

## IN THE HIGH COURT OF SINDH AT KARACHI

### **Criminal Appeal No. 08 of 2022**

Dates of hearing : 10.02.2023

Date of Judgment : 09.03.2023

Syed Sharafat Ali Zaidi : through M/s. Shaikh Riaz Ahmed & Syed Abrar Ahmed Bukhari, Advocates.

Dr. Piyar Ali Soomro, Proposed: through Mr. Aftab Ahmed  
Accused No.1 Channa, Advocate.

State : through Mr. Zahoor Shah,  
D.P.G. along with  
SIP Hasnain of P.S. Aziz Bhatti,  
Karachi.

### J U D G M E N T

**MUHAMMAD SALEEM JESSAR. J-** By means of instant Criminal Appeal the appellant has assailed the order dated 06.12.2021 passed by learned IIIrd Additional Sessions Judge, Karachi East in I.D. Complaint No. 133 of 2021, filed by appellant whereby he has declined to take cognizance in respect of the offence allegedly committed by proposed accused persons No.1 to 5.

2. Brief facts, relevant for the disposal of instant Criminal Appeal, are that the appellant purchased a plot of land No.456, Block-19, Improvement Scheme No.24, Gulshan-e-Iqbal, Karachi admeasuring 149 square yards from KDA which was leased out to him by KDA in his name through registered lease deed dated 16.07.1997 while its letter of acknowledgement was also issued on 11.04.1994. Later on, when the appellant intended to construct a residential house, he applied for approval from the competent authority which was processed and was accordingly approved. The appellant after demarcation of the plot

brought construction material at site to carry out the construction of house, however, proposed accused gathered there and objected on the demarcation and they claimed that said property is part of their passage to their residences in Katchi Abadi. Thereafter, appellant made complaint against hindrance, interference and disturbance created by proposed accused person in the construction work but the miscreants did not stop their interference hence he filed Civil Suit No.1059/2002 (Old No.1709/2001) which was decreed in his favour, but proposed accused persons even then did not obey the said judgment and decree and continued to keep their possession over the legal and lawful property/plot of the appellant, therefore appellant filed Execution Application before the Executing Court which was too allowed but the proposed accused resisted the execution proceedings by taking law into their hands. In the circumstances the appellant made complaint at PS Aziz Bhatti on 22.07.2012 which was processed by SHO through DSP to arrange heavy police contingency for removal of encroachment, but they failed to restore the property in question from the proposed accused. As a last resort, to execute the decree, the Executing Court was pleased to appoint Nazir to recover the possession from proposed accused and to deliver its possession to the appellant, and subsequently, order dated 13.10.2018 was executed through Nazir and the possession was handed over to the appellant, but soon after the possession was handed over to the appellant by Nazir, same was again encroached upon by proposed accused, hence the order of the Court was flouted and remained unaffected, and the appellant was dispossessed on 20.10.2018, therefore the appellant filed complaint under Illegal Dispossession Act, 2005 (the Act).

3. After filing the complaint, report was called from SHO of PS Aziz Bhatti, Karachi who accordingly submitted his report wherein he stated that he recorded the statement of complainant who produced documents of ownership of subject property, and he also inspected the place of incident and inquired from people of vicinity who disclosed that the plot in dispute is situated on main road between Works Society

and Shanti Nagar and no sign of demolition of structure was found there. Thereafter, the trial court, after hearing the learned counsel for the parties dismissed the complaint filed by the appellant vide order dated 06.12.2021 which has been impugned in instant Criminal Appeal filed Under Section 8-A of Illegal Dispossession Act 2005.

4. I have heard arguments advanced by learned counsel for the parties and have perused the material available on the record.

5. Learned counsel for the appellant submitted that appellant is the owner of Plot bearing No.A-456, block 19, Improved Scheme No.24, Gulshan-e-Iqbal, Karachi having an area of 149 Square Yards, which was leased out to him by the KDA through registered Lease Deed dated 16.07.1997 vide its letter of acknowledgment dated 11.04.1994. He further submitted that appellant/ complainant intended to construct a house on his plot, as such he applied for its approval from the authority which was processed and approved (available at pages-53 to 57 of the Court file) and to such effect, applicant also filed F.C Suit No.1709/2001 (old) and 1059/2002 (new) for declaration and permanent injunction, before the Court of VIIth Senior Civil Judge, Karachi-East (re-Syed Sharafat Ali Zaidi Versus Shantinager Welfare Association and others). In said suit, Works Cooperative Housing Society Ltd, Karachi Development Authority and SHO, P.S Aziz Bhatti, Karachi were arrayed as Defendants No.8 to 10. After admission of the suit and pursuant to process issued by the trial Court, defendants appeared and filed their respective written statements and later disappeared, therefore, it was decreed by way of judgment dated 21.05.2010 (available at pages-59 of the Court file) and decree dated 21.05.2010 (available at pages-81 to 85 of the Court file). Learned counsel for the appellant further submitted that since the judgment as well as decree was not assailed by the defendants, the same attained finality; hence, the appellant filed Execution Application No.08/2011 which was also allowed by order dated 25.07.2012 (available at pages-88 to 91 of the Court file). Learned counsel for the appellant referred the concluding

para of the executing Court's order dated 25.07.2012 which reads as under:

