

***JUDGMENT SHEET***  
**IN THE PESHAWAR HIGH COURT,**  
**D.I.KHAN BENCH**  
*(Judicial Department)*

**W.P. No.55-D/2017 with**  
**C.M. No.65-D/2017.**

**Muhammad Irfan**  
**Vs.**  
**D.P.O. etc.**

**JUDGMENT**

Date of hearing: **03.10.2017.**

Appellant-Petitioner by Mr Ghulam Muhammad Sappal Advocate.

Respondent by Mr. Kamran Hayat Khan Miankhel

AAG.

**SHAKEEL AHMAD, J.-** Through instant constitutional petition, the petitioner Shafi Ullah, seeks quashment of FIR No.21 dated 16.01.2017, registered under Sections 5/6 of Khyber Pakhtunkhwa (N.W.F.P.) Prevention of Gambling Ordinance, 1978 of police station City, District D.I.Khan.

2. Brief facts of the case are that on the basis of spy/prior information, the SHO of police station City, Abid Iqbal, raided the Baithak of one Haji Javed Baloch and found the petitioner and co-accused busy gambling inside the Baithak. He arrested them and also recovered gaming amount. On seeing the police party, accused Muhammad Irfan, Abda, Muhammad Rustam

and Muhammad Aslam fled away from the spot, while accused Shah Jehan, Saeed Ahmad and Mehrban were arrested.

3. It has been argued by the learned counsel for the petitioner that under Section 8 of Khyber Pakhtunkhwa (N.W.F.P.) Prevention of Gambling Ordinance, 1978, the SHO could not carry out search of any place and register the case about which he has reason to believe that it is being used as common gaming house and that the action taken by him was illegal, without lawful authority and without jurisdiction.

4. The learned AAG representing the State, admitted that the impugned action of the SHO is in conflict with Section 8 of Khyber Pakhtunkhwa (N.W.F.P.) Prevention of Gambling Ordinance, 1978.

5. We have given our anxious consideration to the arguments advanced by the learned counsel for the parties and perused the record/case law with their able assistance.

6. In order to appreciate the point raised by the learned counsel for the petitioner, it is expedient to reproduce Section 8 of Khyber Pakhtunkhwa

(N.W.F.P.) Prevention of Gambling Ordinance, 1978,

which reads as under:-

**“8. Power to enter and search.** If a District Magistrate, Sub-Divisional Magistrate, Magistrate of the First Class upon information and after such enquiry as he thinks necessary, has reason to believe that any place is used as a common gaming-house, or that an offence under section 6 is being committed at or in any place, he may;

(a) enter such place at any time with such assistance as he may require and using such force as may be necessary;

Provided that, if such place is in the actual occupancy of a woman who according to custom, does not appear in public, the officer so entering such place shall give notice to her that she is at liberty to withdraw and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing may enter the place;

(b) search such place for any instruments of gaming kept or concealed therein, and also the person of all those who are found in that place, except the women;

(c) seize and take possession of gaming moneys and securities for money and articles of gaming which are found therein or upon any person found therein; and

(d) take into custody all persons, except women, found in that place, whether or not then actually gaming.

7. Although, under the provision of Section 103, Cr.P.C, police officer is competent to make search of the premises in connection with the offence reported to him, but the Ordinance being a special law, provisions for search of any premises made out in

section 8 thereof are to be complied with in letter and spirit. The Ordinance being a special law will override the provisions of Code of Criminal Procedure which is a general law and the Ordinance provides particular authorities which only are competent to carry out a search in order to find out any place or premises is being used as a common gaming-house. The District Magistrate or the Sub-Divisional Magistrate or the Magistrate First Class may while making a search of a premises for the purposes of section 8 of the Ordinance, require police assistance in carrying out the job but a Police Officer is not competent to make out a search under Section 8 of the Ordinance. With the introduction of recent local self Govt. system and necessary amendments in various law, the offices of D.M. and S.D.M. are no more in existence, with the result that only the Magistrates of 1<sup>st</sup> Class can supervise the raid in such like circumstances, whereas in the instant case the raid was conducted by SHO in the absence of the Magistrate. The procedure adopted and raid conducted by the SHO police station City, D.I.Khan in the Baithak owned by Haji Javed Baloch, was entirely against the provisions of Section 8 of Khyber Pakhtunkhwa (N.W.F.P.) Prevention of

Gambling Ordinance, 1978 and was illegal, without lawful authority and without jurisdiction. Requirement of law is that search is to be conducted by a Magistrate of 1<sup>st</sup> Class, but it was conducted by the SHO, which is in conflict with the provisions contained in section 8 of the ibid Ordinance. Needless to mention that it is well established principle of law that when an action is required to be taken in a particular manner, that can only be taken in that way. Reliance can well be placed on the case **(Abdur Rauf and 8 others Vs. The State (1990 P.Cr.L.J-1694.**

8. For what has been discussed above, we accept this petition, declare the impugned action of the respondent No.3 as illegal and without jurisdiction and quash the FIR in question.

Announced.  
Dt: 03.10.2017.

**MUHAMMAD AYUB KHAN**  
**JUDGE**

**SHAKEEL AHMAD**  
**JUDGE**