

HCJDA 38
JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.670 of 2023

Muhammad Aslam vs Regional Directorate ACE Lahore, etc.

JUDGMENT

Date of hearing:	<u>18.05.2023</u>
Petitioner by:	Mr. Muhammad Azeem Daniyal, Advocate for the petitioner.
State by:	Mr.Umar Arshad Butt, Assistant Advocate General Punjab for respondents No.1, 2, 3, 5, 6 and 8 alongwith Ghulam Mursaleen Deputy Director (Prosecution), Nazim Farooq Assistant Director (Investigation) ACE Lahore and record of the case.
Respondent by:	Mr.Abdur Razzaq Younas, Advocate for respondent No.4.

Farooq Haider, J:- This constitutional petition in terms of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 has been filed by Muhammad Aslam (petitioner) with the following prayer :-

“In view of the above circumstances, it is respectfully prayed that

- (i) *The impugned order dated 06.04.2022 passed by the respondent No.7 may very kindly be set aside being passed in violation of law having no legal effect;*
- (ii) *The cancellation reports dated 05.09.2020 and 13.12.2021 prepared by the respondent No.5 and 6 illegally, unlawfully and unilaterally may very kindly be set aside in the larger interest of justice.*
- (iii) *The respondents No.1 and 2 may be directed for re-investigation of the case after associating the petitioner and his witnesses in the case FIR No.24/2019 and 31.12.2019, offences under Section 161 PPC, 5(2) PCA, at police station ACE Kasur.*
- (iv) *Any other relief which this honourable court find necessary and proper in the circumstances and as to the subject matter of this writ petition, may also be granted.*
- (v) *Costs may also please be granted.”*

2. Brief however necessary facts for deciding instant petition are that Muhammad Aslam (present petitioner) filed application (copy whereof is available at Page No.10 as Annex-A of the petition) before Director Anti-Corruption Establishment Lahore Region Lahore for registration of the case against Muhammad Bashir, Patwari (now arrayed as respondent No.4 in the instant petition); inquiry was conducted and it was concluded in the same that allegations levelled against Muhammad Bashir (Patwari) have been found correct and registration of case against him was recommended (copy of report is available at Page No.11 to 13 as Annex-B of the petition); thereafter case was registered vide F.I.R. No.24/2019 dated: 31.12.2019 under Section: 5 2(47) of the Prevention of Corruption Act read with Section: 161 PPC at Police Station: Anti-Corruption, District: Kasur (copy whereof is available at Page No.16 as Annex-D of the petition); cancellation report was prepared in said case on 05.09.2020 by Circle Officer, Anti-Corruption Establishment, Kasur while mentioning therein that complainant is neither himself joining investigation nor producing his witnesses, therefore, case is recommended for droppage (copy of said report is available at Page No.17 as Annex-E of the petition) which was submitted before Senior Special Judge, Anti-Corruption Punjab, Lahore. However, same was not approved/agreed by Senior Special Judge, Anti-Corruption Punjab, Lahore vide order dated: 13.10.2020 and file was returned to Director Anti-Corruption Establishment, Lahore for re-investigation under Section: 5(6) of the Criminal Law Amendment Act, 1958 (copy of said order is available at Page No.18-19 as Annex-F of the petition); relevant portion of the order is reproduced:-

“4. Not a single document showing any serious effort made by CO ACE Kasur to summon complainant and his witnesses is available on record to substantiate the reasons for recommendation to drop the proceedings. Investigating Agency should not feel itself so powerless and helpless while summoning complainant and witnesses. It should bring all its resources into action to procure the attendance of witnesses and all such record, should be made part of the file. ACE has not probed into the matter in professional manner. Reasons mentioned to drop the proceedings are not convincing to a judicial mind, therefore, file is returned to Director Anti-Corruption Establishment Lahore Region Lahore for re-investigation u/s 5(6) of the Criminal Law Amendment Act, 1958.”