**"In the light of above facts and circumstances, I therefore allow the execution application in hand, it is hereby directed defendant No.1, 4, 7, 8 & 9 to remove obstruction in respect of construction of plaintiff/D.H of the Suit plot No.A-456 Block No.19 Works Co-operative Housing Society, Gulshan-e-Iqbal, Karachi being Custodian of the Society defendant No.8 and also been directed to give proper space to the D.H for construction of his house and SHO is directed to associate for remove of obstruction."**

6. According to the learned counsel for the appellant, upon orders of the executing Court, SHO, P.S Aziz Bhatti, Karachi restored the possession of property in dispute to the appellant in presence of Estate Officer for Works Cooperative Housing Society on 20.10.2018 (available at page-109 of the Court file), therefore, the appellant brought construction material at the site; however, before he could start raising construction over the plot, proposed accused gathered there and removed the construction material and affixed their tents around the plot in question by forcibly dispossessing the appellant. Therefore, the appellant filed Complaint in terms of Section 3 & 4 of Illegal Dispossession Act, 2005. The learned counsel further submitted that after calling reports from the concerned S..H.O., the trial Court/ IIIrd Addl. Sessions Judge, Karachi (East) dismissed the complaint vide order dated 06.12.2021, which has been impugned in instant appeal. Learned counsel further submitted that the impugned order suffers from many illegalities and infirmities; hence, it may be set-aside and case may be remanded by directing the trial Court to record evidence of the parties and then decide the fate of the complaint according to law.

7. Learned Deputy P.G, Sindh appearing for the State, opposes the impugned order on the ground that title documents are in favour of the appellant and the respondents/ proposed accused have no title or any authentic proof to claim the property in dispute being their own. Hence, learned Deputy P.G, Sindh has no objection for grant of appeal in hand.

8. Learned counsel for respondent No.1/proposed accused submitted that he has already submitted legal objections along with his statement dated 28.06.2022, which may be treated his arguments. He; however, submitted that property in dispute basically is a passage path and the proposed accused had not dispossessed the appellant; hence, impugned order does not suffer from any illegality or infirmity which may require interference by this Court. He; however, admitted that proposed accused have no title document or any sanction from the competent authority to show that property in dispute has been reserved for the passage or the path / street/ road, etc. He; however, opposed the appeal.

9. In instant case the grievance of the appellant / complainant is that he had purchased the plot in question which was duly leased out to him by KDA in his name through registered lease deed dated 16.07.1997 and after getting the building plan approved from concerned authority, when he wanted to raise construction, the accused raised obstructions/hindrances in raising the construction. According to complainant, thereafter he made complaint against hindrance, interference and disturbance created by the accused but they did not stop their interference hence he filed above said Civil Suit which was decreed in his favour and execution application filed by him was allowed. Thereafter, the order dated 13.10.2018 passed in Execution Application was executed through Nazir and the possession was handed over to the appellant, but soon after the possession was handed over to the appellant by Nazir, he was forcibly and illegally dispossessed by accused persons on 20.10.2018 by putting tent around the plot in question, therefore, the complainant filed complaint under the Illegal Dispossession Act. It seems that the main stress laid by learned trial court while dismissing the complaint filed by the appellant/complainant is that the plot in question on which the complainant wanted to raise construction is a passage and is situated on the road. It would be advantageous to reproduce hereunder the relevant

portions from the impugned Order wherein the Trial court has made such observations:-

*"5) The possession of property was although given to the complainant in execution proceedings through Nazir, but the complainant has failed to prove that if any demarcation was made at the time of execution of lease deed, as the record available on record prima facie indicates that the property leased out in favor of complainant was situated right in the middle of road connecting Shanti Nagar and Works Society which is being used as public passage, which can never be allowed for residence, as the same amounts to obstruction in the public way... .."*

*"6... ..The report of SHO is very much clear that no construction was made over the disputed property at any point of time, rather the pictures produced along with inquiry report unequivocally proves that property in dispute is situated on main road on which shops are also situated and it a passage for general public, and if construction is allowed to be made, the entire public passage on main running road would be blocked, causing immense difficulty for general public in going through the main road from one place to the other."*

