2021 P T D 1585

[Islamabad High Court]

Before Babar Sattar, J

The DIRECTOR GENERAL (INTELLIGENCE AND INVESTIGATION INLAND REVENUE), ISLAMABAD and 2 others

Versus

The ADDITIONAL SESSIONS JUDGE-IV, WEST ISLAMABAD and 4 others

Writ Petition No.3857 of 2015, decided on 23rd April, 2021.

(a) Good Governance---

----Official duties, exercise of---Immunity against personal liability---Principle---In a Constitutional democracy wherein rule of law prevails, all public officials exercise delegated authority flowing from citizens to the State and are exercised by public officials in the name of State for the benefit of citizens within the limits prescribed by law---Question of actions of public officials protected against enforcement of provisions of law cannot even arise; it is only that when law vests authority in public official along with discretion, the exercise of such authority and discretion can result in wrong decisions as well--- So long as actions and decisions are reached by public officials within the four corners of law, no personal liability for incorrect or wrong decision attaches for such incorrect acts, omissions or decisions---Law recognizes that when someone is vested with authority to act or make a decision on behalf of State, he/she can get decision wrong as well---Various statutes protect bona fide actions of public officials and shield them from personal liability in order not to debilitate discharge of public functions out of fear of attracting personal liability---Immunity against personal liability for bona fide actions does not translate into a right to act in disregard of law with impunity---Any police officer who abuses state authority vested in him to inflict harm on a citizen enjoys no immunity for exercise of authority is such manner.

Yousaf Ali v. Muhammad Aslam Zia PLD 1958 SC 104; Dr. Omar Masood v. Syed Amir Hussain Naqvi 2019 CLD 931; Arshad Mahmood v. The State PLD 2008 SC 376; 2012 PTD (Trib.) 1416; Rookes v. Barnard (1964) 1 All ER 367; Federation of Pakistan through Secretary Establishment Division v. Saeed Ahmed Khan PLD 1974 SC 151; Muhammad Sharif v. Federation of Pakistan PLD 1988 Lah. 725; Pakistan v. Umar Khan 1992 SCMR 2450; Independent Newspapers Corporation (Pvt.) Ltd. and another v. Chairman, Fourth Wage Board and Implementation Tribunal and 2 others 1993 SCMR 1533; Zahid Akhtar v. Government of Punjab and others PLD 1995 SC 530; Sherin and 4 others v. Fazal Muhammad and 4 others PLD 1995 SC 584; Aftab Ahmed Khan Sherpao v. Farooq Ahmed Leghari PLD 1997 Pesh. 93; Masroor Ahsan v. Ardeshir Cowasjee PLD 1998 SC 823; Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport, Karachi 1998 SCMR 2268; Samiullah Khan Marwat v. Government of Pakistan 2003 SCMR 1140; Dr. Imtiaz Ellahi Piracha v. Government of Punjab and others 2004 PLC (C.S) 705; Muhammad Yasin v. Secretary, Government of Punjab and others 2007 SCMR 1769; Iqbal Hussain v. Province of Sindh 2008 SCMR 105; Mrs. Abida Parveen Channar v. High Court of Sindh at Karachi 2009 SCMR 605; Human Rights Cases Nos. 4668 of 2006, 111 of 2007 and 15283-G of 2010 PLD

2010 SC 759; Air Marshal (Retd.) Muhammad Asghar Khan v. General (Retd.) Mirza Aslam Baig and others PLD 2013 SC 1; Ali Azhar Khan Baloch and others v. Province of Sindh and others 2015 SCMR 456; Province of Sindh through its Chief Secretary v. Syed Kabir Bokhari (2016 SCMR 101; Abdul Rehman Malik v. Synthia D. Ritchie, American National and others 2020 SCMR 2037 and Justice Qazi Faez Isa v. The President of Pakistan PLD 2021 SC 1 rel.

(b) Sales Tax Act (VII of 1990)---

----S.51---Electronics Transactions Ordinance (LI of 2002), Ss.36 & 37---Criminal Procedure Code (V of 1898), Ss.22-A & 22-B---Constitution of Pakistan, Arts.10-A, & 248---Official proceedings---Immunity---Scope---Ex-Officio Justice of Peace allowed application filed by respondents/taxpayers for breach of provisions of Ss.36 & 37 of Electronic Transactions Ordinance, 2002, by petitioners/authorities and directed to register F.I.R.---Petitioners/authorities claimed protection of S.51 of Sales Tax Act, 1990, for acts done in official capacity---Validity---No protection from investigation or prosecution could be afforded to any public official for an alleged act---Whether or not a public official was liable for an illegal act, could only be determined after a fair investigation and trial--- Every citizen had a right to due process and fair trial, when a claim was made by a citizen that a public official was involved in an offence causing legal injury to such citizen---Both citizens and public officials have a right to due process and fair trial and to have their rights and liabilities determined in accordance with law---No public official could claim protection against investigation or prosecution---In view of Art.10-A of the Constitution, it was only the procedure to be followed in conducting investigation and prosecution of public officials that could be regulated by statutory provisions---Allegations regarding any fraud that were or were not committed by respondents/taxpayers were to be determined in accordance with the provisions of Sales Tax Act, 1990---Severity of such allegations had no bearing on obligation of petitioners/authorities to exercise any authority vested in them such that it was in accordance with the law---Complaint was filed by respondents/taxpayers alleging that actions of petitioners/authorities constituted an offence under provisions of Electronic Transactions Ordinance, 2002---Neither immunity afforded by law to petitioners/authorities against investigation and prosecution in relation to such offence, nor order passed by Ex-Officio Justice of Peace suffered from legal infirmity for allowing registration of F.I.R. and initiation of investigation---Constitutional petition was dismissed in circumstances.

