Form No: HCJD/C-121.

JUDGEMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

Writ Petition No. 2932 of 2018

Ishtiaq ur Rehman.

Versus

Special Judge Anti Terrorism Court-I, Islamabad and 02 others.

Petitioner's by	:	**Raja Rizwan Abbasi, Advocate and Sohail Akhtar, Advocate.**
Respondent's by	:	**Mr. Qausain Faisal Mufti, Advocate.** **Mr. Sadaqat Ali Jahangir, State Counsel.** **Muhammad Zameer, Inspector.**
Date of hearing	:	**18.10.2018**

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AAMER FAROOQ, J. - The instant petition calls in question order dated 17.07.2018, whereby, application under Section 23 of Anti Terrorism Act, 1997, filed by the Petitioner, was dismissed.

2. The facts, in brief, are that an F.I.R. was registered against the Petitioner on complaint of one Abdul Hameed (F.I.R. No.198, dated 01.05.2018, PS Koral, Islamabad). Pursuant to the referred F.I.R., the Petitioner alongwith others were imputed for offences under Section 385, 440, 448, 511, 148, 149, 506(ii) P.P.C. read with Section 7 of Anti Terrorism Act, 1997. The Petitioner filed an application for bail before arrest before the Anti Terrorism Court. During the pendency of the referred petition, an

application under Section 23 of the Anti Terrorism Act, 1997 ***(The Act)*** was also filed by the Petitioner, which was dismissed vide the impugned order.

3. Learned counsel for the Petitioner, *inter-alia*, contended that since the bail application of the Petitioner was pending before respondent No.1, hence, application under Section 23 of the Act was maintainable and ought to have been decided in accordance with law. It was further contended that pendency of the bail application means that Court had taken cognizance inasmuch as it had applied its mind to the facts and circumstances of the case, therefore, Section 23 ibid was applicable. It was further submitted that bare reading of the F.I.R. shows that Section 7 of the Act is not attracted in the facts and circumstances of the case.

4. Learned counsel for the Respondents including the State Counsel, *inter-alia*, contended that the application was not maintainable inasmuch as the Court had not taken cognizance as report under Section 173 Cr.P.C. has not yet been filed.

5. Arguments advanced by the learned counsels for the parties have been heard and the documents have been examined with their able assistance.

6. The Petitioner made an application under Section 23 of the Act. For the sake of brevity, the referred provision of law is reproduced below:-

> ***"23. Power to transfer cases to regular courts.-- Where, after taking cognizance of an offence, [an Anti-Terrorism Court] is of opinion that the offence is not a scheduled offence, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for trial of such offence to any Court having jurisdiction under the Code, and the Court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence."***

7. The bare reading of the above Section shows that if after taking cognizance of an offence an Anti-Terrorism Court is of the opinion that the offence is not a scheduled offence then it can order transfer of the case for trial of such offence to any Court having jurisdiction under the Code of Criminal Procedure. In the instant case, admittedly the F.I.R. contains an allegation under Section 7 of the Act and report under Section 173 Cr. P.C. has not yet been filed. However, only the bail before arrest application, filed by the Petitioner, is pending before respondent No.1.

8. The key question for examination before the Court is whether respondent No.1 has exercised jurisdiction in accordance with law or has committed any error of law; whether in the facts and circumstances of the case respondent No.1 has taken cognizance of the offence. The word cognizance as such is not defined in the Code of Criminal Procedure and/or even the Act. In the common parlance, the word cognizance means an

application of mind to any matter. However, this general definition of cognizance cannot be said to be applicable in the instant case as while interpreting the word cognizance the entire section is to be taken into account and holistic interpretation to the Section is to be awarded. Under Section 190 of the Code of Criminal Procedure, a Magistrate takes cognizance of an offence:-

a) upon receiving a complaint of facts, which constitute such offence,

b) upon a report in writing of such facts made by any police officer.

c) upon information received from any person other than a police officer or upon his own knowledge or suspicion.

Likewise, under Section 193 ibid, no Court of sessions shall take cognizance of any offence, unless otherwise provided in any law or the Code, unless the case has been sent to it under Section 190 (2). The reading of the entire Section 23 ibid shows that where cognizance is taken and the Court is of the opinion that it has no jurisdiction in the matter, it can order transfer of the case for trial to Court of competent jurisdiction. The Court can only transfer the case for trial after taking cognizance and not for any other purpose. In somewhat similar facts and circumstances, the Hon'ble Supreme Court of Pakistan while interpreting Section 195-C of Code of Criminal Procedure dilated upon the issue of taking of cognizance. In case reported as *"Muhammad Nazir Vs.*

Fazal Karim and others" ***(PLD 2012 SC 892)***, the august Apex Court observed as follows:-