10. While making aforesaid observations and dismissing the complaint of the appellant / complainant on such ground, learned trial Court seems to have exceeded from his jurisdiction, authority and powers bestowed upon it by the legislature while enacting Illegal Dispossession Act 2005. Needless to emphasize that the purpose and object of Illegal Dispossession Act, 2005 is to provide protection to the owners/occupants of immovable property from forcible and illegal dispossession at the hands of land grabbers and/or any other person(s) who have no legal authority to occupy and enter such property. In fact, the scope of the Act 2005 is very limited and the Court, exercising powers under section 3 of the Act, is merely supposed to determine the fact as to whether who was in actual physical possession of the property in question before filing of the complaint and as to whether the complainant was dispossessed in an illegal and unlawful manner by the persons arrayed as accused/opponents in such complaint. However, the Court is not competent to give any finding with regard to the title or ownership or, for that matter, in respect of authenticity/genuineness of a

document. In this connection reference may be made to the case of *NIAZ MOHAMMAD (DECEASED) through LRs Vs. UMER KHAYAM and 2 others* reported in 2022 P Cr. L J Note 14 wherein it was held as under:

*“12. However, there is another aspect of the case, but before dealing with the said aspect, it may be observed that the scope of Illegal Dispossession Act, 2005 is very limited and the Court, exercising powers under section 3 of the Act, is merely supposed to determine the fact as to whether who was in actual physical possession of the property in question before filing of the complaint and as to whether the complainant was dispossessed in an illegal and unlawful manner by the persons arrayed as accused/opponent in such complaint. However, the Court is not competent to give any finding with regard to the title or ownership or, for that matter, in respect of authenticity/genuineness of a document. In this connection, reference may be made to the cases reported as *Rahim Tahir v. Ahmed Jan and others* (2007 PCr.LJ 1920) and *Gulzar Ali and another v. Station House Officer, Police Station Kandiaro and others* (PLD 2012 Sindh 390).”*

11. In view of this legal position, it is apparent that learned trial Court while deciding the complaint has exceeded from its jurisdiction and has acted like a Civil / Appellate Court. In fact, the domain of discussing and deciding the title and ownership of any property is that of Civil Court and not the Court constituted under the Illegal Dispossession Act 2005. As stated above, the latter Court is supposed / authorized only to look into the fact as to whether the complainant was an owner or occupier of the property in question and as to whether he was dispossessed by any person without adopting the due process of law.

12. Another worthwhile point in the case is that disputed facts are involved in instant case and, in fact, the trial Court itself in para No. 7 of the impugned order has discussed such disputed facts. In such circumstances, learned trial Court ought to have afforded proper opportunity to the parties to lead their respective evidence in order to arrive at just and proper conclusion as to whether the complainant was in physical possession of the property in question and as to whether the accused persons had forcibly and illegally got him

dispossessed therefrom. I am of the firm view that unless and until the evidence is recorded in the case, it would not be possible for the Court to adjudicate upon such point in a just and proper manner. However, in instant case learned trial Court, although has elaborately discussed the versions of both the parties as depicted from the report of the SHO concerned; however, without getting such facts adjudicated by means of recording of evidence, has given findings against the complainant and dismissed his complain in a hasty and mechanical manner. In this connection reference may be made to the case of *Daim Ali Khan Versus Mushtaque Ali alias Farooq and 4 others* reported in 2017 Y L R 1456 wherein it was held as under:-

*“12. There are two different aspects of present controversy i.e. firstly, the question of sale of suit house through sale agreement without mutation of title/Foti Khata in favour of the legal heirs of deceased Moula Bux Khoso, and the matter relating to the sale agreement in question could only be dealt with by the Civil Court; and second, the question of illegal dispossession is absolutely different from the civil liabilities, and learned trial Court was bound to ascertain as to whether the allegations levelled by the applicant constituted an offence under Illegal Dispossession Act, 2005, or otherwise. Trial Court, in circumstance, had failed to exercise the jurisdiction vested in it in appropriate manner and committed material illegality and gross irregularity, while dismissing the complaint without recording the evidence of the parties and affording them opportunity to produce their documents during the trial.”*

13. It is also significant to point out here that while passing the impugned order, learned trial Court has made two contradictory observations. At the one stage in para No. 7 of the impugned order the Trial Judge observed, “.....and nothing was brought on record that if complainant ever remained in physical possession of the property in dispute”, while in para 6 of the impugned order he observed, “The complainant has failed to produce documentary proof with regard to the fate of execution proceedings, as if the possession was immediately taken back from complainant, then he ought to have approached to the Executing Court and give intimation about such illegal act of proposed accused, and Executing Court was competent to take notice of it and execution application could not be satisfied in such circumstances, but learned counsel for complainant frankly conceded that despite of fact



*that soon after getting possession through Nazir it was taken back from him by proposed accused, yet complainant did not intimate the Executing Court promptly which fact does not appeal prudent mind."*