Shahnaz Begum v. The Hon'ble Judges of the High Court of Sindh and Baluchistan and another PLD 1971 SC 677; Emperor v. Khawaja Nazir Ahmed AIR (32) 1945 Privy Council 18; Miraj Khan v. Gul Ahmed and 3 others 2000 SCMR 122; Col. Shah Sadiq v. Muhammad Ashiq and others 2006 SCMR 276; Muhammad Mansha v. Station House Officer, Police Station City, Chiniot, District Jhang and others PLD 2006 SC 598 and Muhammad Rizwan v. The State and others 2016 PCr.LJ 998 rel.

Hafiz Ahsaan Ahmed Khokhar for Petitioner.

Ghulam Qasim Bhatti for Respondents.

Date of hearing: 8th February, 2021.

JUDGMENT

BABAR SATTAR, J.----The petitioner has impugned the order of the learned

Additional Sessions Judge dated 13.10.2015 ("impugned order") and summons issued by respondent No.5/FIA dated 13.11.2015 ("impugned summons").

2. Learned counsel for the petitioner stated that the petitioners were discharging their duties under the Sales Tax Act, 1990 ("Act") and investigating sales tax evasion by respondents Nos. 2, 3 and 4 that had caused the public exchequer of approximately rupees 59.23 million. That the investigation proved that respondents concealed sales tax invoices and subsequently FIR No. 7/2015 was registered under sections 37A and 37B of the Act. That after registration of FIR respondents filed an application under section 22-A, Cr.P.C., before the learned Additional Sessions Judge (ASJ) for breach of sections 36 and 37 of the Electronic Transaction Ordinance, 2002 ("Ordinance") and that pursuant to the impugned order passed by the learned ASJ, respondent No.5 issued the impugned summons leading to the instant petition. The learned counsel stated that the Act is a special law which provides a complete code for dealing with any matter that arises in relation to it and the only remedy available to respondents Nos. 2, 3 and 4 for breach of any provision of the said Act would be to move a complaint before the Special Court established under section 37 of the Act. That the Ordinance has no relevance to the actions of the petitioners who were discharging their obligations under the provisions of the Act. That no court other than established under section 37 of the Act has any authority to adjudicate a grievance in relation to exercise of the authority under the Act and consequently the jurisdiction of the learned ASJ was ousted in view of section 37 of the Act. That the offences made out by respondents Nos. 2, 3 and 4 under the Ordinance actually falls within the scope of section 33 of the Act and when the law itself prescribes a procedure and forum for adjudication and appeal under provisions of the said Act, the jurisdiction of all other forums established under other laws is excluded. That section 51 of the Act provides immunity to the actions of the petitioners who were acting in good faith in discharge of their duties. That under section 38 of the Act data can be accessed by the authorized officer and consequently the act of the petitioners in procuring access to relevant data suffered from no illegality. He relied on Yousaf Ali v. Muhammad Aslam Zia (PLD 1958 SC 104) and Dr. Omar Masood v. Syed Amir Hussain Naqvi (2019 CLD 931) for the argument that the Act ousted the jurisdiction of an adjudicatory forum other than proceedings under section 38 of the Act for any complaint that emerged from the exercise of the authority under the Act. The learned counsel further submitted that the impugned order passed by the learned ASJ is without jurisdiction and consequently the impugned summons issued in pursuance of the impugned order are also illegal.

3. Learned counsel for respondents Nos. 2, 3 and 4 submitted that the respondent has a national tax number and a history of abiding by all tax statutes and has never been charged with any tax fraud. That the accounting software of respondent No.2 was hacked by the petitioners between 25.05.2015 and 27.05.2015 and proprietary data was downloaded by the petitioners and that on 24.06.2015 respondent No.2 filed its complaint through an email and such complaint is evidence that the grievance of respondent No.2 had emerged before an FIR was registered against it by the petitioners on 02.06.2015. That as no action on the complaint was taken by respondent No.5, the respondents filed an application under sections 22-A/22-B, Cr.P.C to seek registration of an FIR against the petitioners for acting in breach of sections 36 and 37 of the Ordinance and consequently the impugned order was passed by the learned ASJ. That the Ordinance is a special law later in time and an offence under it is to be tried by the Sessions Court in view of section 39 and not by Special Judge appointed under section 37 of

the Act. That even under section 38 of the Act there is requirement that data has to be accessed in a legal manner by an authorized officer and in the instant case nobody was authorized to hack the electronic system of respondent No.2 and consequently actions of the petitioners were also in breach of sections 38 and 40 of the Act. That there is no remedy for breach of sections 36 and 37 of the Ordinance that can be availed under any provision of the Act and as the hacking of an electronic system is not defined as an offence under section 33 of the Act, the Special Judge appointed under section 37 of the Act had no jurisdiction to try the offence of hacking. That section 51 of the Act only protects an order passed in good faith and good faith has been defined under section 52 of the Pakistan Penal Code, 1860 ("P.P.C.") as an act done with a due care and attention. But that the actions of the petitioners in relation to which the impugned order was passed and the impugned summons were issued were not in good faith as they fall foul of requirements of section 11 read with sections 38 and 40 of the Act and consequently such actions have no protection of under section 51 of the Act. That actions of the petitioners have breached the rights of the respondents to privacy which are protected under Article 14 of the Constitution. That by hacking the electronic system of respondent No.2 and proceeding against respondents Nos.2, 3 and 4 without issuance of any show cause notice the petitioners breached their rights guaranteed under Article 10A of the Constitution. That mala fide is floating on the surface of the record in view of the behaviour of the petitioners as they only filed a one-page FIR against the respondents and no trial has commenced since 2015. And that while the respondent is an association of persons with three partners, only respondents Nos. 3 and 4 are being prosecuted and the third partner has been left out of the inquiry initiated by the petitioners even though under section 25 of the Partnership Act equal liability attaches to all partners. Learned counsel for the respondents stated that it was confirmed by FIA before this Court in Criminal Misc. No. 746/B-2015 that the petitioners had hacked the electronic system of respondent No.2 as recorded in the order of another learned bench of this Court dated 08.04.2016 as follows:

