ORDER SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Crl.Misc. No.82/Q/2017.

Zaheer Babar

Versus

The Judicial Magistrate, etc.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	13.03.2017	Mr. Sher Afzal Khan, Advocate for petitioner. Raja Shahzad Javed, Advocate for respondent No.3. Mr. Sarfraz Ali Khan, State Counsel. Mumtaz Baig, ASI, Investigation Wing, Islamabad.

Through the instant petition U/S 561-A Cr.P.C, petitioner has prayed for setting aside the order dated 23.01.2017, passed by learned Judicial Magistrate 1st Class (West) Islamabad, whereby cancellation report submitted by the I.O was disagreed and he was directed to submit report U/S 173, Cr.P.C and for quashment of FIR No.173, dated 11.09.2016, U/S 406/34, PPC, P.S Noon, Islamabad.

2. Brief facts of the case are that respondent No.3 lodged FIR No.173, dated 11.09.2016, U/S 406/34, PPC, P.S Shahzad Town, Islamabad against the petitioner with the following allegations:-

(I) یہ کہ سائل کو مسمی سفیر احمد ولد محمد دین ساکن مکان نمبر E-1131 مین بازار ٹیکسلا نے مبلغ -/1,05,00000 روپے بطور قرض مسمی ظہیر بابر ولد غلام حیدر ساکن ٹیکسلا سے دلوایا تھا جس کے عوض سائل سے مسمی سفیر احمد نے ظہیر بابر کو 09 عدد بینک چیکس بطور گارنٹی اور 24 کنال 2 مرلے زمین واقع موضع ڈورا تحصیل وضلع اسلام آباد بطور امانت دلوائے تھے۔

(۲) یہ کہ سائل نے بعد میں خسرہ نمبر 303 رقبہ تعدادی 2 کنال 1 مرلہ واقع رتہ امرال دیہاتی شالے ویلی روڈ راولپنڈی بالعوض مبلغ -/1,05,00000 روپے مسمی ظہیر بابر کو قرض کی واپسی کی مد میں دے دی (بیان حلفی بابت حوالگی امانت زمین وچیک ہائے لف ہمراہ ہیں) جو کہ بعد میں ظہیر بابر نے فروخت کر دی سائل نے مسمی ظہیر بابر سے 9 عدد بینک چیکس اور 24 کنال 2 مرلے زمین واپس کرنے کا مطالبہ کیا تو مسمی ظہیر بابر نے ٹال مٹول سے کام لینا

شروع کر دیااور کہا کہ کچھ دنوں بعد میں آیا تو چیک واپس کر دوں گااور زمین مذکورہ جو میرے اس آپ کی طرف سے بطور امانت ہے دوبارہ آپ کے نام ٹرانسفر کروادونگا۔

(۳) یہ کہ سائل کو پتہ چلا ہے کہ مسمی ظہیر بابر اور مسمی سفیر احمد نے مل کر دھوکہ دہی جعل سازی فراڈ اور خیانت مجرمانہ کاارتکاب کرتے ہوئے سائل کو حسب وعدہ زمین اور چیکس واپس نہ کئے جبکہ زمین مذکورہ کسی دوسرے شخص کو فروخت کر دی ہے۔

(۴) یہ کہ سائل نے ایک درخواست بنام جناب سی پی او صاحب راولپنڈی گزار کی تھی جس پر DSP راولپنڈی نے انکوائری کی اور سائل کو حکم دیا کہ چونکہ رقبہ مذکورہ جو مسمی ظہیر بابر نے فراڈ کرتے ہوئے فروخت کیا وہ اسلام آباد کی حدود میں آتا ہے لہذا سائل اسلام آباد میں درخواست دائر کرے (نقل درخواست اور انکوائری رپورٹ لف درخواست ہذا ہے) اندریں حالات جناب سے استدعا ہے کہ مذکورہ ظہیر بابر اور سفیر احمد کے خلاف دھوکہ دہی جعل سازی فراڈ اور خیانت مجرمانہ کے ارتکاب کا مقدمہ درج کئے جانے کے احکامات جاری فرمائیں اور سائل کو زمین اور چیک واپس دلوائے جائیں۔

3. Learned counsel for the petitioner has contended that the police after registration of the case submitted cancellation report, which was not accepted by the Trial Court vide impugned order dated 23.01.2017; that the dispute between the petitioner and respondent No.3 is of civil nature; that the petitioner paid the entire sale consideration of Rs.1,05,00,000/- to respondent No.3 against the purchase of land measuring 25 Kanal 2 Marla situated in Mouza Dora, Tehsil & District Islamabad through mutations No.754 & 755 dated 18.10.2008 and the said land was further transferred/alienated to other parties through subsequent mutations; that respondent No.3/complainant filed a civil suit before the competent Court prior to registration of the instant FIR but this fact has not been disclosed by respondent No.3 while lodging the FIR; that from simple reading of the FIR, offence of criminal breach of trust has not been made out.