Then again cancellation report in the case was prepared on 13.12.2021 by Circle Officer Headquarter/Anti-Corruption Establishment Region-B, Lahore (copy whereof is available at Page No.20-21 as Annex-G of the petition) which was agreed by Special Judge, Anti-Corruption, Lahore vide impugned order dated: 06.04.2022 (copy whereof is available at Page No.22 as Annex-H of the petition); relevant portion of the order is hereby reproduced:-

“2. Record shows that ACE has recommended droppage of this case due to non-prosecution and non-producing evidence of the complainant against accused as the same was disagreed in the first round of investigation so in the circumstances when no one is coming to pursue his case and not producing evidence in the second round of investigation so there is no need to any interference. In view of above, I agree with the instant cancellation report prepared by CO, ACE Lahore Region-B, Lahore. File be consigned to the record room after its due completion.”

3. Learned counsel for the petitioner submits that impugned order has been passed against the law and facts of the case; further adds that any serious attempt was never made for joining the complainant as well as witnesses in the process of investigation; also adds that matter was never investigated on merits rather merely on the basis of non-joining of investigation by the complainant/witnesses, cancellation report was prepared and same has been agreed even without hearing the petitioner; finally prays for setting aside the impugned order.

4. Conversely, learned counsel appearing on behalf of respondent No.4 submits that inspite of issuing notices to the complainant about seven times during investigation, complainant neither himself appeared nor produced his witnesses in support of allegations levelled by him in the case; further adds that Special Judge Anti-Corruption, Lahore was having jurisdiction to pass the order, therefore, instant petition is not maintainable; finally prays for dismissal of this petition.

3. Learned Assistant Advocate General Punjab assisted by Deputy Director (Prosecution), Anti-Corruption Establishment, Lahore and after himself going through the available record submits that first cancellation report was prepared for the reason that complainant and witnesses did not join the investigation and even second time cancellation report was prepared for the same reason that they have not joined the investigation, however, at both the occasions the allegation levelled in the case was not investigated on merits and veracity/genuineness of the

allegation levelled in the case was not thrashed out; further submits that any warrants of arrest as well as proclamation for procuring the attendance of the complainant as well as witnesses were never issued in this case; also submits that even in anti-corruption cases, for the purpose of summoning the witnesses during investigation, separate rules have not been framed and procedure available in Punjab Police Rules and in Code of Criminal Procedure, 1898 is to be adopted.

4. After hearing learned counsel for the parties, learned Assistant Advocate General Punjab assisted by Deputy Director (Prosecution), Anti-Corruption Establishment, Lahore and going through the available record, it has been noticed that the petitioner moved application to the Director Anti-Corruption Establishment, Lahore for registration of the case upon which inquiry was conducted and it was concluded in the same that allegations levelled against Muhammad Bashir Patwari/respondent No.4 have been found correct and registration of case was recommended against Muhammad Bashir Patwari; thereafter case was registered vide F.I.R. No.24/2019 dated: 31.12.2019 under Section: 5 2(47) of the Prevention of Corruption Act read with Section: 161 PPC at Police Station: Anti-Corruption, District: Kasur. After registration of the case, investigation was to be conducted and though for the purpose of summoning witnesses and compelling the production of documents and the penalty for disobeying, or evading the same, in addition to or substitution of the provisions of the Code of Criminal Procedure, 1898, rules were to be framed to carry out the purpose of the Pakistan Criminal Law (Amendment) Act, 1958 and Section: 12 of the ibid Act is reproduced:-

“12. Power to make rules—(1) The appropriate Government may frame rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for any of the following matters, namely:-

(a) Authorization of person to exercise the power to sanction persecution on behalf of the appropriate Government in respect of various grades of public servants.

(b) The emoluments of the Special Judges, and their appointment;

(c) Territorial limits of the jurisdiction of Special Judges and the place and time of sitting of the Courts presided over by the Special Judges.

(d) The summoning of witnesses and compelling the production of documents and the penalty for disobeying, or evading the same, in addition to

or substitution of the provisions of the Code of Criminal Procedure, 1898.

