

JUDGMENT SHEET
IN THE LAHORE HIGH COURT,
LAHORE
JUDICIAL DEPARTMENT

Crl. Misc. No.40242-M of 2023

Parvez Elahi

Versus

Additional Sessions Judge and 3 others

JUDGMENT

Date(s) of hearing(s)	15.09.2023 and 18.09.2023
Petitioner by	M/s Asif Mehmood Cheema, Chaudhary Muhammad Farman Manais, Mukhtar Ahmad Ranjha, Safdar Hayat Bosal and Mohsan Rabbani, Advocates.
Respondents No.2 & 3 by	Mr. Abdul Samad Khan, Addl. Prosecutor General. Mr.Ghulam Sarwar Nehang, Addl. Advocate General, Mr. Farrukh Khan Lodhi, Malik Muhammad Tahir, Mr. Idrees Bhatti and Mr. Salman Asif Warraich, Assistant Advocates General with Jam Salah-ud-Din, Director (Legal), Anti-Corruption, Muhammad Riaz Chaudhary, Deputy Director Legal (Anti-Corruption Headquarter), Abdul Majeed Deputy Director Legal, Muhammad Asghar, Circle Officer, Sabtain Shah, I.O., Rizwan Deputy Director Investigation, Gujranwala and Khalid Mehmood Circle Officer, Lahore. Rana Sir Buland Khan, and Mir Haroon-ur-Rashid, Assistant Attorney General.

SULTAN TANVIR AHMAD, J:- Through this petition, filed under section 561-A of the Code of Criminal Procedure, 1898 (the '***Code***'), the petitioner has challenged order dated 12.06.2023 passed by learned Additional Sessions Judge, Lahore, whereby, the revision-petition filed by the State has been allowed and order dated 04.06.2023 passed by the learned Judicial Magistrate Section 30, Lahore

(the '*Magistrate*') refusing the physical remand of the petitioner in case FIR No.09/2023 dated 03.06.2023, registered under section 420, 468, 471, 161, 162/34 PPC read with section 5(2) of Prevention of Corruption Act, 1947, with Anti-Corruption Establishment District Headquarter, Punjab, Lahore, has been set aside.

2. Mr. Asif Mehmood Cheema, learned counsel for the petitioner has submitted that while passing order dated 04.06.2023 the learned *Magistrate* exercised powers under section 167 of the *Code* and while exercising these powers he has not acted as a Court subordinate to the Court of Sessions, therefore, the same could not have been revised under section 435 and 439-A of the *Code*. He has submitted that the order of the learned *Magistrate* was not a judicial order, thus, the same was not subject to the revisional jurisdiction of the Court of Sessions. Learned counsel for the petitioner has next submitted that without prejudice to the above argument, learned "*Special Judge*" appointed in terms of Section 3 of the Pakistan Criminal Law Amendment Act, 1958 (the '*Act of 1958*') was the only Court that had the powers of revision. He has relied upon section 6 (1) of the *Act of 1958* and contended that all provisions of the *Code* are applicable to the proceedings before the Court of "*Special Judge*". He read above said sub-section of the *Act of 1958* and stated that since the provisions of the *Code* (except Chapter XXXVIII) are applicable to the proceedings before the "*Special Judge*", therefore, the powers under section 435 and 439-A also vested with the "*Special Judge*", thus ordinary Court of Sessions had no jurisdiction and the order assailed before this Court is *coram non judice*. Mr. Asif Mehmood, learned counsel for the petitioner contended that even otherwise, the order of learned Additional Sessions

Judge is against the facts.

3. Mr. Abdul Samad, learned Additional Prosecutor General and Ch. Ghulam Sarwar Nehang, learned Additional Advocate General have submitted that order dated 04.06.2023 passed by the learned *Magistrate* refusing the physical remand was a judicial order and the same is correctly and validly revised under section 435 read with 439-A of the *Code*; that the Court of Sessions has rightly examined the record of the proceedings before the learned *Magistrate*, which is inferior criminal Court and after satisfying itself the order of the learned *Magistrate* has been set aside for which cogent reasons have been recorded, therefore, the same requires no interference by this Court.