14. While making such observations, learned trial Court has miserably failed to consider the legal position that once the complainant had been put in physical possession of the property in question by the Nazir of the Court in compliance with the order passed in Execution Application, the operation of the Illegal Dispossession Act, 2005 would come into motion when proposed accused dispossessed him from the property in question and in such circumstances the complainant was fully competent and legally justified to invoke the jurisdiction of the Court constituted under the Illegal Dispossession Act. Needless to emphasize that now it is well settled that even the pendency of civil litigation does not bar a person to approach the Court by invoking the provisions of Illegal Dispossession Act if he has been illegally dispossessed from the property which was owned and / or occupied by him. In this connection, reference may be made to the case reported as *Habibullah and others Vs. Chaman and others (2922 P.Cr. L.J. 1730)*, wherein a Division Bench of Peshawar High Court held as under:

*"9. No doubt, civil litigations remained pending adjudication before the parties since 1982 but the merely on the basis of civil litigation neither the proceedings in criminal matter can be terminated nor the transfer of possession in term of section 8 of the Act of 2005 can be declared illegal. This controversy was put to rest by the apex Court in the case of Shaikh Muhammad Naseem (2016 SCMR 1931) where it was held:*

*"In the impugned judgment it was also held that where civil litigation with regard to illegal dispossession from immoveable property is pending between the parties, the proceedings under the Illegal Dispossession Act, 2005 cannot be maintained. This finding is also based on the decision of the Lahore High Court in Zahoor Ahmed's case (PLD 2007 Lahore 231, reasoning of which was adopted by three-member bench of this Court in Bashir Ahmed's case (PLD 2010 SC 661). We are of the view that such a finding is also not sustainable in law. Any act which entails civil liability under civil law as well as criminal penalty under*

*criminal law, such as the Illegal Dispossession Act, 2005 then a person can be tried under both kinds of proceedings, which are independent of each other. Once the offence reported in the complaint stands proved against the accused within the confines of the provisions of the Illegal Dispossession Act, 2005 then he cannot escape punishment on the ground that some civil litigation on the same issue is pending adjudication between the parties. No one can be allowed to take law in his own hands and unlawfully dispossess an owner or lawful occupier of an immovable property and then seek to thwart the criminal proceedings initiated against him under the Illegal Dispossession Act, 2005 on the pretext that civil litigation on the issue is pending adjudication between the parties in a court of law. Therefore, irrespective of any civil litigation that may be pending in any Court, where an offence, as described in the Illegal Dispossession Act, 2005, has been committed, the proceedings under the said Act can be initiated as the same would be maintainable in law."*

15. Learned Trial Court in the impugned order has also observed that the complainant had not yet raised the construction on the plot in question and that the enquiry officer / SHO in his report has also stated that when he inspected the site he did not find any sign of demolition. It appears that while making such observations, learned trial Judge has totally ignored that at no point of time the complainant has either said that he had raised construction on the plot in question and that the accused had demolished the construction raised by him. In fact, from the very beginning the plea of the complainant has been that after he was handed over possession of the plot in question by the Nazir, he brought construction material at the site and as soon as he was going to start construction, the accused persons gathered there and forcibly and illegally removed construction material from there and got the complainant dispossessed from the property in question. In this view of the matter the observations made by learned trial Court are contrary to the factual aspects of the case.

16. It is also worthwhile to point out at this stage that during the proceedings of the suit in which ultimately decree was passed in favour of the complainant, there was in all ten defendants and out of them

some of the defendants did not file even written statement whereas some of them filed written statement but did not adduce their evidence whereas only defendant No.1 namely Shantinagar Welfare Association and defendant No.4 namely Iftekhhar R/o Sindhi Para Shantinagar adduced their evidence, however, they also did not challenge the judgment and decree so also execution order by way of filing appeal etc, thus the judgment and decree attained finality.

17. The upshot of above discussion is that instant Criminal Appeal is hereby allowed. Consequently the impugned order dated 06.12.2021 passed by learned IIIrd Additional Sessions Judge, Karachi East in I.D. Complaint No. 133 of 2021 is hereby set aside, resultantly the matter is remanded to the Trial Court with direction to take cognizance in the matter and proceed with the trial and afford opportunity to both parties to lead their evidence and after appreciation of such evidence dispose of the matter strictly in accordance with the law within a period of six months under intimation to this Court.

18. Since, learned counsel for the appellant has shown apprehension of injustice on the part of Presiding Officer of the trial Court, therefore, file of I.D Complaint No.133/2021 is hereby withdrawn from the file of 3<sup>rd</sup> Addl. Sessions Judge, Karachi (East) and is made over to learned Sessions Judge, Karachi (East) with directions to try himself or assign it to any other Court having jurisdiction.

Dated. 09<sup>th</sup> March, 2023.

Judge