> "Petitioner has filed bail before arrest primarily on the ground that the system of the registered person i.e. M/s. Forte Associates was hacked i.e. there was an unauthorized access, therefore, the information obtained from such unauthorized access tantamount to unlawfully obtaining the evidence which cannot be relied upon. In this behalf Fazal Muhammad, S.I, FIA confirmed that on 24th, 26th and 27th May, 2015 the system of M/s. Forte Associates was accessed from the system at the site of Intelligence and Investigation Inland Revenue, Islamabad. It was also confirmed by the referred FIA officer that the system was accessed by the user I.D of one Uzma Hafeez who has made a statement that she is an ex-employee of M/s. Forte Associates, however, never accessed the system. In this behalf for further investigation Assistant Accountant of M/s. Forte Associates was called up. In view of the statement and enquiry report of FIA it is clear that the Intelligence and Investigation Wing of Inland Revenue, Islamabad unlawfully accessed the system of M/s Forte Associates. The stance taken by the learned counsel for the respondent is that under section 38 of the Sales Tax Act, 1990 along with Section 40 ibid the department has authority to access the record."

Learned counsel for the respondents relied on Arshad Mahmood v. The State (PLD 2008 SC 376) for the argument that provisions of the Act do not permit violation of constitutional guarantees of privacy and dignity of a person and further on 2012 PTD (Trib.) 1416 (S.T.A No. 1140/LB of 2009 decided on 13.03.2011) wherein it was held that general provision of

section 38 of the Act could not be used so as to circumvent or override the constitutional guarantees protecting individuals including the right to be treated in accordance with law.

4. The questions that arise for adjudication of this petition are as follows:

1. Whether provisions of the Act override the provisions of the Ordinance and consequently jurisdiction vested in the Sessions Court under section 39 of the Ordinance be ousted by virtue of section 37 of the Act that vests the jurisdiction in the special court created thereunder?

2. Whether protection of section 51 of the Act apply to actions of the petitioners in such manner that they cannot be proceeded against for any offence under the Ordinance?

3. Should this court exercise its extraordinary constitutional jurisdiction to prohibit the Federal Investigation Agency from continuing its investigation into the matter?

5. The question of how to interpret special laws, provisions of which seemingly overlap or are in conflict with one another came up before a Division Bench of this Court in Tax Reference No. 07 of 2007 M/s. Federal Bank for Co-operatives v. Commissioner of Income Tax, Companies Zone, wherein, after reviewing case law on the issue, the following was held:

> "8. In view of the case law cited above, the following principles of interpretation can be deciphered while construing the meaning of seemingly conflicting provisions between special laws:
>
> i. While applying seemingly conflicting provisions of two statutes a court must seek to interpret them in a manner that affords harmonious construction and prevents the emergence of a conflict between their provisions. It is to be assumed that in the event the legislature wished to override an existing law it would do so explicitly and thus the doctrine of implied repeal is not to be readily or mechanically invoked.
>
> ii. Special law prevails over general law. And in a conflict between two special laws the one later in time will ordinarily prevail for being an embodiment of the latest expression of the legislature intent. But, as aforesaid, this principle is not to be mechanically applied as being aware of an earlier special law, the legislature could override the same through explicit language in a subsequent special law if it is so wished.
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> iii. In the event that there is contradiction between the provisions of two statutes it is to be presumed that the statute within the provision of which the legislature has included a non-obstante clause is to be given overriding effect over provisions of the other statute that it is in conflict with, in order to give effect to expressed legislative intent. (In the event that both statutes contain non-obstante clauses, the special law will prevail over general law, and the law later in time will ordinarily prevail in case of conflict between two special laws). However, a non-obstante clause is also not to be given overriding effect in a mechanical fashion as the underlying object of the interpretive project undertaken by the court is to discover the meaning of words used by the legislature: a non-obstante clause is usually employed to suggest that the provision referred to in the non-obstante clause is to prevail over other provisions of the statute, but repugnancy between non-obstante clause and other clauses is not to be presumed and overriding

effect is to be accorded only in case of irreconcilable conflict.

iv. In the event that harmonious construction cannot be accorded to the provisions of two special statues without giving tortured meaning to the words used in the text, the object, purpose and policy of the statutes is to be borne in mind in order to discover the legislative intent regarding which statute is to be given overriding effect and to be treated as the special law with overriding effect over another special law. It is possible that a law is to be treated as a special law vis-a-vis one enactment and general law vis-a-vis another enactment."

6. In order to consider if the provisions of the Act are in conflict with the provisions of the Ordinance as asserted by the petitioners, let us consider the relevant provisions of both statutes.

Relevant Provisions of Sales Tax Act, 1990

37C. Special Judges.- (1) The Federal Government may by notification in the official Gazette, appoint as many Special Judges as it considers necessary and, where it appoints more than one Special Judge, it shall specify in the notification the headquarter of each Special Judge and the territorial limits within which he shall exercise jurisdiction under this Act.

(2) No person shall be appointed as a Special Judge unless he is or has been a Sessions Judge.

37D. Cognizance of Offences by Special Judges.- (1) Notwithstanding anything contained in this Act or any other law for the time being in force, a Special Judge may, within the limits of his jurisdiction, take cognizance of any offence punishable under this Act:

(a) Upon a report in writing made by an officer of Inland Revenue or by any other officer especially authorized in this behalf by the Federal Government; or

(b) Upon receiving a complaint or information of facts constituting such offence made or communicated by any person; or

(c) Upon his own knowledge acquired during any proceeding before him under this act or under any other law for the time being in force.

