

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Revision Application No.281 of 2022

Date	Order with signature of Judge
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1. For orders as to maintainability
2. For hearing of main case
3. For order on MA No.15276/2022

17.11.2023

Mr. Muhammad Habib Jalib advocate for the applicant
Ms. Liaqat Ali Khan advocate for respondent No.1
Mr. Siraj Ali Khan, Additional PG

Applicant Mst. Rubina Wahid being aggrieved by and dissatisfied with the impugned Order dated 20.12.2022 passed by the Learned Additional Sessions Judge-VI, Karachi West to the extent of restitution of the possession of the subject property to the respondent No.1.,inter-alia on the ground that applicant filed an application for withdrawal of her ID Complaint No.107/2021 under section 3 & 4 of Illegal Dispossession Act, 2005 and the same was allowed as withdrawn, however, the possession of the subject property was ordered to be handed over to the respondent No.1., which was not the mandate of the Court and the learned trial court acceded his power and authority. She prayed for setting aside the aforesaid portion of the order.

2. As per the record applicant filed a Complaint under sections 4, 7, and 9 of the Illegal Dispossession Act, 2005, against respondent No.1 and 2. During the proceeding, the applicant /complainant moved an application dated 20.12.2022 for withdrawal of her complaint. His application was allowed through the impugned order. The point that requires consideration at first instance is whether the complaint filed under provisions of Act-XI of 2005 can be withdrawn or not. As per learned Additional PG, this cannot be done as there is no provision in the Act. While counsel for respondent No.1 objected the same. The application for withdrawal was moved, which speaks as under:-

“It is respectfully prayed on behalf of the Complainant named above that this Court may be pleased to dispose of the above matter as the Complainant is withdrawing the above matter.”

3. The point that requires consideration at first instance is whether the complaint filed under provisions of Act-XI of 2005 can be withdrawn or not and whether upon withdrawal possession of the subject property could be handed over to the party from whom it was taken as an interim arrangement. Primarily, Section 9 of the Act, which

speaks to the provisions of the Code of Criminal Procedure, 1898 (V of 1898), shall apply to proceedings under this Act and in the presence of the aforesaid provision section 248 Cr. P.C. speaks about the withdrawal of the complaint at any stage of the proceedings and now the question is whether the said provision is applicable in sessions case, prima-facie the answer is not positive for the reason that section 248 Cr. P.C relates to the proceedings pending before the Magistrate. But the case in hand is for an offense only triable by the Court of Session. However, I have not come across any provision for such withdrawal of the complaint in respect of cases pending adjudication under the Act 2005, and if the withdrawal is allowed at all whether, the possession can be restored to the other side when the complainant voluntarily withdraws her complaint as the purpose of filing the complaint was served as the possession was handed over to her by the interim order passed by the trial court.

4. As per the applicant/complainant, she has the right to withdraw the complaint filed by her without condition. As per learned APG, the case in hand is filed in respect of an offense under sections of the Illegal Dispossession Act, 2005, a special Law, therefore, the procedure provided therein is to be observed, while conducting the trial/ decision of the case and that as per section 4 of the Act, the offense defined in section 3 of the Act shall be triable by the Court of Session on a complaint; that Section 5 of the Act describes the procedure of trial and of investigation required to be made by the Court, while sections 6, 7 and 8 describe the procedure required to be observed while attachment of the property, eviction, and mode recovery of the property and delivery of possession to owner on conclusion of the trial. Per learned APG there is no provision as to withdrawal of the complaint during its pendency.

5. learned counsel representing the respondent has opposed this revision application by refereeing the objections and arguing that he is the owner of the subject premises and by the order of the trial court his possession was taken over under section 7 of the Illegal Dispossession Act, 2005, as an interim arrangement and since the applicant failed to produce evidence to bring her case within the Act,2005, opted to withdraw from her complaint and the learned trial court avoided to impose a penalty upon her, preferred to restore the possession to its true owner and the same was acted upon thus no case for indulgence of this court is made out. He prayed for the dismissal of the instant revision application.