4. Heard. Documents available on the file have been perused with the able assistance of learned counsel for the parties.

5. As far as the contention of learned counsel for the petitioner that the order of learned *Magistrate*, whereby, he refused to allow physical remand, being executive order, is not amenable to revisional jurisdiction is concerned. This aspect of the matter has already been considered by this Court in several cases, including cases titled “*Abdul Waheed Versus Additional Sessions Judge And Others*” (2017 MLD 1319), “*Zawar Hussain Versus The State And 3 Others*” (2009 P.Cr. L.J 705), “*Misbah-Ul-Hassan Versus The State And 3 Others*” (2005 P Cr. L J 1709) and “*Riaz Ul Haq And Another Versus Muhammad Naveed And Another*” (2005 YLR 805). This Court has already settled that an order passed by the learned *Magistrate* refusing remand is a judicial function and under section 435 of the *Code*, the Court superior to the one refusing remand can exercise jurisdiction of revision. In “*Abdul Waheed*” case (*supra*),

this Court has concluded this matter as follows:-

“Same view was expressed in other cases cited by learned counsel for respondents. However, in the case titled “Nasreen Bibi v. Nazir Ahmad and another” (2001 MLD 1459), cited by learned counsel for the petitioner, it was observed that revision against order passed by Magistrate was not maintainable as it was not a judicial order and it could be challenged in constitutional jurisdiction of this Court. The case law cited by learned counsel for respondents i.e. “Riaz ul Haq and another v. Muhammad Naveed and another”(2005 YLR 805), is more pertinent to the question involved in this case, being identical on the facts. Two questions came under consideration in the case cited by learned counsel for respondents; firstly, whether order passed by the learned Judicial Magistrate refusing remand was a judicial order and secondly complainant had locus standi to file revision petition against the order passed by learned Judicial Magistrate. Regarding first question, it was observed that not granting physical remand was a judicial function and that a complainant in a criminal case had locus standi to file the revision petition being an aggrieved person”.

(Underlining is added)

In “Riaz Ul Haq and another” case (*supra*), after detailed analysis of the earlier case law and the relevant provisions, this Court observed as follows:-

The order for not granting the physical remand passed by learned Magistrate 1st Class in a case registered under section 392, P.P.C. is a judicial function. The reliance in this respect can be safely placed on 1984 PCr. LJ 2588 titled as Ghulam Sarwar and another v. The State and 1969 PCr. LJ 873 (Lahore) titled as Muhammad Rafi v. The State and 2 others and subsections (3) and (4) of section 167, Cr.P.C., which are reproduced below:--

“167. Procedure when investigation cannot be completed in twenty four hours.---

- (1)*
- (2)*
- (3) A Magistrate authorizing under this*

section detention in the custody of the police shall record his reasons for so doing.

(4) The Magistrate giving such order shall forward a copy of his order with his reasons for making it, to the Sessions Judge.”

6. This aspect was also examined in Writ Petition No. 3780 of 2010 titled “Muhammad Aslam, etc. Vs. The State, etc.” in which this Court has observed that the order for refusal of remand is outcome of judicial function and when the Court of Sessions comes to the conclusion that any illegality or irregularity is committed, revisional jurisdiction u/s 435 read with Section 439-A of the Code can be exercised. It will be beneficial to reproduce the following extract of the said judgment:-

*“It will be a judicial order and it is sent to the Court of Sessions only for the purpose in the light of Section 435 read with Section 439-A Cr.PC which comes to his knowledge and if he comes to the conclusion that any illegality or irregularity has been committed, he can exercise his revisional jurisdiction under Section 435 Cr.PC read with Section 439-A Cr.PC; hence, by bare reading of Section 435 to 439-A read with Section 167 Cr.PC it becomes clear that the order passed under Section 167 Cr.PC is a judicial order and revisable by Sessions Judge/ Additional Sessions. Reliance is placed upon **2005 YLR 805**.*

19. For what has been discussed above, it is crystal clear that the order passed by the learned Magistrate under Section 167 Cr.PC is a judicial order and passed in judicial proceedings; hence, learned Additional Sessions, Haslipur in the case in hand has rightly entertained the revision petition and passed the impugned order.”

