

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Writ Petition No. 1541/2018

Hafiz Umer Bilal Sandhu
Versus
Judicial Magistrate and others

Petitioner By : Khawaja Shahid Rasool Siddiqui, Advocate.
Respondent No.2 By : Ch. Abdur Rehman Hur Bajwa, Advocate.
State By : Hafiz Mazhar Iqbal and Mr. Zohaib Hassan
Gondal, State Counsel along with Shafique,
Inspector.
Date of Hearing : 09.03.2019

Ghulam Azam Qambrani, J.:-Through the instant writ petition, the petitioner seeks setting aside of the impugned order dated 15.03.2018, passed by the learned Judicial Magistrate, 1st Class, (West), Islamabad, whereby the cancellation report submitted by the I.O, in case F.I.R No.240 dated 01.09.2017 offence under Section 420, 468 and 471 P.P.C registered with Police Station Ramna, Islamabad, was accepted/ agreed.

2. Brief facts of the case as narrated by the petitioner are that, respondent No.2 Muhammad Javaid Janjua and one Talha Asad Kahloon entered into a business agreement dated 09.05.2014 for the sale of imported vehicles, company Alamco, owned by respondent No.2, who had license for the said purpose. Further stated that on the basis of said agreement, the petitioner sent from Japan 13 cars of different classifications, which were mis-

appropriated by respondent No.2 and his business partner, on account of which a dispute arose between the parties whereupon respondent No.2 and Talha Asad executed an agreement for appointment of Arbitrator dated 12.04.2016, whereby the petitioner, respondent No.2 and Talha Asad issued cheques of Rs.30,00,000/- (thirty lacs) and it was agreed that the decision of the arbitrator shall be final between the parties. Respondent No.2 issued cheque No.A-18763585 dated 16.06.2016, amounting to Rs.30,00,000/- in favour of the petitioner and handed over the same to the Arbitrators namely Mufti Abdul Basit s/o Muhammad Muzafar and Mufti Muhammad Ismaeel Tooru S/o Dalil Khan. The Arbitrator decided the matter vide award dated 23.01.2017, and handed over the cheque No.A-18763585 to the petitioner, who presented the same before concerned bank branch but the same was dishonoured due to insufficient funds. The petitioner initiated criminal proceedings on the basis of dishonor of the said cheque against respondent No.2 and submitted an application before the S.S.P, Islamabad, for registration of criminal case against the respondent, which application was cancelled and the proceedings under Section 182 P.P.C were initiated against the petitioner by the S.H.O Police Station Shalimar, Islamabad.

3. The petitioner was called upon to face the *Kalandra* proceedings under Section 182 P.P.C before the learned Magistrate 1stClass/Assistant Commissioner, Shalimar, Islamabad. During the said proceedings, the petitioner submitted an application under

Section 249-A Cr.P.C which was allowed vide order dated 23.08.2017. According to petitioner, during said proceedings, respondent No.2 presented a photocopy of the said cheque No.A18763585, dated 16.06.2016 before the Assistant Commissioner-Shalimar, Islamabad, which was attested by one of the Arbitrator namely Mufti Muhammad Ismail Tooru in which respondent No.2 deleted the lines written by him that "*I am responsible for the claim established against me as per my share*" by tempering the cheque. During the said proceedings under Section 182 P.P.C, the petitioner filed an application on 17.08.2017, before the Assistant Commissioner-Islamabad, regarding commission of forgery by respondent No.2 for the purpose of cheating, whereby a direction was issued to S.H.O Ramna, Islamabad, for registration of a criminal case, consequently, F.I.R No.240 dated 01.09.2017 under Sections 420, 468 & 471 P.P.C was registered against respondent No.2.

4. The attesting authority i.e. Mufti Muhammad Ismail Tooru sworn an affidavit that said forged cheque was never attested by him; respondent No.2 was arrested in the said F.I.R but late at night the S.H.O released him without any lawful justification; that respondent No.2 moved application for grant of bail before arrest before the learned Additional Sessions Judge, Islamabad, which was withdrawn by him. Respondent No.2 moved an application before the S.S.P, Islamabad, against the petitioner for tempering the same cheque and after lengthy and thorough investigation, the ASP,

Sihala Circle, Islamabad, dismissed the said application vide order dated 20.02.2018. The petitioner filed an application under Section 22-A & 22-B before the learned Ex-Officio Justice of Peace which was dismissed vide order dated 05.07.2017 and the writ petition filed against the said order was also dismissed. The I.O of the F.I.R submitted cancellation report of the above said F.I.R before the learned Judicial Magistrate 1st class-West, Islamabad, which was agreed vide impugned order dated 15.03.2018, hence, this writ petition.

