C., which was also dismissed vide order dated 14.5.2015. For the just decision of the instant petition, I deem it appropriate to reproduce the relevant portion of the order passed by the learned ASJ, which is as under:-

“Prima facie due to tangible evidence available in the case file against the petitioner he has been summoned by the learned trial court and his stance requires evidence, therefore, at this stage when charge has not been framed cannot be treated as to be baseless and groundless. Petitioner in this respect is required to assail his matter before learned trial court at the time of framing of charge against him as to whether he is liable to be charged or not”.

3. *It is contended by the learned counsel for the petitioner that from the bare perusal of the FIR as well as the private complaint filed by the respondent No.3, no offence whatsoever is made out against the petitioner; that the petitioner stands implicated in the instant case on the basis of a general allegation without attribution of any act, which may attract the mischief of any offence defined under Pakistan Penal Code; that in the instant case, respondent No.3 is using the process of a criminal court for achieving the positive ends in the civil proceedings pending between the parties; that the perusal of the impugned orders passed by*

both the courts below reflects that the same are not in consonance with the facts and circumstances of the case and at the same time are in sharp conflict with the mandate of section 249-A Cr.P.C.; that in the given circumstances even if the proceedings before the learned trial court are permitted to continue the same are not likely to end in the conviction of the petitioner, hence being abuse of process of court are liable to be quashed.

4. *On the other hand, learned Law Officer assisted by the learned counsel for respondent No. 3 strongly controverted the arguments advanced by the learned counsel for the petitioner and submitted that the petitioner is part and parcel of gang of cheaters, who are operating in an organized manner, depriving the general public of their hard earned money; that they have also deprived the respondent No.3 of heavy amount of Rs.1.00 million, thereby committed offences u/s 406, 420 PPC; that the petitioner is seeking a pre-mature acquittal without affording an opportunity to the respondent No.3 to prove his case; that the impugned orders passed by both the courts below being in accordance with law and facts of the case are not to be interfered with by this Court.*

5. Arguments heard and record perused.

6. *It evinces from the perusal of the record as well as from the arguments advanced by both the parties, that Shaukat Iqbal (brother of the petitioner) was owner in possession of a piece of land measuring 01-kanal (hereinafter to be referred as 'the land') situated in Hafizabad City. Shaukat Iqbal (co-accused) sold the land to respondent No.3 through a registered sale deed dated 24.09.2009 for an amount of Rs.1,50,000/-. As regards sale consideration, the stance of respondent No.3 is to the effect*

that though he paid an amount of Rs.1.00 million but since scheduled rate of the land for the vicinity was declared as Rs.1,50,000/- per kanal by the Revenue Department, hence in the registered sale deed the price was mentioned on the lower side. Be that as it may, on 23.01.2010, the petitioner challenged the above mentioned transaction through a pre-emption suit, which has yet not been decided. After the lapse of about 16-months, respondent No.3 got registered a criminal case through FIR No. 480/2011 registered u/s 406, 420 PPC at P.S. City Hafizabad. The registration of the criminal case, prompted the petitioner and his co-accused to invoke the jurisdiction of learned ASJ through an application u/s 498 Cr.P.C. During the pendency of application for bail before arrest, the parties patched up their differences resultantly, the pre-arrest bail granted to the petitioner and his co-accused was confirmed vide order dated 13.06.2011. It is important to mention here that interim pre-arrest bail was mainly confirmed on account of compromise statement made by respondent No.3, which was to the following effect:-

“I have received Rs.4,50,000/- from Javed Iqbal petitioner and Rs.1,00,000/- from Shaukat Iqbal petitioner before the Court today, and have compromised with all the four petitioners, so have no objection on grant of bail to them. I have made statement without any undue pressure or coercion.”

It divulges from the statement of respondent No.3 recorded before the learned Sessions Judge, Hafizabad that he received an amount of Rs.4,50,000/- from Javed Iqbal (petitioner) and stated in unequivocal terms that he has no objection on the grant of bail. It further spells out from the record that approximately three years thereafter, a private complaint was instituted by respondent No.3 on similar facts.

7. *In the above backdrop, I have meticulously examined the proposition in hand and have noticed that subsequent to the dismissal of application u/s 249-A Cr.P.C., the learned Magistrate proceeded to charge sheet the petitioner and his co-accused u/s 406, 420, 468, 471 PPC. For the just decision of the instant petition, I feel pressing need to have a look as to how the above mentioned four offences stand incorporated in Pakistan Penal Code. Section 406 PPC provides “**Punishment for criminal breach of trust**”, whereas section 420 PPC is an offence titled as “**Cheating and dishonestly inducing delivery of property**”. As regards, section 468 PPC, it stands for “**Forgery for purpose of cheating**”, whereas section 471 PPC is defined as “**Using as genuine a forged document**”. In order to see as to whether any of the foregoing provisions stand attracted to the facts and circumstances of the case, first of all I consider it appropriate to embark upon the applicability of section 406 PPC. The offence of criminal breach of trust is defined in section 405 PPC, the perusal of which shows that in order to attract its mischief the prosecution has to make out following ingredients:-*

- i. Entrustment of a property;*
- ii. Dishonest misappropriation or conversion to his own use that property;*
- iii. Dishonest use or disposal of a property in violation of any direction of law or of any legal contract express or implied;*

The record of the instant case is suggestive of the fact that admittedly, at no point of time, the petitioner was entrusted with any property or with any dominion over property. The entrustment of the property is a primary ingredient, which is required to be fulfilled in order to attract liability u/s 406

PPC. Since the primary ingredient of entrustment is found missing from the prosecution case, hence, in my humble view, the petitioner cannot be saddled with any such responsibility. In order to see any possibility of the conviction of the petitioner u/s 406 PPC, I have minutely gone through the proposed prosecution evidence and have not come across any such probability, even of remote in nature.

