

**IN THE HIGH COURT OF SINDH AT
KARACHI**

Cr. Appeal No.163/2016

Appellants : Manzoor Ali and Imtiaz,
Appeared in person.

Respondents : The State and another,
through Mr. Abrar Ali Khichi, DPG for
respondent No.1 and Mr. Raza Muhammad
advocate for respondent No.2.

Date of hearing : 04.05.2018.

Date of judgment : 04.05.2018.

JUDGMENT

Salahuddin Panhwar, J: This appeal assails judgment dated 13.04.2016 passed by the court below in Direct Complaint No.55/2012 filed by respondent No.2 under section 3 and 4 of Illegal Dispossessions Act, 2005, whereby appellants were convicted and sentenced for five years R.I. with fine of Rs.100,000/- each.

2. Brief facts of the case are that a direct complaint was filed by complainant (respondent No.2 herein) stating that he is the real, legal and lawful owner of Property bearing House No.1267, Sector 12-E, Saeedabad, Baldia Town, Karachi, measuring 80 square yards, having purchased the same from its previous owner Muhammad Afzal vide sale Agreement dated 12.03.1998 and thereafter got installed Electricity, Sui-gas and

phone connections in his name in the year 2000; that he rented out the said house to tenant namely Gulzar Khan son of Imdad Ali Khan vide Tenancy agreement dated 26.01.2001 after the same was also got vacated after expiry of tenancy period and in this connection a case was proceeded in the competent court of law; that accused (appellants herein) are respectively his father and brother to whom the complainant had allowed to reside in his aforesaid house; that these accused in collusion of some area people who having good approaches in the area, with a preplan scheme, on 19.12.2011 threatened the complainant and beaten him and subsequently forcibly dispossessed/ejected the complainant and his family from the house in question on gun point and further threatened him to leave the house otherwise they will kill the complainant and his family; due to fear of life the complainant alongwith his family was compelled to leave the house in question; that in the month of April 2012 the accused No.2 (Mushtaque) with the connivance of accused No.1 & 3 (appellants herein) got prepared forged documents pertaining to the said property and transferred the Utility bills in their name; that when this fact came into the knowledge of the complainant, he got published a public notice in Daily Jang dated 09.05.2012; that subsequently he moved an application dated 25.06.2012 to SHO PS Saeedabad for taking legal action and lodging the FIR against the culprits, but no action was taken, as such the complainant sent said application through TCS and thereafter filed Petition u/s 22-A Cr.P.C. bearing Cr. Misc. Application No.739/2012 in the Court of District and

Sessions Judge (West) for lodging the FIR, complaint was allowed and FIR was lodged FIR No.359/2012 against the accused persons; that on the basis of said FIR the concerned departments re-named the utility bills in the name of complainant; that accused persons jointly and severally not only illegally occupied the aforesaid property of the complainant but have also committed forgery and perjury by getting the utility bills in the name of accused No.2 and are advancing threats of dire consequences to complainant and his family that if the complainant taken any legal action against them, then they will kill the complainant and his family; thus he prayed for :-

- 1) To take cognizance of the offence committed by accused U/S 3 (1) (2) of the Illegal Dispossession Act, 2005, and prosecute/punish the accused in accordance with law.
- 2) To issue directions to the concerned Police authority to eject the accused from the plot in question and thereby put the complainant/owner in peaceful physical possession of the Property bearing viz. House No.1267, Sector 12-E, Saeedabad, Batdia Town, Karachi, measuring 80 square yards, being lawful owner of the same.
- 3) To compensate the complainant in terms of Section 544 Cr.P.C. being victim of the offence caused the hand of the accused.

3. On filing such complaint, inquiry report dated 27.02.2013 was submitted by SHO PS Saeedabad; by order dated 05.09.2013 complaint was admitted for trial and BW's were issued in sum of Rs.30,000/- each against all accused persons, who appeared and joined the trial; charge was framed against them to which they plead not guilty.