> ***It appears that the provisions of section 195(1)(c), Cr.P.C. had not been correctly appreciated by the learned Judge-in-Chamber and for facility of reference the relevant provisions are reproduced here:***
>
> > ***"195. Prosecution for -------certain offences relating to documents given in evidence--***
> >
> > ***(1) No Court shall take cognizance:***
> >
> > ***(a) ------***
> >
> > ***(b) ------***
> >
> > ***(c) of any offence described in section 463 or punishable under section 471, section 475 or section 476 of the same Code, when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or some other Court to which such Court is subordinate."***
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> ***We may observe with respect that the learned Judge-in-Chamber of the Lahore High Court, Lahore seems to have confused the expression "cognizance" appearing in section 195, Cr.P.C. with the expressions "cognizable" and "non-cognizable" finding mention in sections 154 to 157, Cr.P.C. and had also failed to appreciate that taking of cognizance of an offence by a court is a thing quite distinct from investigation of a reported offence by the police or any other***

investigation agency. The learned Judge-in-Chamber ought to have appreciated that the provisions of section 195(1)(c), Cr.P.C. deal only with taking of cognizance of an offence by a court and the same do not place any embargo upon reporting such an alleged forgery to the police, registration of an F.I.R. in that regard or conducting of an investigation in respect of such an allegation. There may be situations where a court before whom an allegation has been levelled regarding production or giving in evidence of a forged or tampered document may in the first instance like to get the matter of alleged forgery inquired into or investigated by a trained investigating agency or it may require the party levelling the allegation to report the matter to the investigating agency for an inquiry or investigation before making up its mind whether to lodge any complaint in writing under section 195(1)(c), Cr.P.C. before the trial court or not. In the case of Industrial Development Bank of Pakistan and others v. Mian Asim Fareed and others (2006 SCMR 483) it had expressly been held by this Court as follows:

> ***"Needless to add that the registration of an F.I.R. and taking of cognizance of cases were two distinct and independent concepts under the criminal law; that if the intention of the law-maker was to put any clog on the registration of an F.I.R. then the Legislature would have said so specifically and that if the law put a condition only on the taking of cognizance then it can never be read to imply prohibition on registration of F.I.Rs."***

The said exposition of law was subsequently followed by the Lahore High Court, Lahore in the case of Muhammad Bashir alias Bakola and 8 others v. Superintendent of Police, City Division, Lahore and 9 others (2007 PCr.LJ 864). It may not be out of place to mention here that in the context of the provisions of section 197, Cr.P.C., which also contemplate a prohibition against taking of cognizance of an offence by a court in the absence of a sanction for prosecution, this Court had observed in the case of Federation of Pakistan through Secretary, Ministry of Law, Justice and Parliamentary Affairs, Islamabad v. Zafar Awan, Advocate, High Court (PLD 1992 SC 72) as under:

> ***"10. There are other cases referred to like R.C. Pollard v. Satya Gopal Mazumdar (AIR 1943 Calcutta 594), Matiar Rahman Dewan v. The State (PLD 1958 SC 21), Syed Ahmad v. The State (PLD 1958 SC 27) and Iqbal Hussain Siddiqui and 2 others v. The State (1970 SCMR 726) followed by Syed Mushtaq Hussain Shah Bokhari v. The State and another (PLD 1981 SC 573), all indicating that proceedings can start in a Criminal Court against the functionary unhampered till the stage when it is found that there is nexus between the act complained of and the official position enjoyed by him in which case and at that stage the sanction of the competent authority is to be sought for and obtained before proceeding further."***

> ***An analogy from the last mentioned precedent case could be drawn to conclude that if the provisions of section 195(1)(c), Cr.P.C. place a prohibition against taking of cognizance of an offence by a court except in the given manner then all prior steps taken before the stage of taking of cognizance by a court could be deemed to be permissible."***

9. In view of the above pronouncement it can be safely concluded that respondent No.1 has not yet taken cognizance of the case and the stage for determination regarding transfer of the case for trial has not yet arisen, hence, the application under Section 23 ibid filed by the Petitioner was premature. Respondent No.1 has rightly observed that investigation in the matter is underway and any finding/ observation at this stage regarding applicability of provisions of the Act shall amount to interfering in the investigation. Moreover, the Hon'ble Peshawar High Court in two cases, reported as *"Khan Javed Khan Vs State"* ***(2017 YLR 461)***, *"Abdur Rehman Vs. Ghazan and 5 others"* ***(2005 MLD 954)*** involving similar facts has held that even at bail stage Section 23 of the Act is applicable as cognizance means application of mind. For the reasons stated above, we are unable to concord with referred view of the Hon'ble Peshawar High Court.

10. The impugned order does not suffer from any error of law, hence, no interference is required. It is pertinent to observe that though learned counsel for the Petitioner made submission regarding the merits of the case to elucidate that

Section 7 of the Act is not attracted, however, at this juncture since we are dismissing the petition on the ground that the Court has not yet taken cognizance, hence, no observation is being made regarding merits of the case.

11. For the above mentioned reasons, the instant petition is without merit and is accordingly dismissed.

(AAMER FAROOQ)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in Open Court on *03/12/2018.*

JUDGE

JUDGE

M. Zaheer Janjua

Approved For Reporting