(e) *Matters incidental to the above.”*

yet till now no separate rules on the subject i.e. as required under Section: 12(2)(d) of the ibid Act have not been framed and rule No.14 of the Punjab Anti-Corruption Establishment Rules, 2014 only speaks about application of the Punjab Police Rules, which reads as under:-

“14. Application of the Punjab Police Rules.- The Establishment shall, as far as may be, follow the provisions of the Punjab Police Rules for the time being in force for purposes of inquiry and investigation of offences specified in the Schedule.”

hence investigation in the case was to be carried out in the manner as provided in Punjab Police Rules as well as Code of Criminal Procedure, 1898 (hereinafter referred to as “Code”), therefore, it was necessary for the investigating officer to firstly issue notice under Section: 160 of Code for summoning complainant as well as witnesses for joining investigation and if same remained ineffective then to get issued warrants for their arrest in the shape of Form No.VII as provided in Schedule-V and under Section: 90 of the Code and for ready reference same is hereby scanned below:-

VII. WARRANT IN THE FIRST INSTANCE TO BRING UP A WITNESS

(See section 90)

To (name and designation of the Police-officer or other person or persons who is or are to execute the warrant).

WHEREAS complaint has been made before me that _____ of has (or is suspected to have) committed the offence of (mention the offence concisely) and it appears likely that (name and description of witness) can give evidence concerning the said complaint; and whereas I have good and sufficient reason to believe that he will not attend as a witness on the hearing of the said complaint unless compelled to do so;

This is to authorize and require you to arrest the said (name), and on _____ the day of _____ to bring him before this Court, to be examined touching the offence complained of.

Given under my hand and the seal of the Court, this _____ day of _____ 19_____.
(Seal) (Signature)

and if it was also going to be remained as unsuccessful then to get issued proclamation requiring attendance of the complainant as well as witnesses, as per Form No.V provided in Schedule-V under Section: 87 of the Code and same is hereby scanned below:-

V. PROCLAMATION REQUIRING THE ATTENDANCE OF A WITNESS

(See section 87)

Whereas complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of *mention the offence concisely* and a warrant has been issued to compel the attendance of (name, description and address of the WITNESS) before this Court to be examined touching the matter of the said complaint: and WHEREAS it has been returned to the said warrant that the said (name of WITNESS) cannot be served, and it has been shown to my satisfaction that he has absconded (or is concealing himself to avoid the service of the said warrant);

Proclamation is hereby made that the said (name) is required to appear at (Place) before the Court of on the day of next at o'clock to be examined touching the offence complained of.

Dated this day of 19 .

(seal) (Signature)

and if even said exercise was going to be failed then to get issued the order of attachment to compel the attendance of complainant and witnesses as provided under Section: 88 through Form No.VI provided in Schedule-V of the Code and same is hereby scanned below:-

VI. ORDER OF ATTACHMENT TO COMPEL THE ATTENDANCE OF A WITNESS

(See section 88)

To the Police-officer in charge of the Police-station at

Whereas a warrant has been duly issued to compel the attendance of (name, description and address) to testify concerning a complaint pending before this Court and it has been returned to the said warrant that it cannot be served; and whereas it has been shown to my satisfaction that he has absconded (or is concealing himself to avoid the service of the said warrant); and thereupon a Proclamation has been or is being duly issued and published requiring the said to appear and give evidence at the time and place mentioned therein.

This is to authorize and require you to attach by seizure the movable property belonging to the said to the value of rupees which you may find within the District of and to hold the said property under attachment pending the further order of this Court, and, to return this warrant with an endorsement certifying the manner of its execution.

Dated this day of 19 .

