Copy kept on Legal Lexicon for reference. Source: https://pakistancaselaw.com/case/188691/mohmad-vs-s-h-o-2023-lhc-2489. Reported as 2023 LHC 2489. Check the official report before citing.

Mohmad vs S.H.O. etc

Lahore High Court

Present: Asjad Javaid Ghural, J

Mohmad Versus S.H.O. etc

Writ Petition No.70407/2021, decided on 27th April, 2023.

Authored by Asjad Javaid Ghural. Result: Order Accordingly.

ORDER

Through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, petitioner Mohmad has questioned the legality and validity of impugned orders dated 22.10.2021 and 27.10.2021 passed by the learned courts below. Through the former, Area Magistrate dismissed his application U/S 176 Cr.P.C. for disinterment of corpse of daughter of the petitioner namely Mst. Najma Bibi and through the latter Revisional Court dismissed revision against the said order on account of maintainability.

2.Brief facts necessary for disposal of this petition are that the petitioner being father of deceased Mst. Najma Bibi, filed an application U/S 176 Cr.P.C. before the Area Magistrate for disinterment of her corpus, inter-alia, on the grounds that she was done to death by his son in law namely Muhammad Irfan/ respondent No.4 through administering some poisonous material, therefore, her post mortem after disinterment of corpse was essential to dig out the truth. The Area Magistrate after seeking report from the police vide impugned order dated 22.12.2021 dismissed the said application. Being aggrieved the petitioner filed revision petition before the Addl. Sessions Judge, which met with the same fate vide impugned order dated 27.10.2021 while observing that the order of Magistrate for declining disinterment of corpse was an administrative order, as such revision against such order did not lie. Hence, this writ petition.

3.Heard. Revisonal Court has not decided the lis on merits rather declined intervention in the impugned order of Area Magistrate on the score that the same was not a judicial order rather administrative one, therefore, before discussing the merits of the case, it would be in the fitness of things to firstly settle this issue, as if in the end it is resolved that Magistrate's order was judicial in nature, then discussing the merits of the case, would deprive either side from a judicial forum. In order to answer this question, we have to go through relevant provisions of Sections

174 & 176 Cr.P.C. contained in Chapter XIV in Part V of the Code of Criminal Procedure, 1898. Section 174 of Cr.P.C. which reads as under:-

174. Police to inquire on suicide, etc. (1)The officer incharge of a police-station or some other police-officer specially empowered by the Provincial Government in that behalf, on receiving information that a person:

(a)has committed suicide, or

(b)has been killed by another, or by an animal, or by machinery, or by an accident, or (c) has been died under circumstances raising a reasonable suspicion that some other person has committed an offence, shall immediately give intimation thereof to the nearest Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the Provincial Government, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death describing such wounds fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

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4. Section 176 Cr.P.C. which deals with the powers of Magistrate provides as under:-

176. Inquiry by Magistrate into cause of death. (1) When any person dies while in the custody of the police, the nearest Magistrate empowered to hold inquests shall, and, in any other case mentioned in section 174, clauses (a), (b) and (c) of sub-section (1), any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police-officer, and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manner hereinafter prescribed according to the circumstances of the case.

(2).Power to disinter corpses. Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover

the cause of death, the Magistrate may cause the body to be disinterred and examined." 5. While going through the aforesaid provisions of law, it is abundantly clear that the former Section prescribes the powers of Officer in-charge of police station (or some other police official specially empowered by the Provincial Government) to undertake investigation qua cause of death in cases mentioned in clauses (a), (b), (c) of said section, whereas, the latter stipulates the powers of Magistrate, who in case of death of a person while in custody of police 'shall' and in other cases mentioned in former section 'may' make an inquiry into the cause of death. This power is vested with the Magistrate either instead of, or in addition to investigation held by the police under Section 174 Cr.P.C. Wisdom behind conferring such powers upon a Magistrate is apparently to have a check upon the inquiry held by the police or to dispel doubt in the mind of public against a particular person. In order to achieve this purpose, the Magistrate holding an inquiry as a part of "inquest" is empowered with all the powers which he possessed while doing an inquiry into an offence. He is supposed to record the evidence taken by him in connection with the inquest in any of the manners hereinafter prescribed according to the circumstances of the case. This fact leads me to the conclusion that disinterment proceedings before a Magistrate falls within a meaning of 'judicial proceedings' provided in Section 4(1)(m) of the Cr.P.C. which reads as under:-

(m)."Judicial Proceeding". "Judicial Proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath;"

Any order passed pursuant to such proceedings would obviously be revisable. Reliance is placed on case reported as "Khuda Bakhsh ..Vs.. Province of West Pakistan and another (PLD 1957 (W.P.) Lahore 662", wherein, a Division Bench has observed as under:-

