

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

WRIT PETITION NO. 440 OF 2022

MUHAMMAD TANVEER AHMAD.

Vs.

**EX-OFFICIO JUSTICE OF PEACE/ADDITIONAL SESSIONS
JUDGE-III, ISLAMABAD-EAST AND OTHERS.**

Petitioner by : Malik Irfan Asif, Advocate.

**Respondents by : Hazrat Younas, State Counsel.
Mr. Tanveer Hussain, A.S.I.**

Date of hearing : 30.03.2022.

SAMAN RAFAT IMTIAZ, J. The Petitioner has invoked the Constitutional Jurisdiction of this Court by filing the instant writ petition seeking setting aside of the order dated 14.01.2022 (“**Impugned Order**”) passed by the Ex-Officio Justice of Peace/Additional Sessions Judge-III, Islamabad-East, whereby his petition under Section 22-A Cr.P.C. has been dismissed. The Petitioner further seeks direction for Respondent No.4 (Station House Officer, Police Station Sihala, Islamabad) to register FIR against Proposed Accused.

2. Brief facts of the case as per the Memo of Petition are that the Petitioner filed a petition under sections 22-A/B Cr.P.C. before Respondent No.1 for issuance of direction to Respondents No. 2 to 4 to register FIR against the Proposed Accused alleging therein that his wife in connivance with her father and brother committed theft of the precious household items, car, cash, gold ornaments and 9MM pistol of the Petitioner . Respondent No.1 dismissed the Petition vide Impugned Order dated 14.01.2021 with the observation that Proposed Accused is the wife of the Petitioner and a civil case of maintenance is pending between the parties before the learned Judge Family Court and from the contents of application and report submitted by police, no cognizable offence is made out. Feeling aggrieved, Petitioner filed instant petition.

3. Learned counsel for the Petitioner, inter alia, contended that the Impugned Order is against law and facts hence not sustainable and liable to be set aside; that from bare perusal of the application submitted by the Petitioner for registration of FIR cognizable offence is made out from its contents, and Respondent No.4 is under obligation to register FIR as envisaged in section 154 Cr.P.C.; that the Respondents have failed to follow the guidelines given in famous cases PLD 2016 SC 581 & PLD 2007 SC 539; that Respondent No.1 ignored the fact that Proposed Accused persons illegally, unlawfully stole the precious household items of the Petitioner; that Respondent No.1 also ignored that evidence is available to the Petitioner in shape of voice messages of the accused persons who threatened the Petitioner of dire consequences and also demanded illegal money/bhata from the Petitioner; that there is no bar on concurrent running of civil and criminal proceedings; that Respondent No.1 has ignored that Petitioner has divorced the Proposed Accused when he came to know that said Proposed Accused in connivance with her father and brother has stolen from the Petitioner and prior to marriage with Petitioner, they looted many other innocent people as they are professional thieves; that the Respondent No.1 has failed to exercise jurisdiction vested in it; that the Impugned Order is patently illegal, factually incorrect and suffers from legal perversity resulting in miscarriage of justice; that the Impugned Order is violation of fundamental rights guaranteed by the Constitution of Islamic Republic of Pakistan, 1973; that refusal to register FIR amounts to depriving the Petitioner for a right to approach to the court for redress of his grievance; that the Petitioner has no other efficacious, speedy and less expensive remedy available to him except to invoke the Constitutional jurisdiction of this Court. Learned counsel prayed for acceptance of the instant writ petition, set aside Impugned Order dated 14.01.2022 passed by Respondent No.1 and issue a direction to Respondent No.4 to register FIR on the application of the Petitioner.

4. On the other hand, learned State counsel vehemently opposed the arguments raised by the learned counsel for the Petitioner and supported the Impugned Order and prayed for dismissal of instant writ petition.

5. I have heard the learned counsel for the Petitioner as well as learned State Counsel and have also perused the available record including the Impugned Order.

6. Perusal of the complaints filed with the Respondents No. 2 & 4 as well as the Memo of Petition clearly shows that admittedly the Flat in Zaraj Society, Islamabad was purchased by the Petitioner after marriage in the name of the Proposed Accused where the Petitioner and the Proposed Accused both shifted and started living together. In addition, the Petitioner also bought for the Proposed Accused a Coure car. It was further alleged that the Petitioner fully furnished the said Flat and bought for the Proposed Accused household items including furniture, LED, AC, dishes, electric cooler, electronics, carpets, jewelry (approx. 2-3 tola), and expensive dresses which have allegedly been stolen by the Proposed Accused along with the said car, 2-3 lacs in cash, title documents of properties, and 9mm pistol.

7. The learned counsel for the Petitioner informed this Court during arguments and laid great stress on the fact that benami Suit has been filed by the Petitioner in respect of the said Flat. Be that as it may, what is not controverted is that on the date of the alleged occurrence said Flat was in the name of Proposed Accused herself not to mention that it still is, to date, as the Petitioner's suit for benami has not been finally adjudicated upon yet. Therefore, the question arises whether a person can commit theft in their own home.

8. In this regard, Section 378, P.P.C., is reproduced hereunder:

“378. Theft. *Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking is said to commit theft.*

Explanation 1. A thing so long as it is attached to the earth, not being movable property, is not the subject of theft but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2. A moving effected by the same act which effects the severance may be a theft.

Explanation 3. A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4. A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5. The consent mentioned in the definition may be expressed or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied."

9. The elements of Section 378, PPC were laid out in the case of *Abdul Aziz Sattar alias Abdul Aziz Abdul Sattar versus Khaja M. Ashraf and another*, PLD 1965 Dhaka 315 as follows:-

"(1) There must be an intention to take some movable property,

(2) The intended taking must be dishonest,

(3) It must be from the possession of another person without his consent, and

(4) There must be a moving of the property in order to such taking."
[Emphasis added].

10. The basic element of Section 378, PPC as enumerated in *Abdul Aziz Sattar (Supra)* which is relevant in the facts and circumstances of the instant case is that movable property must be taken out of the possession of a person without such person's consent. Whereas, in the instant case, the movable property alleged to have been taken by the Proposed Accused was admittedly in the house belonging to such Proposed Accused. As such, it was in her possession and cannot be described as having been taken from the possession of the Petitioner.

11. Another element of Section 378, PPC as enumerated in *Abdul Aziz Sattar (Supra)* which is relevant in the instant case is that the intended taking must be dishonest. The Court in *Abdul Aziz Sattar (Supra)* found that the petitioner therein had a bona fide claim of right on the property in question. In such circumstances, the Court held that removal of property on a bona fide claim of right does not constitute theft. In the instant case, admittedly, the household items and car were bought by the Petitioner for the Proposed Accused. In view of the foregoing, the Proposed Accused had a bona fide claim of right on the property, removal of which does not therefore constitute theft.

12. In view of the foregoing, the allegation that the Proposed Accused committed theft of the movable property to which she had a bona fide claim of right from the Flat admittedly belonging to her does not spell out any cognizable offence. The Respondent No. 1 has reached the correct conclusion vide the Impugned Order. Hence, present petition being devoid of any merit is hereby **dismissed.**

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in open Court on 07.04.2022.

JUDGE

Approved for Reporting
Blue Slip added.