(2) Upon the receipt of report under clause (a) of subsection (1), the Special Judge shall proceed with trial of the accused.

(3) Upon the receipt of a complaint or information under clause (b), or acquired in the manner referred to in clause (c) of subsection (1), the Special Judge may, before issuing a summon or warrant for appearance of the person complained against, hold a preliminary inquiry for the purpose of ascertaining the truth or falsehood of the complaint, or direct any magistrate or any officer of Inland Revenue or any police officer to hold such inquiry and submit a report, and such Magistrate or officer shall conduct such inquiry and make report accordingly.

(4) If, after conducting such inquiry or after considering the report of such Magistrate

or officer, the Special Judge is of the opinion that--

(a) there is no sufficient ground for proceeding, he may dismiss the complaint, or

(b) there is sufficient ground for proceeding, he may proceed against the person complained against in accordance with law.

(5) A special Judge or a Magistrate or an officer holding inquiry under subsection (3) may hold such inquiry, as early as possible, in accordance with the provision of section 202 of the Code of Criminal Procedure, 1898 (Act V of 1898).

37E. Special Judge, etc. to have exclusive jurisdiction.- Notwithstanding anything contained in this Act or in any other law for the time being in force,-

(a) no court other than the Special Judge having jurisdiction, shall try an offence punishable under this Act;

(b) no other court or officer, except in the manner and to the extent specifically provided for in this Act, shall exercise any power, or perform any function under this Act;

(c) no court, other than the High Court, shall entertain, hear or decide any application, petition or appeal under Chapters XXXI and XXXII of the Code of Criminal Procedure, 1898 (Act V of 1898), against or in respect of any order or direction made under this Act; and (d) no court, other than the Special Judge or the High Court, shall entertain any application or petition or pass any order or give any direction under Chapters XXXVII, XXXIX, XLIV or XLV of the aforesaid Code.

51. Bar of suits, prosecution and other legal proceedings.- (1) No suit shall be brought in any Civil Court to set aside or modify any order passed, any assessment made, any tax levied, any penalty imposed or collection of any tax made under this Act.

(2) No suit, prosecution or other legal proceeding shall lie against the Federal Government or against any public servant in respect of any order passed in good faith under this Act.

(3) Notwithstanding anything in any other law for the time being in force, no investigation or inquiry shall be undertaken or initiated by any governmental agency against any officer or official for anything done in his official capacity under this Act, rules, instructions or direction made or issued thereunder without the prior approval of the Board.

Relevant Provisions of the Electronic Transactions Ordinance, 2002.

31. Application to certain laws barred. (1) Subject to subsection (2), nothing in this Ordinance shall apply to:

(a) a negotiable instrument as defined in section 13 of the Negotiable Instruments Act, 1881 (XXVI of 1881);

(b) a power-of-attorney under the Powers of Attorney Act, 1881 (VII of 1882);

(c) a trust as defined in the Trust Act, 1882 (II of 1882), but excluding constructive,

implied and resulting trusts;

(d) a will or any form of testamentary disposition under any law for the time being in force; and

(e) a contract for sale or conveyance of immovable property or any interest in such property.

(2) The Federal Government after consultation with the provinces may, by notification in the official Gazette and subject to such conditions and limitations as may be specified therein, declare that the whole or part of this Ordinance shall apply to the whole or part of one or more instruments specified in clauses (a) to (e) of subsection (1).

33. Overriding effect. The provisions of this Ordinance shall apply notwithstanding anything to the contrary contained in any other law for the time being in force.

36. Violation of privacy of information.----Any person who gains or attempts to gain access to any information system with or without intent to acquire the information contained therein or to gain knowledge of such information, whether or not he is aware of the nature or contents of such information, when he is not authorised to gain access, as aforesaid, shall be guilty of an offence under this Ordinance punishable with either description of a term not exceeding seven years, or fine which may extend to one million rupees, or with both.

37. Damage to information system, etc.----(1) Any person who does or attempts to do any act with intent to alter, modify, delete, remove, generate, transmit or store any information through or in any information system knowingly that he is not authorised to do any of the foregoing, shall be guilty of an offence under this Ordinance.

(2) Any person who does or attempts to do any act with intent to impair the operation of, or prevent or hinder access to, any information contained in any information system, knowingly that he is not authorised to do any of the foregoing, shall be guilty of an offence under this Ordinance.

(3) The offences under subsections (1) and (2) of this section will be punishable with either description of a term not exceeding seven years or fine which may extend to one million rupees, or with both.

39. Prosecution and trial of offences.----No Court inferior to the Court of Sessions shall try any offence under this Ordinance.

7. The Act and the Ordinance are both special laws. Both include non-obstante clauses. Each of them vests jurisdiction in a special court to take cognizance of offenses under such law. And the Ordinance is later in time, wherein under Section 31, the legislature has listed other laws to which provisions of this law would not apply, and the Act is not included in the list. However, there is no conflict between the provisions of the two statues. The petitioners, in exercise of their functions, derive authority from provisions of the Act. No provision of the Act has been identified by the petitioners, which would justify exercise of authority in such manner which while being legitimate under such Act would tantamount to an offense under the Ordinance. Just as in the event that an official exercising search powers under the Act were

to kill someone while conducting the search, he would be liable for an offense under the Pakistan Penal Code, an official while exercising search powers under the Act exercises them such that it constitutes an offense under the Ordinance, he would be liable to be investigated for such offense and subsequently tried if the investigation finds enough evidence indicting him. Provisions of the two statues i.e. the Act and the Ordinance can be read harmoniously.