Likewise, I have also noticed that this is not the case of the complainant that petitioner ever interacted with him or made any misrepresentation so as to give rise to an offence u/s 420 PPC. I have also given a considered thought to the offences u/s 468 and 471 PPC. I have not been able to be found traces of any document, which may be termed as forged within the meaning of section 463, 464 PPC. Even, during the course of arguments, the learned counsel for respondent No.3 was duly confronted with the situation in hand but he failed to make reference to any such material, which may give birth to any possibility of awarding of conviction to the petitioner in offences under section 468 and 471 PPC.

8. *In the above backdrop, I have also peeped through the impugned orders passed by both the courts below and have found them to be in conflict with the object of insertion of section 249-A Cr.P.C. The provision of section 249-A Cr.P.C., which was inserted in the Pakistan Penal Code through Ordinance No. XXXVI of 1977 provides the remedy of acquittal to an accused person and that too without undergoing the ordeal of full-fledged trial, if the circumstance so warrants. Since the legislatures, in their wisdom have made permissible to move such an application at any stage of the trial, hence there is no bar for an accused to invoke the jurisdiction of the trial court u/s 249-A Cr.P.C.*

*even before the recording of the prosecution evidence. In this backdrop, the reasons advanced by the learned Magistrate as well as the learned ASJ in their impugned orders are not found to be in consonance with the intent of the legislature. Since the relevant extracts of the impugned orders are already reproduced above, hence, no useful purpose is likely to be served by recapitulating them in the instant para. As regards, my observation of moving an application u/s 249-A Cr.P.C. even before the recording of evidence, I am enlightened by the observation of the Honourable Supreme Court of Pakistan contained in the case titled as **The State vs. Asif Ali Zardari and another (1994 SCMR 798)**, which is as under:-*

“In order to appreciate contentions of learned Advocate General, it would be necessary to make reference to sections 249-A and 561-A Cr.P.C. Section 249-A Cr.P.C. empowers the Presiding Officer of the trial court to acquit accused at any stage of the trial and the only requirements to be fulfilled are firstly that hearing is to be given to the prosecutor and counsel of accused and secondly reasons are to be recorded in support of conclusion that charge is groundless or that there is no probability of accused being convicted. It is very clear that application can be filed at any stage of the proceedings and it is not necessary and there is no requirement that such application is to be filed after evidence of all the witnesses is recorded.”

9. *The provision of section 561-A Cr.P.C. from its plain reading is meant to be exercised by this Court in following cases:-*

- i) to give effect to any order under this Code*
- OR*
- ii) to prevent the abuse of process of any Court*
- OR*
- iii) to secure the ends of justice.*

*The powers, which are blessed upon the High Court by virtue of section 561-A Cr.P.C. being wide in nature, can be exercised at any time, if the circumstance of a case so demands. In cases, where an accused person seeks quashing of proceedings pending before a criminal court, the powers of High Court u/s 561-A Cr.P.C. are akin to the provision of section 249-A Cr.P.C. The only restriction imposed by the Honourable Supreme Court of Pakistan in case titled as **Dr. Sher Afgan Khan Niazi vs. Ali S. Habib and others (2011 SCMR 1813)** is to the effect that such powers i.e. u/s 561-A Cr.P.C. is not to be exercised, unless the jurisdiction of the trial court is invoked either u/s 249-A Cr.P.C. or 265-K Cr.P.C., as the case may be. In the instant case, since the petitioner has already exhausted the remedy of section 249-A Cr.P.C. as well as under section 435 and 439-A Cr.P.C., hence this Court is under no limitation or restriction to exercise the power blessed u/s 561-A Cr.P.C.*

10. *In addition to what I have discussed above, I have also noticed that the petitioner stands implicated in the instant case on the basis of generalized allegation, without attribution of any role performed by him in the commission of offence. Keeping in view the peculiar facts and circumstances of the case, I have arrived at irresistible conclusion that respondent No.3, in order to secure undue advantage in the civil suit has instituted criminal proceedings as a tool. The instant transaction from its very genesis appears to be civil in nature and through sheer misuse of abuse of process of a criminal court, the complainant has turned it into criminal litigation. Likewise, I have not been able to understand that as to how Qaiser Ayub (respondent No.3) is entitled to institute the private complaint, even after extorting an amount of Rs.4,50,000/- from the petitioner, as admitted by*

*him before the learned ASJ. I am of the considered view that the peculiar facts and circumstances of the case are suggestive of the fact that the proceedings against the petitioner, pending before the trial court are sheer abuse of process of a criminal court. These features of the case, coupled with the fact that there is no probability of conviction of the petitioner in any offence, warrant interference of this Court. Resultantly, the petition in hand is **accepted** and the impugned orders dated 09.03.2015 and 14.05.2015 passed by learned Magistrate as well as by the learned ASJ, **are hereby set-aside and the petitioner is acquitted from the instant case.***

**(Ch. Abdul Aziz)
Judge**

Approved for reporting.

JUDGE

M. Rizwan