4. Appellant No.1 filed counter affidavit to direct complaint denying the allegations and stated that the said plot was sold by Mohammad Afzal to Mst. Naseem Begum and purchased through complainant with mutual consent of Shehzada Muhammad Mushtaque and their mother but heavy amount paid by Shehzada Muhammad Mushtaque and some payments were contributed by other brothers i.e. complainant, Imtiaz and their mother; they were living in said house as joint family along with two unmarried sisters except Mushtaque who was abroad and Riaz who was living at Korangi. It is stated that sale agreement dated 27.04.1998 filed by respondent No.2 in the court below proved to be false and fabricated, as it showed names of witnesses as Shahzada Mohammad Mushtaque and Mohammad Iqbal; that Mohammad Afzal and Shahzada Mohammad Mushtaque had no knowledge about such deal as they did not sign the agreement hence their signatures were forged; that on 08.12.2011 respondent No.2 stated in writing that respectable persons of locality gathered at P.S. Bldia Town and on decision of Panchayat committee with mutual consent that the house belonged to him, his brother Shahzada Mohammad Mushtaque and Shahzada Mohammad Imtiaz; he also wrote on stamp paper in presence of witnesses that after this decision in Panchayat committee, he would not file any proceedings against his family before any forum and that his two brothers would get the utility connections transferred in their names and he would have no objection; that he left the house along with his family voluntarily however the complainant filed

false application before the police and lodged FIR on 09.07.2012 after about seven months of above *faisla*.

5. During trial on 11.01.2014 complainant recorded his evidence at Exhibit 3 and produced sale agreement, payment receipt, utility bills, tenancy agreement, application to IG Sindh Police, courier receipt, application alongwith courier receipts, public notice published in Daily Jang Newspaper, application u/s 22-A Cr.P.C. and FIR lodged by him as Exhibits 3/A to 3/K respectively. The complainant examined his real brother PW-2 Shahzada Muhammad Riaz at Exhibit 4, PW-3 Samiullah as Exhibit 5, PW-4 Muhammad Idrees as Exhibit 6 and thereafter closed his side. Accused Shehzada Muhammad Imtiaz, Choudhry Manzoor and Shehzada Muhammad Mushtaque recorded their statements at Exhibits 7 to 9 respectively denying the allegations being false. They claimed to examine themselves on oath and examine witnesses in defence. The statements on oath of accused were recorded at Exhibits 10 to 12. DW-1 Muhammad Afzal recorded his evidence at Exhibit 3, DW-2 Mst. Najma Parveen also recorded her evidence at Exhibit 14. Learned advocate for accused closed his side vide statement at Exhibit 15. After recording statement on oath accused Shahzada Muhammad Ishtiaque did not appear before this court and abscond away hence was declared proclaimed offender.

6. I have heard appellants, learned counsel for respondent as well as learned D.P.G. and perused the record.

7. The *conviction* u/s 3(2) of the *Act* as well quantum of *sentence*, so awarded by trial court, has made it quite proper and necessary to *first* refer and discuss the provision of Section 3(1) and 3(3) of the *Act separately*. The provision of Section 3(1) of the *Act* reads as:-

3. Prevention of illegal possession of property, etc.—
(1) No one shall enter into or upon any property to dispossess, grab, control or occupy it without having any lawful authority to do so with the intention to dispossess, grab, control or occupy the property from owner or occupier of such property.

The very **title** and language of the provision makes it quite obvious and clear that it is *aimed* to prevent **illegal possession** and *prima facie* restrains one from entering into or upon any property '**without lawful authority**' in order to or *even* with an intention to dispossess, grab, control or occupy same. The deliberate addition of '**grab, control or occupy**' also signifies that this (3(1)) is meant for **illegal possession**. Therefore, it has never been the requirement of Section 3(1) of the *Act* that there must be an **actual** dispossession of **owner** or **occupier** from such property but requirement would only be that:-

- i) one enters into or upon a property without lawful authority; and
- ii) such entrance into or upon was in order to or with intention to dispossess, grab, control, or occupy it;

Reference can be made to the case of **Gulshan Bibi v. Muhammad Sadiq** PLD 2016 SC 769 (Rel. P-777) wherein it is held as:-

7. ... So all that the Court has to see is whether the accused nominated in the complaint has entered into or

upon the property in dispute in order to dispossess, grab, control, or occupy it without any lawful authority. **Nothing else is required to be established by the complainant** as no precondition has been attached under any provision of the said Act which conveys the command of the legislature that only such accused would be prosecuted who holds the credentials and antecedents of 'land grabbers' or 'Qabza Group'. It does not appeal to reason that for commission of an offence reported in the complaint filed under the Illegal Dispossession Act, 2005 the Legislature would intend to punish only those who hold history of committing a particular kind of offence but would let go an accused who though has committed the offence reported in the complaint but does not hold the record of committing a particular kind of offence. In our view trial of a case is to be relatable to the property which is subject matter of the complaint, pure and simple. Any past history of the accused with regard to his act of dispossession having no nexus with the complaint cannot be taken into consideration in order to decide whether the accused stands qualified to be awarded a sentence under the Act or not. Once the offence reported in the complaint stands proved against the accused then he cannot escape punishment under the Illegal Dispossession Act, 2005.