8. Let us also reproduce the relevant excerpt from the impugned order in exercise of powers under Sections 22-A and 22-B, Cr.P.C.:

> "According to report of FIA such complaint filed Fawad Ali is submitted regarding unauthorized login to his official compute/business data by FBR. The FIA has registered inquiry No.78/15. The FIA, is therefore, directed to initiate and complete the inquiry in order to redress the genuine and lawful grievances of the complainant/applicant within 30 days and if cognizable offence is made out such FIR may be registered accordingly and report to this Court."

9. Through the impugned order, the learned Additional Sessions Judge has directed FIA to conduct an inquiry to determine whether the petitioners became liable for an offense under the Ordinance, even if they were purportedly discharging duties under the Act. There was no allegation that the petitioners committed an offense under the Act, which could have attracted the provisions of the Act and which attracted the exclusive jurisdiction of the special court established under the Act. The actions complained of i.e. that of hacking into the electronic systems of the respondents, is an offense under the Ordinance and not under the Act. Further, the obligation to seek prior approval from the Federal Board of Revenue ("FBR") under section 51(3) of the Sales Tax Act, 1990, would be attracted if the FIA had decided to initiate the inquiry on its own accord. Even in such case, FBR would have no discretion to turn down a request from an investigation agency seeking permission to initiate an inquiry in discharge of statutory functions vested in it. The purpose of such procedural requirement is twofold: one, to ensure that officials under the hierarchy of FBR are not embroiled in bogus cases by a law enforcement or investigation agency that could distract them from the discharge of their duties, and to take the matter up with the Federal Government at an appropriate level if that happens; and two, to inform FBR of allegations against its officials so it can consider whether to initiate its own disciplinary proceedings in view of the nature of the allegations, and to place such official under suspension or in an appropriate post while undergoing the investigation or prosecution so that the work of FBR does not suffer. In the instant case, as the order has been passed by a court and the inquiry has not been initiated by FIA on its own accord, the procedural requirement of section 51(3) is not attracted. Notwithstanding this, in view of the legislative intent behind section 51(3), it would still be desirable for a law enforcement and/or investigation agency to inform the FBR whenever an investigation is initiated against an official serving under it, even when a sanction or order has been issued by a court. But in view of the discussion later in this judgment regarding how even the courts have a hands-off policy when it comes to investigations, it cannot be countenanced that a statutory authority such as FBR, whose officials are to be investigated or prosecuted, can be granted a veto over whether or not such investigation should be allowed to proceed.

10. On the question of whether actions of the petitioners enjoy absolute immunity from enforcement of the law by virtue of Section 51 of the Act, it is too late in the day to even conceive such argument within any system of rule of law. The obligation of public officials to

abide by the law, to not follow illegal orders and the extent to which legal protection under the Constitution and the law can be afforded to their actions has been addressed at length by the jurisprudence that has evolved within administrative law. The relevant dicta are reproduced below:

(i) In Rookes v. Barnard (1964) 1 All ER 367) it was aptly observed by Lord Devlin that, "the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service."

(ii) In the Federation of Pakistan through Secretary Establishment Division v. Saeed Ahmed Khan (PLD 1974 SC 151), the august Supreme Court explained the Latin expression 'mala fides':

"Mala fides" literally means in "in bad faith". Action taken in bad faith is usually action taken maliciously in fact, that is to say, in which the person taking the action does so out of personal motives either to hurt the person against whom the action is taken or to benefit oneself. Action taken in colorable exercise of powers, that is to say, for collateral purposes not authorized by the law under which the action is taken or actions taken in fraud of the law are also mala fide."

(iii) In Muhammad Sharif v. Federation of Pakistan (PLD 1988 Lahore 725) the learned Lahore High Court held that:

"The immunity does not cover acts based on mala fide, initiated in bad faith, or prompted by bad motive. If the act purporting to be done in exercise of powers for performance of functions is so far- fetched or unrelated to the issue at hand, the immunity cannot apply. The act done or purporting to be done must bear such close and intimate relation to the duty or the functions that the person concerned can lay a reasonable claim, but not in pretended claim that he did it in the exercise of powers for performance of functions given to him by the Constitution. The personal immunity from legal action does not place the acts of the President or the Governor, done or purporting to be done in pursuance of their power and duties under the Constitution, beyond the scrutiny of the Courts. What the Constitution establishes is the supremacy of law and not of men, however, highly placed they may be. Though the immunity provided by the Constitution gave full immunity, but only so long as the person was not guilty of dishonesty or bad faith."

(iv) In Pakistan v. Umar Khan (1992 SCMR 2450), the august Supreme Court held that, "where allegations of mala fides of fact were involved or alleged, it was necessary that the parties against whom such mala fides of fact was alleged must be impleaded as a party so that it had the occasion to meet the allegation which was made notwithstanding the constitutional protection enjoyed by such functionaries under Art. 248 of the Constitution of Pakistan, 1973.

(v) In Independent Newspapers Corporation (Pvt.) Ltd. and another v. Chairman, Fourth Wage Board and Implementation Tribunal and 2 others (1993 SCMR 1533) the august Supreme Court observed that, "Where express statutory power is conferred on a public functionary, it should not be pushed too far, for such conferment implies a restraint in operating that power, so as to exercise it justly and reasonably. Excessive use of lawful

power is itself unlawful."

(vi) In Zahid Akhtar v. Government of Punjab and others (PLD 1995 SC 530) it was held by the august Supreme Court that:

"Compliance of an illegal or an incompetent direction/ order can neither be justified on the plea that it came from a superior authority nor it could be defended on the ground that its non- compliance would have exposed the concerned Government servant to the risk of disciplinary action."

(vii)In Sherin and 4 others v. Fazal Muhammad and 4 others (PLD 1995 SC 584), the august Supreme Court observed that:

"A public authority whether doing an act which it is its duty to do or doing an act which it is merely empowered to do, must, in doing the act, do it without negligence, or must not do it carelessly or improperly. A duty upon a public authority to act without negligence or not carelessly or improperly does not include a duty to act reasonable diligence by which it is meant reasonable dispatch.