5. Learned counsel for the petitioner submitted that order dated 15.03.2018 is illegal and same is liable to be set aside; that opinion of the investigation officer is not binding upon the Court; that under Section 173 Cr.P.C, the Court may disagree with the police report and proceed to take cognizance as provided under Section 190 Cr.P.C; that the impugned order is not a judicial but an administrative order. Further submitted that the learned Judicial Magistrate has not applied his independent mind while passing the impugned order, therefore, the same is liable to be set-aside.

6. Conversely, learned counsel for respondent No.2 assisted by the learned State counsel, supported the impugned order passed by the learned Judicial Magistrate. Further submitted that respondent No.2 neither appeared before the learned Judicial Magistrate nor produced the said cheque No.A-18763585. Next contended that the "*Kalandra*" was submitted before the learned Executive Magistrate and not before the learned Judicial Magistrate; that the cheque

dated 16.06.2016 was a security cheque and it pertains to the account of Alamco Pvt Ltd. and the same was presented on 22.05.2017 and returned with the remarks "outdated" hence, it cannot be termed to be valid dishonor.

7. I have heard learned counsel for the parties and perused the record with their able assistance.

8. Perusal of record reveals that the cheque was never issued in favour of the petitioner rather he has incorporated his name through fraud and forgery. Writing on the back side of the said cheque clearly shows that the said cheque was only for the purpose of security and settlement of account and was not meant for encashment. Record further reveals that the petitioner submitted an application under Section 22-A& 22-B before the learned Additional Sessions Judge, East, Islamabad with regard to dishonor of the cheque but the same was dismissed vide order dated 05.07.2017. The execution of agreement dated 09.05.2014 and 12.04.2016 requires evidence to prove. The decision of the Arbitration was not made rule of the Court; therefore, the decision of the Arbitrator is not binding upon the parties. Record further shows that the agreement dated 09.05.2014 was revoked by the petitioner himself prior to the dispatch of vehicle on the license of Alamco Company. It transpires from the record that F.I.R No.240/2017 was registered against respondent No.2 with the allegations that during trial of kalandra under Section 182 P.P.C before the learned Executive Magistrate 1st Class Shalimar Islamabad, respondent No.2 produced

photocopy of the cheque issued to the petitioner, which was alleged to have been afforded by respondent No.2 and upon the complaint of the petitioner before the Assistant Commissioner, Shalimar, Islamabad, the matter was forwarded to the S.H.O concerned for investigation and the investigation officer, after thorough investigation, submitted the cancellation report stating therein that no offences are made out against respondent No.2 which was agreed by the learned Judicial Magistrate, holding that in the presence of original document, photocopy has no value and cannot be considered as forged document. As such, the learned Judicial Magistrate has rightly agreed with the cancellation report submitted by the investigation officer.

9. The impugned order further reveals that the learned Magistrate perused the record and gave reasons for his findings which are as under:-

"5. Perusal of the record shows that the instant case was registered against the accused namely Javed Janjua son of Muhammad Yaqoob Janjua, on 01.09.2017 under sections 420, 468 & 471 PPC, P.S. Ramna, Islamabad. The allegation as per prosecution story is that during trial of a Kalandra under Section 182 PPC before the Executive Magistrate 1st Class, Shalimar, Islamabad. The accused produced a photo copy of a cheque issued to the present complainant, which was alleged to have a forged by the accused. Upon which the complainant of the instant case filed an application before the Assistant Commissioner Shalimar, Islamabad, who forwarded the application for registration of the case, hence, the instant case was registered against the accused. The I.O. after investigation submitted the instant cancellation report.