(Seal) (Signature)

Aforementioned are the mandatory provisions of law to be complied with for the purpose of procuring presence of complainant as well as witnesses and spirit behind this legislation was to adopt each and every mode for procuring presence of persons concerned for the purpose of investigation because thrashing out the veracity of allegations levelled in the crime report (first information report) through collecting relevant evidence during the process of investigation in order to conclude that allegation has been established or not is the basic purpose of fair investigation and in this regard rule No.10 of the Punjab Anti-Corruption Establishment Rules, 2014 can be referred, which is hereby reproduced:-

'Dropping of case or reference for departmental action.- (1)

The following procedure shall be followed for dropping a case or, as the case may be, recommending disciplinary action:

- (a) ***on completion of investigation, if the allegations are not established, the case shall be dropped and intimation to that effect shall be sent to the concerned administrative department and the public servant; and***
- (b) ***if after investigation, it is found that judicial action is not warranted but reasonable evidence***

is available to initiate disciplinary action against the public servant, the Establishment shall, after the confirmation of the cancellation report by the concerned court, refer the matter to the competent authority for initiation of such action in accordance with law for the time in force.

(2) *The authorities competent to pass an order for purposes of dropping a case or recommending disciplinary action in terms of sub-rule(1) shall be as under:-*

- (a) *Director, in case of public servants upto BPS-17;*
- (b) *Director-General, in case of public servants upto BPS-18;*
- (c) *Additional Chief Secretary, for public servants in BPS-19 except those mentioned in clause (e);*
- (d) *Chief Secretary, in case of public servants in BPS-20, except those mentioned in clause (e); and*
- (e) *Chief Minister, in case of District Coordination Officers, Commissioners of Divisions, Administrative Secretaries and other officers in BPS-21 and above.*

(3) *The Establishment shall forward the facts of the case, draft charge sheet, list of witnesses and documents, if any, to the competent authority for initiation of disciplinary proceedings.*

(4) *On receipt of a reference for disciplinary proceedings, the competent authority shall initiate such proceedings in accordance with the law for the time being in force.*

(5) *The competent authority shall promptly convey to the Establishment the final order passed in the disciplinary proceedings alongwith a copy of the inquiry report.*

(6) *Copies of final report of the cases dropped shall not be supplied to anyone without the prior permission in writing of the Director at the Region and the Director General at the Headquarters.” (emphasis added)*

By now it is well settled that fair investigation is mandatory for the fair trial which has been now guaranteed by Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973; in this regard, guidance has been sought from the case of **“Bank of Punjab and another versus Haris Steel Industries (Pvt.) Ltd. and others” (PLD 2010 SC 1109)** and relevant portion from Page No.1136 of the same is as under:-

*“30.Needless to say that it is evidence and evidence alone which could lead a court of law to a just and fair conclusion about the guilt or innocence of an accused person. **It is, therefore, only an honest investigation which could guarantee a fair trial** and conceiving a fair trial in the*

absence of an impartial and a just investigation would be a mere illusion and a mirage. It is, hence, only a fair investigation which could assure a fair trial and thus any act which ensures a clean investigation which is above board, is an act in aid of securing the said guaranteed right and not in derogation thereof.”

(emphasis added)

Case of “**Afzal Ahmad versus City Police Officer, Faisalabad and 3 others**” (**PLD 2022 Lahore 721**) can also be safely referred on the subject; relevant portion from the same is reproduced:-

“7. Fair investigation is concomitant to the right to fair trial guaranteed under Article 10A of the Constitution. In *Babubhai v. State of Gujrat and others [2010] 12 SCC 254]* the Supreme Court of India held that it is also a part of right to life and personal liberty and that “investigation must be fair, transparent and judicious as it is the minimum requirement of rule of law.””