All public authorities including the judicial functionaries while doing an act enjoined by law or merely empowered to do it must not do it improperly. An action may lie against a public authority for misfeasance or non-feasance."

(viii) In Aftab Ahmed Khan Sherpao v. Farooq Ahmed Leghari (PLD 1997 Peshawar 93), it was held by the learned Peshawar High Court that, "if mala fides of fact are pleaded then the person concerned must be impleaded as party in spite of the protecting provision of Art.248, Constitution of Pakistan."

(ix) In Masroor Ahsan v. Ardeshir Cowasjee (PLD 1998 SC 823), the apex Court observed in relation to protection afforded to the Prime Minister under the Constitution that, "neither the Constitution nor any law authorize Prime Minister to commit a criminal act or do anything which is contrary to law," and that "immunity provided in Art. 248 of the Constitution cannot extend to illegal or unconstitutional acts…Prime Minister is bound to obey the Constitution and law under Art. 5(2) of the Constitution which is basic obligation of every citizen".

(x) In Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport, Karachi (1998 SCMR 2268), the august Supreme Court reiterated that public office holders must act according to law:

"Public functionaries derive authority from or under law and therefore are obligated to act justly, fairly equitably, reasonably, without any element of discrimination and squarely within the parameters of law as applicable in a given situation."

(xi) In Samiullah Khan Marwat v. Government of Pakistan (2003 SCMR 1140) the august Supreme Court observed that:

"….the exercise of powers by the public functionaries in derogation to the direction of law would amount to disobey[ing] the command of law and the Constitution…"

(xii) In Dr. Imtiaz Ellahi Piracha v. Government of Punjab and others (2004 PLC (C.S) 705) it was held by the august Supreme Court that, "public functionaries are not

supposed to pass order in arbitrary and capricious manner or in a fashion which may bring the result of victimization"

(xiii) In Muhammad Yasin v. Secretary, Government of Punjab and others (2007 SCMR 1769) the august Supreme Court held that:

"7. …It is settled law that public functionaries are duty bound to act within the frame-work of Constitution and law… It is a command of constitution by virtue of its Art. 5(2) read with Art.4 that everybody, whosoever, must act in obedience of the constitution to perform/ discharge his duties in accordance with law..."

(xiv) In Iqbal Hussain v. Province of Sindh (2008 SCMR 105), the august Supreme Court observed that "the compliance of any illegal and arbitrary order is neither binding on the subordinate forums nor valid in the eyes of law."

(xv) In Mrs. Abida Parveen Channar v. High Court of Sindh at Karachi (2009 SCMR 605) that, "all public powers must be exercised reasonable and honestly for purposes for which same are conferred."

(xvi) In Human Rights Cases Nos. 4668 of 2006, 111 of 2007 and 15283-G of 2010 (PLD 2010 SC 759), it was held by the august Supreme Court that in case the subordinates are directed to implement an illegal order, "they should put on record their dissenting note."

(xvii) In Air Marshal (Retd.) Muhammad Asghar Khan v. General (Retd.) Mirza Aslam Baig and others (PLD 2013 SC 1) the august Supreme Court held that public officers are liable for obeying unlawful orders, by stating that, "All officers who obey unlawful commands are individually liable. All superior officers giving unlawful commands or who fail to prevent unlawful action on the part of their subordinates are liable and culpable..."

(xviii) In Ali Azhar Khan Baloch and others v. Province of Sindh and others (2015 SCMR 456) while placing reliance on Syed Mehmood Akhtar Naqvi's case, the august Supreme Court observed that:

"Public functionaries have to reinforce good governance, observe rules strictly and adhere to rule of law in public service. Public functionaries were not obliged to follow illegal orders of higher authorities."

(xix) In Province of Sindh through its Chief Secretary v. Syed Kabir Bokhari (2016 SCMR 101) the august Supreme Court observed that:

The Government and its department are bound to act justly and fairly with the citizens of the country and in case of illegal and unlawful conduct of the government and its officials of department any loss is caused to the citizen of this country, same is appropriately to be compensated.

(xx) In Abdul Rehman Malik v. Synthia D. Ritchie, American National and others (2020 SCMR 2037) the august Supreme Court defined the extent of immunity as provide by

Article 248 of the Constitution as follows:

> "Immunity provided to the President, a Governor, the Prime Minister, a Federal Minister, a Minister of State, a Chief Minister and a Provincial Minister was confined to the exercise of powers and performance of functions of their respective offices and for the acts done or purported to be done in exercise of powers and performance of their official functions… Since the law did not authorize holder of any office, howsoever high to commit a crime to do anything inconsistent with law, even the limited functional immunity could not be pressed into service to hold the process of law in abeyance."

(xxi) In Justice Qazi Faez Isa v. The President of Pakistan (PLD 2021 SC 1) the august Supreme Court observed that even Article 248 of the Constitution does not protect illegal acts:

> "Constitutional office holders have immunity from prosecution under Article 248 of the Constitution of the Islamic Republic of Pakistan, however, no protection could be extended to such holders of Constitutional office from prosecution for their illegal acts."

11. In a constitutional democracy wherein rule of law prevails, all public officials exercise delegated authority flowing from the citizens to the state and being exercised by public officials in the name of the state for the benefit of citizens within the limits prescribed by law. The question of actions of public officials being protected against enforcement of provisions of the law cannot even arise. It is only that when law vested authority in a public official along with discretion, the exercise of such authority and discretion can result in wrong decisions as well. So long as the actions and decisions are reached by public officials within the four corners of the law, no personal liability for incorrect or wrong decisions attaches for such incorrect acts, omissions or decisions. The law recognizes that when someone is vested with the authority to act or make a decision on behalf of the state, he/she can get the decision wrong as well. This is why various statutes protect bona fide actions of public officials and shield them from personal liability in order not to debilitate discharge of public functions out of fear of attracting personal liability.