The punishment for such an *offence* has been provided as:

2). Whoever contravenes the provisions of the sub-section (1) shall, without prejudice to any punishment to which he may be liable under any other law for the time being in force, be punishable with imprisonment which may extend **to ten years and with fine** and the victim of the offence shall also be compensated in accordance with the provisions of section 544 of the Code.

However, the Act also provides a protection against ***forcible or wrongful dispossession*** of '**owner**' or '**occupier**' but independently which is covered by Section 3(3) of the Act which reads as:-

(3) Whoever **forcibly and wrongfully dispossesses any owner or occupier** of any property and **his act does not fall within sub-section (1)**, shall be punished with imprisonment which may **extend to three years or with fine or with both**, in addition to any other punishment to which he may be liable under any other law for the time being in force. The person dispossessed shall also be compensated in accordance with provisions of section 544-A of the Code)

Such act *prima facie* not only has been made a ***separate offence***

but punishment thereof has been provided *independently* hence for proving this [offence u/s 3(3)] it would always be requirement of the law to prove that:

- i) the '**owner**' or '**occupier**' was physically dispossessed;
- ii) such *dispossession* was either forcible or wrongful;
- iii) such *dispossession* was without lawful authority;

Now, I would conclude that no offence within meaning of Section 3(1) of the Act would be made out if there is no allegation of one to have **wrongfully entered into** or **upon a property**. In short, this would not be applicable against one who was allowed / permitted entrance into or upon *disputed* property by '**owner**' or '**occupier**' such as against **tenant; licensee; co-owner** etc. The Section 3(2) of the Act *even* is not in derogation to well settled principle of law that **none has to take the law into his hands** hence even if status of '**occupier**' (not obtaining possession *illegally* within meaning of Section 3(1) of Act) is denied / disputed by '**owner**' yet he (**owner**) would not be legally justified to **forcibly** or **wrongfully** dispossessed such '**occupier**'. Thus, a complaint under section 3(3) of the Act could well be maintained against the '**owner**' *even* by the '**occupier**' if such '**owner**' forcibly or *wrongfully* dispossesses the '**occupier**' .

8. Now, I would revert to merits of the case, *prima facie*, it was an admitted position that the complainant *himself* had stated in his complaint that:

“accused are respectively his father and brother **to whom the complainant had allowed to reside in his aforesaid house;**

The very admission of the complainant that accused (appellant *herein*) were allowed to reside was always sufficient to conclude that there had not been any **illegal** or **wrongful** entrance into or upon the disputed property hence offence under section 3(1) of the Act was never made out. A permission by ‘**owner**’ or ‘**occupier**’ to one to enter into or upon would dress such person with status of ‘**licensee**’ which status would provide protection, as provided by Section 3(3) of the Act, to such person *even*. In such a situation no conviction can sustain under section 3(2) of the Act thus, the learned trial court judge wrongly awarded conviction to appellants under section 3(2) of the Act when *undeniably* there was no **illegal entry into or upon** disputed property rather admittedly it was the **complainant** himself who had allowed them (appellants) to enter into and reside in disputed property (house). Accordingly, conviction, so awarded by learned trial court judge under section 3(2) of the Act, was / is not sustainable.

However, since the complainant claimed **dispossession** which, as already discussed is an independent offence, therefore, it would be proper to see whether the complainant succeeded in establishing the charge within meaning of section 3(3) of the Act or otherwise?.

9. In the instant matter, *prima facie*, the complainant never successfully established his **forcible or wrongful**

dispossession which, *otherwise*, was necessary ingredient to make out an offence within meaning of Section 3(3) of the Act. It is a matter of record that the complainant himself stated in his complaint as:-

‘5. That the accused above-named with the collusion of some area peoples who having good approaches in the area, with a preplan scheme, on 19.12.2011 threatened the complainant and beaten him and subsequently forcibly dispossessed/ejected the complainant and his family from the house in question on gun point and on gun point threatened the complainant to leave the house otherwise they will kill the complainant and his family their dead body will pack in bags and will throw anywhere. **Due to fear of life the complainant alongwith his family was compelled to leave the house in question and presently residing at the address given in the title of the complainant.**

6. That in the **month of April 2012 the accused No.2** with the connivance of accused No.1 & 3 got prepared forged documents pertaining to the said property and transferred the Utility bills in his name.