The purpose of investigation is to dig out the truth and to bring it before the court of justice otherwise ultimately it causes harm to fair trial; in this regard, case of “**Saira Fatima Sadozai versus D.I.G. Investigation and others**” (**2023 PCr.LJ 427**) can be safely referred and relevant portion of the same is hereby reproduced:-

“Purpose of “investigation” is to dig out the truth regarding crime/occurrence and put up the same before the Court. Investigating Officer has to collect entire relevant facts of the occurrence irrespective of the fact that such facts favour prosecution or accused; he is under obligation to collect the evidence honestly, justly and fairly for bringing the truth on record not only to build up the case of complainant with evidence enabling the Court to record conviction but also for reaching to a just and fair decision. **If investigation is not conducted on merits then ultimately it causes frightful harm to the concept of fair trial guaranteed by Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973.”**

(emphasis added)

Rule 25.2(3) of the Police Rules, 1934 provides that it is the duty of investigating officer to dig out the truth and bring it before the court of justice, same is hereby reproduced for ready reference:-

“**25.2 Power of investigating officers:**

- (1).....
- (2).....

(3) *It is the duty of an investigating officer to find out the truth of the matter under investigation. His object shall be to discover the actual facts of the case and to arrest the real offender or offenders. He shall not commit himself prematurely to any view of the facts for or against any person."*

It is admitted fact and even not denied by any party that this case was never investigated on merits i.e. veracity of allegations levelled in the same were not thrashed out by digging out the truth and required evidence has not been collected under Section: 4(1)(l) of the Code inspite of the fact that first cancellation report was returned vide order dated: 13.10.2020 by the Senior Special Judge Anti-Corruption for re-investigation i.e. collecting evidence but at both occasions cancellation reports were prepared merely on the basis of non-joining of investigation by complainant and witnesses, however it was not mentioned in both cancellation reports that for procuring attendance of complainant and witnesses, warrants of their arrest, proclamation and order of attachment against them were got issued so said cancellation reports were prepared without fulfilling mandatory requirements for procuring attendance of complainant and witnesses; furthermore, as per rule No.10(1)(a) of the Punjab Anti-Corruption Establishment Rules, 2014, case can be dropped if on "completion" of investigation, allegations are not established but in this case, what to speak of completion of investigation, practically speaking, it could not be carried out to conclude that allegation was established or not because it is own case of investigating agency that complainant and witnesses did not join investigation, hence said reports were defective and it goes without saying that when law requires a thing to be done in a particular manner, it should have been done in that manner otherwise same would be deemed as illegal in the light of maxim "A communi observantia non est recedendum" and in this regard case of "Muhammad Zafar Iqbal versus Sadozai Khan and two others" (2021 YLR 1206) and case of "Maqsood Yameen versus R.P.O. Multan and others" (2015 PCr.LJ 923) can be referred. Needless to add that law does not favour knocking out any one on technical grounds rather decision on merits. Since, cancellation reports in the case were prepared without concluding that allegation levelled in the case has been established or not but merely on the ground that complainant and witnesses did not join investigation however not mentioning in the reports that process for compelling their attendance through warrants,

proclamation and attachment was got issued and also not annexing any proof in this regard, and impugned order dated: 06.04.2022 has been passed by Special Judge, Anti-Corruption, Lahore without taking into consideration above said important aspect, hence, impugned order is not sustainable and hereby set-aside; matter is remanded to Special Judge, Anti-Corruption Punjab, Lahore where second cancellation report prepared by Circle Officer, Anti-Corruption Establishment, Kasur will be deemed as pending and same would be re-decided through fresh and speaking order within a period of 30-days after receipt of attested copy of this judgment strictly in accordance with law. Parties will appear before said court on 25.05.2023. It goes without saying that it has been apprised by learned Assistant Advocate General assisted by Deputy Director (Prosecution), Anti-Corruption Department that rules for procedure regarding summoning of witnesses, documents and penalty for disobeying the same, in addition to or substitution of the provisions of the “Code” has not been framed, therefore, Registrar of this Court shall send copy of the judgment to Chief Secretary Punjab for bringing this state of affairs in the notice/knowledge of all concerned quarters.

**(Farooq Haider)
Judge**

APPROVED FOR REPORTING.

**(Farooq Haider)
Judge**

This judgment has been dictated, and pronounced on 18.05.2023, however signed after completion of its preparation on 22.05.2023.

Iftikhar