12. But immunity against personal liability for bona fide actions does not translate into a right to act in disregard of the law with impunity. A police officer who abuses state authority vested in him to inflict harm on a citizen enjoys no immunity for exercise of authority in such manner. A police officer who kills a citizen while performing his duties can claim no immunity from investigation on the basis that all his actions in discharge of duty have absolute protection. It is after an investigation that the state would determine whether to press charges for an offense or not. Likewise, a tax official who travels outside the four corners of the authority vested in him by law and breaches the fundamental rights of a citizen or commits an offense against a citizen enjoys no immunity against an investigation for purposes of determining that an offense was committed or against prosecution if it is determined by the investigation that an offense is made out.

13. In view of the principles of law as enshrined in judicial pronouncements, it is now settled that public officials have a higher duty to abide by the law as the authority that they exercise on behalf of the state flows from the law. Their bona fide actions in discharge of official duties are protected. But as soon as their actions transgress the limits of authority

circumscribed by law, they are liable to be held accountable in accordance with law. Neither ignorance of law, nor illegal orders from a higher authority is any justification or excuse for transgressing the limits of their authority or acting in breach of law. And in view of the scope of constitutional immunity provided under Article 248, as defined by the august Supreme Court, it is evident that no protection from investigation or prosecution can be afforded to any public official for an illegal act. And whether or not a public official is liable for an illegal act can only be determined after a fair investigation and trial. And as every citizen has a right to due process and fair trial, when a claim is made by a citizen that a public official is involved in an offense causing legal injury to such citizen, both, the citizen and the public official have a right to due process and fair trial and to have their rights and liabilities determined in accordance with law. Consequently, no public official can claim protection against investigation or prosecution. In view of Article 10A, it is only the procedure to be followed in conducting investigation and prosecution of public officials that can be regulated by statutory provisions.

14. On the third question framed in para. 4 above as to whether this court ought to exercise is discretionary constitutional jurisdiction to interfere with the exercise of investigative authority by an investigation or law enforcement agency, the law is now well-settled. Courts of law are loath to interfere with investigations, subject to limited exceptions. Let us consider the dicta of superior courts in this regard:

(i) Shahnaz Begum v. The Hon'ble Judges of the High Court of Sindh and Baluchistan and another (PLD 1971 SC 677)

> "We have, therefore, upon a review of the relevant judicial opinions, come to the conclusion that the High Court has no power under section 561-A even to quash an investigation. The decision of another learned Single Judge of the High Court of West Pakistan, Lahore Seat, in the case of Yaqoob Khan v. State (PLD 1965 SC 287) holding that the High Court has such power cannot, therefore, be approved of and is accordingly overruled.
>
> If an investigation is launched mala fide or is clearly beyond the jurisdiction of the investigating agencies concerned then it may be possible for the action of the investigating agencies to be corrected by a proper proceeding either under Article 98 of the Constitution of 1962 or under the provisions of section 491 of the Criminal Procedure Code, if the applicant is in the latter case in detention, but not by invoking the inherent power under section 561-A of the Criminal Procedure Code."

(ii) Emperor v. Khawaja Nazir Ahmed [AIR (32) 1945 Privy Council 18]

> "It is conceded that the findings in a civil proceeding are not binding in a subsequent prosecution founded upon the same or similar allegations. Moreover, the police investigation was stopped and it cannot be said with certainty that no more information could be obtained. But even if it were not, it is the duty of a criminal Court when a prosecution for a crime takes place before it to form; its own view and not to reach its conclusion by reference to any previous decision which is not binding upon it.
>
> In their Lordships' opinion, however, the more serious aspect of the case is to be found

in the resultant interference by the Court with the duties of the police.

In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always of course subject to the right of the Court to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus."

(iii) Miraj Khan v. Gul Ahmed and 3 others (2000 SCMR 122)

"...the High Court in exceptional cases can exercise jurisdiction under section 561-A, Cr.P.C without waiting for trial Court to pass orders under section 249-A or 265-K, Cr.P.C., if the facts of the case so warrant. The main consideration to be kept in view would be whether the continuance of the proceedings before the trial forum would be futile exercise, wastage of time and abuse of process of Court or not. If on the basis of facts admitted and patent on record no offence can be made out then it would amount to abuse of process of law to allow the prosecution to continue with the trial."

(iv) Col. Shah Sadiq v. Muhammad Ashiq and others (2006 SCMR 276).

"It is also a settled proposition of law that if prima facie an offence has been committed, ordinary course of trial before the Court should not be allowed to be deflected by resorting to constitutional jurisdiction of High Court. By accepting the constitutional petition the High Court erred in law to short circuit the normal procedure of law as provided under Cr.P.C. and police rules while exercising equitable jurisdiction which is not in consonance with the law laid down by this Court in A. Habib Ahmad v. M.K.G. Scott Christian PLD 1992 SC 353. The learned High Court had quashed the F.I.R. in such a manner as if the respondent had filed an appeal before the High Court against order passed by trial Court. The learned High Court had no jurisdiction to quash the impugned F.I.R. by appreciation of the documents produced by the parties without providing chance to cross-examine or confronting the documents in question. Respondents had alternative 'remedy to raise objection at the time of framing the charge against them by the trial Court or at the time of final disposal of the trial after recording the evidence. Even otherwise, respondents have more than one alternative remedies before the trial Court under the Cr.P.C. i.e. sections 265-K, 249-A or to approach the concerned Magistrate for cancellation of the case under provisions of Cr.P.C.