6. I heard the parties and perused the record of the case with their assistance. The learned trial Court while accepting the request for withdrawal, passed the following order:-

“Learned counsel for the complainant has filed an application for withdrawal of his Direct Complaint praying therein to dispose of the matter as the complainant herself is withdrawing the above matter unconditionally. Complainant Mst. Rubina Wahid is present in court and she has also assented with the statement of withdrawal. Learned counsel for respondent/intervener Muneer Ahmed and proposed accused Salahuddin are also present in the court and raised no objection in respect of such withdrawal, subject to the restitution of the possession at the same stage as it was previously before filing of instant Direct Complaint under Illegal Dispossession Act, 2005.

Heard the parties and perused the record, it appears that after filing of the instant Direct Complaint, the matter was proceeded and an inquiry report was duly filed by the concerned police official. This court after hearing the parties and perusal of record took cognizance on 26 08 2021. The record further reveals that the matter since last one year is fixed for recording of the evidence of the complainant side, but learned counsel for the complainant time and again is avoiding to record the evidence of the complainant without any plausible reason and today he has filed the application for withdrawal of his direct complaint. It further transpires that the court during the course of proceedings, heard the application under section 7 of the Illegal Dispossession Act, 2005 which was allowed in favor of the complainant, and the interim possession of the property was handed over to the complainant as an interim relief. Since then complainant has failed to bring any evidence and today she wishes to withdraw the complaint without any plausible reason. Such type of attitude of the complainant appears that the complainant side is trying to take undue advantage, in order to usurp the property which was only handed over to her as an interim relief under section 7 of the Illegal Dispossession Act, 2005, till the final decision of the instant direct complaint.

Keeping in view of the above, the application of withdrawal of direct complaint under sections 3 & 4 of the Illegal Dispossession Act, 2005 is allowed with no order to impose any penalty, subject to a further order for restituting the possession of the subject property to the person who was already in possession Nazir is directed to restitute the possession of subject property from complainant namely Mst. Rubina Wahid and handover the same to respondent Salahuddin who was stated to be in possession at the time of passing the interim order dated 11.11.2021. Nazir is further directed to seek assistance from the concerned SHO of P.S. Surjani Town, if he requires so, in terms of taking over the possession, and the same may be executed within 48 hours after receipt of this order and submit such report before this court.

Accused Salahuddin is present on bail. He is acquitted from the charge, his bail bond stands canceled and surety discharged.”

7. In this matter it has come on record that the applicant simply filed a statement before the trial Court to the extent that she does not want to prosecute the accused and intends to withdraw the direct complaint, which was allowed however the trial went ahead and directed the applicant to hand over the peaceful possession of the subject property to Respondent Salahuddin who was stated to be in possession at the time of passing the interim order dated 11.11.2021. In my view, this finding is beyond the mandate of the statement filed by the applicant from withdrawing the complaint filed under Section 3, 4 of the Illegal Dispossession Act 2005.

So far as the question of possession of the subject property in terms of Section 7 of the Illegal Dispossession Act 2005 is concerned, suffice it to say that once the Court reached its conclusion that the applicant was entitled to interim possession, in the intervening period no further order could be passed till the matter is decided on merits either in the conviction of the accused or acquittal of the accused, which factum is missing in the present case, as the learned trial Court simply allowed the withdrawal of the complaint and ordered the possession to be handed over to the respondent without findings on the subject issue, thus the impugned order to the extent handing over possession is the erroneous decision on the part of trial Court before Judicial Proprietary demand the decision to be made on merits, by allowing the parties to adduce the evidence.

8. In view of the above discussion, the Criminal Revision Application bearing No.281 of 2021 is hereby accepted. The impugned order dated 20.12.2022 passed by the Learned Additional Sessions Judge-VI, Karachi West is set aside; the case is remanded to the trial court with direction to proceed with the matter on merits. The trial Court is further directed to determine the issue of possession of the subject property in the intervening period, without any loss of time, and conclude the proceedings within two months positively.

JUDGE