4. Conversely, learned counsel for respondent No.3 and learned State Counsel have contended that petitioner has received an amount of Rs. 1,05,00,000/-; that mutations No.754 & 755 were duly executed on 18.10.2008 in the presence of

witnesses in Mouza Dora Tehsil & District Islamabad and affidavit confirms the stance of complainant; that civil suit titled Yasir Hussain vs Zaheer Baber, etc. is pending adjudication before competent Civil Court regarding the same subject matter.

5. Arguments heard, record perused.

6. From perusal of the record, it has been observed that FIR No.173, dated 11.09.2016, U/S 406/34, PPC, P.S Noon, Islamabad was registered against the petitioner on the complaint of respondent No.3, whereby respondent No.3 alleged that Safeer Ahmed managed Rs.1,05,00,000/- as loan from petitioner/Zaheer Baber to the respondent No. 3 against which nine post dated cheques were issued as guarantee and land measuring 24 Kanal 2 Marla situated in Mouza Dora, Tehsil & District Islamabad was also handed over /transferred as guarantee/Amanat. Respondent No.3 further alleged that he transferred land measuring 2 Kanal 1 Marala from Khasra No.303, situated in Ratta Amral Dihati Shale Valley Road Rawalpindi to petitioner against return of land but the said land was sold out by the petitioner. Respondent No.3 through instant FIR has claimed that petitioner has to return his land measuring 25 Kanal 2 Marla as well as nine post dated cheques.

7. It has further been observed from the record that a copy of affidavit was produced by respondent No.3/complainant, which is available on the police file but the said affidavit was executed by Safeer Ahmed witness of the case and it was not executed by the petitioner. During the course of investigation, no other document was produced by respondent No.3 before the I.O to justify his version. Respondent No.3 and his learned counsel when confronted as to whether any document ever executed by the petitioner, in which he admitted his liability of Rs.1,05,00,000/- for nine negotiable instruments i.e. the cheques

and even for that matter any document through which the term ***"Amanat"*** can be justified but they failed to substantiate their plea before this Court. It is settled proposition of law that when a party alleges particular facts, they are under obligation to prove the same. Therefore, respondent No.3/complainant is under obligation to prove the fact that he delivered the land measuring 24 Kanal 2 Marla situated in Mouza Dora, Tehsil & District Islamabad as "Amanat" in the year 2008 to the petitioner and has not transferred the same against any consideration.

8. In order to verify the said contention of respondent No.3, I have gone through the mutations No.754 & 755 Mouza Dora, Tehsil & District Islamabad dated 18.10.2008, whereby the land was transferred in the name of petitioner and even the said mutations had never been assailed by respondent No.3, who has raised objection regarding the said mutations for the first time on 25.08.2016, hence, it can safely be concluded that the FIR was lodged against the petitioner after the delay of nine years and no explanation has been offered by respondent No.3. Mutations No.754 & 755 clearly show that land in question was transferred through mutual consent through the sale mutations against valuable consideration. Even the said land was alienated to another party ZM International vide mutation No.953 dated 26.05.2014. Respondent No.3/complainant filed a civil suit through his son namely Yasir Hussain for declaration, cancellation of mutations No.754 & 755, Permanent and mandatory injunction titled as *"Yasir Hussain vs Zaheer Baber, etc"*, which is pending adjudication before the Civil Court. Civil suit was filed on 25.08.2016, whereas the FIR was lodged on 11.09.2016 after the delay of nine years.

9. The above referred background of the case clearly reflects that the matter in dispute is of civil nature. Respondent No.3 in

order to exert pressure lodged the criminal case against the petitioner without disclosing pendency of the civil suit, hence, the instant FIR is based on malafide, which is apparent from the record. During the course of investigation respondent No.3 himself submitted an affidavit dated 28.02.2017, in which he has declared Safeer Ahmed as his witness in the FIR whereas prior to the submission of said affidavit, the status of Safeer Ahmed was of an accused but respondent No.3 in order to accommodate Safeer Ahmed and to prosecute the petitioner converted the status of Safeer Ahmad.

10. The I.O after completion of the investigation submitted cancellation report before the Ilaqa Magistrate, which was not agreed by the said Court vide order dated 23.01.2017. The said order is also subject matter of the instant petition, wherein learned Ilaqa Magistrate has not discussed the details of documents available on record rather decided the matter in hasty manner.