" It was contended by the learned counsel for the petitioner that an order of the Magistrate who holds an inquiry either under Section 174 or section 176 of the Code of Criminal Procedure is a judicial order which is open to scrutiny not by the Provincial Government but only by the High Court in the exercise of revisional powers and he relied in this connect on in re Laxminarayan Timmanna Karki (AIR 1928 Bom,390), wherein it was held that proceedings of a Magistrate under section 176 of the Code of Criminal Procedure are judicial proceedings which can be dealt with by the High Court in revision. He also relied upon Advocate-General v. Maung Chit Maung (AIR 1940 Rang.68), wherein the question for determination was whether a Magistrate holding an inquest was a Court subordinate to the High Court for the purposes of the Contempt of Courts Act and it was held that he was. I am in respectful agreement with the views expressed in the above two decisions and hold that the proceedings of a Magistrate who holds an inquest under

the Code of Criminal Procedure are judicial proceedings, which are open to revision by the High Court."(emphasis supplied)

This view has been consistently followed in cases reported as "Muhammad Anwar vs. Sheikh Qurban Ali and 3 others (1973 P Cr.LJ 882), Ghulam Hussain vs. District Magistrate Muzaffargar and 3 others (1992 P Cr.LJ 1870), Mansab Ali v. Asghar Ali Faheem Bhatti, Additional Sessions Judge, Nankana Sahib and 3 others (PLD 2007 Lahore 176).

6.In case reported as "The State ..Vs.. Ch. Altaf Hussain Magistrate 1st Class, Gujrat and 2 others (PLD 1978 Lahore 1259)", where daughter of the complainant breathed her last after sustaining bullet injury on her head and the complainant got lodged FIR against his son in law i.e. husband of deceased, however, his request, for dispensation of post mortem examination of the deceased was accorded by the Magistrate. Subsequently, Investigating Officer moved an application U/S 176(2) Cr.P.C. seeking disinterment of the dead body for post mortem examination, which was permitted by the Magistrate, but upon revision by the complainant, order of Magistrate permitting disinterment of the corpse was set-aside and the issue came up before this Court , where this Court while maintaining the order of Revisional Court ruled in a very elaborative and instructive manner that:-

" I am in respectful agreement with the views expressed in this behalf in the rulings of Muhammad Anwar and Khuda Bakhsh. I may add that although the word "inquest" used in sections 174 and 176 Cr.P.C., has not been defined in the Code, it carries particular significance when the same is conducted by a Magistrate. Subsection (5)of section 174 provides only that the District Magistrate, a Sub-Divisional Magistrate or Magistrate of the 1st Class and any other Magistrate specially empowered in this behalf can hold inquests. Subsection (1) of section 176 gives an indication as to what would be the ordinary procedure in conducting the inquest. It is necessary for the Magistrate, when holding an enquiry as a part of the inquest, to "record the evidence taken by him in connection therewith", in any of the manners prescribed in the Code of Criminal Procedure for conducting enquiries. The choice from amongst "the manners" has been left to the Magistrate and it would depend upon the circumstances of each case. Thus, the Magistrate, when holding an inquest, would be making an "enquiry" in accordance with the provisions of the Criminal Procedure Code and, thus, it would, all the more, make it a judicial function. Any order passed as a result of such an enquiry, would, obviously, be revisable. It is needless to emphasize that the power to be exercised under subsection 2 of section 176 for disinterment of the body is a part of the jurisdiction conferred on the Magistrate to hold inquests. If the entire process of the inquest is to be conducted as an enquiry, then the disinterment of the body would also form part of the enquiry and any order passed in this behalf

would also be a judicial function. Looked at from this angle also, the orders dated 24-4-78 and 25-4-78 passed by the learned Magistrate in this case have to be treated as judicial orders and the learned Additional Sessions Judge could decide the revision and pass the judgment, which has been impugned in these petitions."(emphasis supplied)

7.For what has been discussed above, I am of the considered view that impugned order of Area Magistrate declining disinterment of the corpse for the purpose of post mortem examination was a judicial order, amenable to the revisional jurisdiction and holding of the Revisional Court to the contrary is erroneous and cannot be allowed to hold the field. Resultantly, this writ petition is allowed as a result whereof impugned order of the Revisional Court dated 27.10.2021 is set-aside. Matter is remanded to the said Court with direction to decide the same on merits. Keeping in view the nature of lis, it is expected that the Revisional Court shall endeavor to finally decide the matter within fifteen days from the date of receipt of certified copy of this order.