7. The main question raised before this Court, also a reason of admission of this petition, is that only “*Special Judge*” appointed in terms of section 3 of the Act of 1958 has power to pass an order in revision. Mr. Asif Mehmood,

learned counsel for the petitioner, has relied on section 6(1) of the *Act of 1958* that reads as follows:-

6. *Procedure in trial of cases and powers of Special Judges-*

(1) *The provisions of the Code of Criminal Procedure, 1898, except those of chapter XXXVIII of that Code, shall, in so far as they are not inconsistent with this Act, **apply to the proceedings of the Court of a Special Judge and for the purposes of the said provisions, the Court of a Special Judge shall be deemed to be a Court of Session trying cases without the aid of assessors or jury, and a person conducting prosecution before the Court of a Special Judge shall be deemed to be a public prosecutor.***

(2) xxxxxx

(3) xxxxxx

(4) xxxxxx

(5) xxxxxx

(Emphasis supplied)

8. The above sub-section provides that in course of trial the provisions of the *Code* shall apply to the “proceedings” in the Court of “*Special Judge*”. The question remained before me if the word ‘proceedings’ in the above section is used in wider sense to cover the cases of remand and its revision or if it is used in narrower sense just to cover the cases when the matter is brought before the “*Special Judge*” in the shape of complaint or through report by the police or concerned agency. Word “proceedings” is not defined in the *Act of 1958*, however, *Code* has defined the word “judicial proceeding”. The section 4 (m) of the *Code* reads as follows:-

4(m) “*Judicial proceeding*”. “*Judicial proceeding*” includes any proceeding in the course of which evidence is or may be legally taken on oath.”

9. As per above definition “judicial proceeding” includes any proceeding in the course of which evidence is or may be legally taken on oath. Section 4 of the *Act of 1958* further provides that a “*Special Judge*” shall have jurisdiction, in the given territorial limits, *upon receiving a complaint of facts which constitutes such offence or upon a report in writing of such facts made by any police officer.* The word ‘proceedings’ sometime is given wider meanings to cover the remaining steps towards progress of a case but when section 6 of the *Act of 1958* is read with the heading of the section, in its context and in the light of surrounding provisions, it appears that legislature intended to give restricted meaning to the word “proceedings”.

10. In case titled “**Satyahari Choudhury v. The State**” (A.I.R. 1953 CAL. 661) a Division Bench of Calcutta High Court, facing similar circumstances, reached to the following conclusion:-

“(5) Under S. 167, Criminal P. C. if investigation cannot be completed within 24 hours the police must produce the accused before a Magistrate and the Magistrate even if he has no jurisdiction to try the case may order further detention from time to time not exceeding 15 days on the whole or he may grant bail if he so thinks fit. Under the provisions of the Constitution, production before a Magistrate within 24 hours is now compulsory, but a case would not be allotted to a Special Court until the charge- sheet is ready, and proceedings before a Special Court would commence ordinarily with the submission of charge-sheet or a complaint by a police officer after completion of the investigation. Before that stage is reached the accused must be produced before an ordinary Magistrate and it cannot be argued that since the accused is produced before the ordinary Magistrate and the question of

bail is considered there is a proceeding before the Court and therefore S. 12 of Act 21 of 1949 bars the jurisdiction of the Special Court. We must agree, therefore, with the learned Special Judge in holding that the words ‘proceedings pending before a Court’ in S. 12 of Act 21 of 1949 would mean judicial proceedings which started with the submission of a charge-sheet or a complaint or taking cognizance thereon. In this case there were no proceedings pending on 9-4-1952, when the Ordinance came into force and therefore, S. 12 of the Act does not bar the jurisdiction of the Special Court.”

(Underlining is added)

I am of the firm opinion that the learned Court of Sessions can decide a revision petition arising out of the order of refusal of physical remand.

11. The learned *Magistrate* in some apparent haste has refused the physical remand on the very first day when the petitioner was produced before him, therefore, the learned Sessions Court intervened after examination of record of the proceeding of its inferior Court and after satisfying itself the learned Sessions Court has exercised its jurisdiction under section 435 read with 439-A of the *Code*. The case has been dealt in detail by the learned Sessions Court by giving cogent reasons. No ground convincing to exercise inherent powers of section 561-A of the *Code*, to give effect to any order under the *Code* or to prevent abuse of any Court, is made out. This petition, therefore, fails. No order as to costs.

(SULTAN TANVIR AHMAD)
JUDGE

Approved for reporting

JUDGE