11. I have gone through the contents of the plaint of the civil suit filed by son of respondent No.3, in which same relief was sought, which creates serious doubt about the instant FIR. The relief claimed by son of respondent No.3 in civil suit is as under:-

> *a. A decree for declaration to the effect that plaintiff is lawful owner in possession of the suit land measuring 24 Kanals 11 Marlas, falling in Khewat No.137, 174, Khatooni No.369, 370, Khasra No.354, 330, situated in the Revenue Estate of Moza Dorah, Tehsil and District Islamabad and its transfer in the name of defendant No.1 by further transferring the suit land in the name of Defendant No.2 by virtue of Mutation No.754, 755 by way of fraud, misrepresentation, concealment of and in favour of Defendants No.3 to 6 alongwith all subsequent transfers is illegal, unlawful, arbitrary, without any legal or moral justification and against the legitimate rights of the plaintiff.*
>
> *b. A decree for cancellation of impugned Mutation No.754, 755 and Transfer in*

favour of defendants No.3 to 6 as the same has been succeeded to be done by way of fraud, cheating, criminal breach of trust, misrepresentation, concealment of facts.

c. *A decree for permanent injunction, restraining the defendants permanently from interfering into the peaceful possession of the plaintiff, further transferring, alienating the suit land in any manner whatsoever, entering into any kind of agreement, coming at the suit property and any other act which is pre-judice to the rights of the plaintiff till the final disposal of the instant suit.*

d. *A decree for mandatory injunction directing the Defendants to cancel the impugned Mutation No.754, 755 alongwith all subsequent transfers including the transfer of land measuring 10 Kanals 02 Marlas in the name of Defendants No.3 to 6 along with all of its subsequent transfers (if any).*

12. It is apparent from the record that the matter in issue relates to a civil dispute. Respondent No.3 has not explained the delay in lodging of the FIR nor even placed any document to prove that he has transferred the land in question through mutations as guarantee against the amount of Rs.1,05,00,000/-, therefore, the FIR on the face of it shows colourable exercise of powers and abuse of process of law. It has been observed from record that a civil matter is converted into criminal dispute and person like respondent No.3 tried to recover property and amount without due process of law, especially in violation of remedies available under Contract Act, 1872 and Specific Relief Act 1877. Respondent No.3 has failed to demonstrate from record that his case falls within purview of entrustment of property in terms of section 406, PPC. Even there is no misappropriation of the property or amount. Reliance is placed upon ***2013 YLR 2513 (Rana Saeed Ullah vs. Inspector General of Police and 6 others), 2007 YLR (Badar ur Islam vs. District Police Officer, Faisalabad and 3 others), 2006 P Cr. L J 1900 (Shaukat Ali Sagar vs. Station House Officer, Police Station Batala Colony, Faisalabad and 5 others), 2014 P Cr. L J 1305 (Umair Aslam***

vs. Station House Officer and 7 others), 2011 P Cr. L J 1241 (Mufti Pervaiz Manzoor vs. The State and 2 others), 2015 SCMR 1575 (Rafiq Haji Usman vs. Chairman NAB and another) & 2017 P Cr. L J 133 (Muhammad Nawaz vs. SHO, P.S Sabzi Mandi, Islamabad and others).

13. From the above referred judgment of the Higher Courts, it has been observed that offence of criminal breach of trust has some essential elements i.e. entrustment of the property or conversion for his own use by an person to whom the confidence is reposed under the law or under a legal contract , whereas the property in question was transferred to the petitioner against the valuable consideration referred in registered mutations, therefore, it cannot be presumed by any stretch of imagination that the property was entrusted to the petitioner by respondent No.3 and the petitioner has dishonestly misappropriated or converted the same for his own use. The petitioner has already availed the remedy of filing of civil suit before the competent Court, therefore, lodging of instant FIR is sheer abuse of process of law with intent to harass and humiliate the petitioner for personal gain.

14. From the bare perusal of instant FIR, no offence is made out. Even respondent No.3 himself has admitted in his affidavit that he already approached the competent Court in civil suit for his claim prior to registration of instant FIR. Therefore, instant petition is allowed, FIR No.173, dated 11.09.2016, U/S 406/34, PPC, P.S Noon, Islamabad is quashed and the order dated 23.01.2017, passed by Ilaqa Magistrate is set aside, whereby, learned Judicial Magistrate has disagreed with the cancellation report submitted by the I.O. Reliance is placed upon ***1990 SCMR 1299 (Haji Muhammad Latif vs. Farman Ali and another), 1971 SCMR 613 (Akbar Ali vs. Julian H. Dinsha and 2***

others), 2011 P Cr. L J 1241 (Mufti Pervaiz Manzoor vs. The State and 2 others), 1998 SCMR (State through Advocate-General, N.W.F.P. Peshawar and others vs. Gulzar Muhammad and others) & 2000 SCMR 122 (Miraj Khan vs. Gul Ahmed and 3 others).

15. In view of above reasons, instant petition is allowed.

(MOHSIN AKHTAR KAYANI)
JUDGE

R.Anjam

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