6. *Perusal of record further reveals that as per allegation the accused has removed some of the writing from a photo copy of a cheque issued to the complainant and after removing the writing submitted the same during the trial before the Executive Magistrate 1st Class, Shalimar, Islamabad. From bare reading of the complaint of the complainant the alleged offences are not made out against the accused because in the presence of original document photocopy has no value and cannot be deemed a forged document, where the original is available with the complainant. With these observations, this court is of the view that the I.O. after investigation has rightly submitted cancellation report and no fruitful purpose shall be served to proceed with the trial. In light of these observations the instant cancellation report is hereby agreed. Let file be consigned to the record room after due completion while copy of this order be sent to concerned SHO for information.*

10. The bare reading of impugned order shows that it was passed after application of judicial mind. As far as jurisdiction of Magistrate under section 173, Cr.P.C. is concerned, the Hon'ble Supreme Court of Pakistan has held in a case reported as Habib v. The State (1983 SCMR 370) that:-

"The crux of the above noted provisions i.e. sections 169, 170 and 173 is that whatever course the Investigating Officer adopts i.e. whether he acts under section 169 or under 170, Cr.P.C. it is incumbent upon him to submit a final report under section 173, Cr.P.C. with regard to the result of his investigation to a competent Magistrate and the said Magistrate shall, thereupon, take such action as he may consider proper under subsection (3) of section 173, Cr.P.C. or under section 190, Cr.P.C, as the case may be."

11. The provisions of Section 173 Cr.P.C show that a Magistrate is fully empowered to pass an order, as passed in this case. Therefore, the impugned order is consistent with the above declaration of the law as interpreted by the Hon'ble Supreme Court of Pakistan, by agreeing with the recommendation of the Investigating Officer and thereby cancelling the F.I.R and the impugned order has been passed after recording reasons.

12. Criminal Procedure Code does not provide a clear provision under which F.I.R. may be cancelled by a Magistrate or any other authority. However, consistent view of the superior Courts of the country is that such power is inherent under section 173(3), Cr.P.C. For example, this question was examined by a Full Bench of the Hon'ble Lahore High Court in case of **Wazir Vs. State** (PLD 1962 Lahore 405), wherein it was held that power of cancellation of F.I.R. is available in section 173, Cr.P.C. because it is inherent in section 173 read with section 190, Cr.P.C. Subsequently, the Hon'ble Supreme Court of Pakistan approved the above finding of the Full Bench of the Hon'ble Lahore High Court in **Bahadur Vs. State** (PLD 1985 SC 62), and it was held as under:

"The Magistrate; by the impugned order, dealt with and disposed of a final report submitted to him under section 173, Cr.P.C., recommending the cancellation of the registered criminal case. Neither section 173, Cr.P.C., nor any other provisions of the Criminal Procedure Code specifically deals with the question of cancellation of a registered criminal case. In the Full Bench decision Wazir v. State PLD 1962 Lah. 405, such a power was found to be inherent in section 173 read with section 190 of the Code of Criminal Procedure though the language of subsection (3) does not specifically apply to the case."

13. In the above two judgments, Rule 24.7 of Police Rules, 1934 was not part of discussion. In Rule 24.7, expressly this power is conferred upon 'the Illqa Magistrate and a procedure is also provided which is as under:--

"Unless the investigation of a case is transferred to another police station or district, no first information report can be cancelled without the orders of a Magistrate of the 1st Class.

When information or other intelligence is recorded under section 154, Criminal Procedure Code, and, after investigation, is found to be maliciously false or false owing to mistake of law or fact or to be non-cognizable or matter for a civil suit the Superintendent shall send the first information report and any other papers on record in the case with the final report to a Magistrate having jurisdiction and being a Magistrate of the first class for orders of cancellation. On receipt of such an order the officer in charge of the police station shall cancel the first information report by drawing a red line across the page, noting the name of the Magistrate cancelling the case with number and date of order. He shall then return the original order to the Superintendent's office to be filed with the record of the case."

14. In a recent case reported as Zafar- ul-Haq v. Muhammad Amin and others (PLD 2005 Karachi 375), the Division Bench of Karachi High Court has dealt with a similar proposition. In the said case, the Court held that when a police officer reaches to a conclusion that F.I.R. deserves to be cancelled, he follows the procedure provided under Police Rules. The learned Division Bench of Karachi High Court, observed as under:

"However, position is quite different when after investigation; police submit a report to the Magistrate for cancellation of the case under "B" class. If the Magistrate approves such report then he will order for cancelling the F.P.R. After passing such order by the Magistrate, the police would cancel the F.I.R. by putting cross lines on the said F.I.R. available in the 154, Cr.P.C., book in red ink as per Rule 47.7, Volume-III of Police Rules, 1934. After crossing, the said F.I.R. in red ink then there will be no F.I.R. pending on the file of police."

15. In view of what has been discussed above, I am not inclined to set-aside the impugned order dated 15.03.2018, passed by the learned Judicial Magistrate 1st Class Islamabad. Therefore, this petition having no force, is **dismissed**."

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open Court, on 18th day of March, 2020.

JUDGE