7. That **when this fact came into the knowledge of the complainant**, he got published a public notice in **Daily Jang dated 09.05.2012.**’

Prima facie, the complainant was compelled to leave the house which act, *no doubt*, would fall within meaning of **wrongful dispossession** but would always require the complainant to establish the complained acts and omissions, thereby resulting into one’s wrongful dispossession. The contents of the complaint *themselves* indicate that there was no *grievance* to complainant till the accused no.2 got the *utility connections* changed into his name and there was no complaint or *approach* even by complainant to any authority with regard to his **wrongful dispossession**. Though the learned trial Court judge *himself*

admitted that burden was upon the complainant to prove the ingredients of complained offence yet failed to appreciate that complainant only established his claim as *purchaser* but never proved his **forcible** or **wrongful dispossession** by independent and confidence inspiring evidences. Here a referral to operative part of the *impugned* judgment, being relevant, is made hereunder which reads as:-

“10. There is no cavil to proposition that complainant in this case is duty bound to prove the charges of this case/complaint against the accused beyond shadow of doubts. The admission made by DW Muhammad Afzal for purchase of disputed property by complainant from him and making such sale amount/consideration to him, is sufficient to prove that complainant was lawful purchaser of subject property as well as owner of the same. In these circumstances I am of view that complainant has proved that **he is lawful purchaser and occupier of the disputed property** through cogent evidence and even defence witness has also supported the complainant on this point..... In such circumstances it is clear that though complainant is not titled owner of the disputed property but it is proved that he is lawful occupier of the same and he was in possession of the disputed property **when he was illegally dispossessed by the accused.** The complainant deposed that **his father had asked him to give share from disputed property to his other brothers but he refused on which they started extend threats of murder to his family.** The complainant further deposed that on 19.12.2011 the accused persons on pointation of gun had extended threats of murder of his wife and children and forcibly dispossessed him from the said disputed property/house. The accused had not denied in possession of the disputed house but deposed in their statements on oath that on **19.12.2011 complainant himself left the house and shifted to some other place.** Since the complainant has proved that he was lawful purchaser and occupier of the disputed property/house and he also deposed on oath before this Court that on 19.12.2011 he was forcibly dispossessed by the accused from said house hence the **burden of proof shifted towards the accused**

to prove that they had not illegally dispossessed the complainant from the disputed house and they are in lawful possession of the same..... The complainant has also proved that accused persons had entered into the disputed house and they are in possession of the same without any lawful authority. ... The accused had also failed to produce any document in support of their plea taken in defence or to prove that they are in lawful possession of disputed property.”

It is pertinent to add that mere proof of one to be **‘owner’** or **‘occupier’** is never sufficient to prove his **forcible** or **wrongful dispossession** from disputed property. Nor it would be sufficient to shift the burden upon the accused (otherwise falling within meaning of **‘occupier’**) to prove that complainant was not **forcibly** or **wrongfully ‘dispossessed’** particularly where the accused claimed that complainant himself had left the house. It is a matter of record that disputed property is situated in a populated area where there happened a **forcible dispossession** of complainant under **guns** yet the complainant did not examine any independent person from *mohalla* so as to prove his claimed **forcible dispossession** on a particular date and time. Needless to add that any *doubts* in proving the **ingredients of offence** would always go in favour of the accused even in a complaint, filed under Illegal Dispossession Act because it was / is always the duty of the complainant to prove complained offence **beyond shadow of doubt**. Thus, I am also of the clear view that the complainant also failed in proving the offence within meaning of Section 3(3) of the Act i.e **forcible / wrongful dispossession** hence the conviction, so awarded by the learned trial court judge, cannot sustain.

10. While parting, it is necessary to add here that since Section 3 of the Act has been in addition and never “**to any other punishment to which he may be liable under any other law for the time being in force**” therefore, an acquittal or conviction under IDA would never prejudice the merits of some other *criminal case*, if so lodged even on same facts, nor would allow the accused to raise plea of *double jeopardy* in such *independent* proceeding, else this shall frustrate the deliberate use of **phrase ‘in addition to any other punishment to which he may be liable under any other law for the time being in force’** by legislature.

These are the detailed reasons for the short order dated 04.05.2018 whereby impugned conviction was set-aside and appellants were acquitted.

Imran/PA

J U D G E