According to provisions of Cr.P.C. it is for the Investigating Officer to collect all the facts connected with the commission of offence and if he finds that no offence is committed, he may submit a report under section 173, Cr.P.C. to the Allaqa Magistrate. On the other hand, if on the basis of his investigation he is of the opinion that the offence has in fact been committed, he has to submit report accordingly. However, the report of the Investigating Officer cannot be the evidence in the case. The investigation

is held with a view to ascertaining whether or not an offence has been committed."

(v) Muhammad Mansha v. Station House Officer, Police Station City, Chiniot, District Jhang and others (PLD 2006 SC 598)

"This Court has been repeatedly reminding all concerned that determination of the correctness or falsity of the allegations levelled against an accused person; the consequent determination of the guilt or innocence of such an accused person and the ultimate conclusion regarding his conviction or acquittal, was an obligation cast on the Court prescribed by the Code of Criminal Procedure for the purpose on the basis of legal evidence led at the trial after a proper opportunity to both the parties to plead their causes. It is a principle too well established by now that a resort to the provisions of section 561-A, Cr.P.C. or to the provisions of Article 199 of the Constitution seeking quashment of a criminal case was an extraordinary remedy which could be invoked only in extraordinary circumstances and the said provisions could never be exploited as a substitute for the prescribed trial or to decide the question of guilt or innocence of an accused person on the basis of material which was not admissible in terms of Qanun-e-Shahadat Order of 1984.

(vi) Muhammad Rizwan v. The State and others (2016 PCr.LJ 998)

The scope of the powers to be exercised by this Court under Article 199 of the Constitution by way of quashment of a criminal case needs to be considered. In this regard, the principles and law, as enunciated and laid down by the august Supreme Court, are well settled by now and may be summarized as follows.-

i) The High Court is not vested with the power to quash an FIR under section 561-A of Cr.P.C., on the grounds of mala fide or disclosing a civil liability.

ii) Resort to the provisions of section 561-A of Cr.P.C. or Article 199 of the Constitution for quashing a criminal case is an extraordinary remedy, which can only be granted in exceptional circumstances.

iii) As a general rule powers under Article 199 of the Constitution cannot be substituted for the trial, nor can any deviation be made from the normal course of law.

iv) The consideration to be kept in view for quashment of a criminal case is whether the continuance of the proceedings before the trial Court would be a futile exercise, wastage of time and abuse of the process of the Court, and whether an offence on the admitted facts is made out or not.

v) The exercise of powers and jurisdiction under Article 199 of the Constitution is discretionary in nature; however, the same are to be exercised in good faith, fairly, justly and reasonably, having regard to all relevant circumstances.

vi) While considering quashment of a criminal case in exercise of powers vested under Article 199 of the Constitution, the High Court is required to take into consideration the various alternate remedies available to a petitioner before a trial Court, inter alia, under sections 249-A and 265-K of Cr.P.C.

vii) Besides the above, the other alternate remedies available under the law have been

enumerated by the august Supreme Court in the case of 'Col. Shah Sadiq v. Muhammad Ashiq and others' [2006 SCMR 276] as follows.-

a. To appear before the Investigating Officer to prove their innocence.

b. To approach the competent higher authorities of the Investigation Officer having powers vide section 551 of Cr.P.C.

c. After completion of the investigation, the Investigation Officer has to submit the case to the concerned Magistrate, and the concerned Magistrate has the power to discharge them under section 63 of the Cr.P.C. in case of their innocence.

d. In case he finds the respondents innocent, he would refuse to take cognizance of the matter.

e. Rule 24.7 of the Police Rules of 1934 makes a provision for cancellation of cases during the course of investigation under the orders of the concerned Magistrate.

f. There are then remedies which are available to the accused person who claims to be innocent and who can seek relief without going through the entire length of investigation.

viii) A criminal case registered cannot be quashed after the trial Court has taken cognizance of a case, as the law has provided an aggrieved person with efficacious remedies for seeking a premature acquittal, if there is no probability of conviction or a case is not made out.

ix) Prior to exercising jurisdiction under Article 199 of the Constitution, the High Court has to be satisfied that the trial Court has neither passed an order nor any process issued.

x) Courts exercise utmost restraint in interfering with or quashing investigations already in progress, pursuant to statutory powers vested in the police or other authorities. Courts do not interfere in the matters within the power and jurisdiction of the police, particularly when the law imposes on them the duty to inquire or investigate.

15. The issue before this Court is not whether respondent No. 2 is liable under provisions of the Sales Tax Act, 1990, or whether or not allegations of tax fraud pending against respondents Nos. 2, 3 and 4 are of a serious nature. The impugned order and the impugned summons do not impinge upon exercise of authority by the petitioners under the Act. The issue before this Court is whether or not the impugned order and impugned summons suffer from any legal infirmity because of grant of permission to record an FIR in exercise of his powers under sections 22-A and 22-B of Cr.P.C and initiation of an inquiry to be conducted by respondent No.5. Allegations regarding any fraud that may or may not have been committed by respondent No. 2 will have to be determined in accordance with provisions of the Act. However, the severity of such allegations has no bearing on the obligation of the petitioners to exercise any authority vested in them such that it is in accordance with the law. To the extent that a complaint has been filed by respondents Nos.2, 3 and 4, alleging that actions of the petitioners constitute an offense under the Ordinance, there is neither any immunity afforded by law to the petitioners against investigation and prosecution in relation to such offense, nor does the impugned order suffer from legal infirmity for allowing the registration of an FIR and

initiation of an investigation.

16. In view of the fact that an investigation is yet to be undertaken by respondent No. 5, in order not to prejudice such investigation this Court has made no observations in relation to submissions of the parties on whether or not the actions of the petitioners suffer from mala fide and amount to colorable exercise of authority.

17. For the aforesaid reasons, this petition is dismissed with no order as to costs.

MH/138/Isl. Petition dismissed.