

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Revision Application 119 of 2019
(Muhammad Naveed & others v Kamran Shamim & another)

Date Order with signature of Judge

Priority Cases

1. For orders on office objection.
2. For hearing of main case

Date of hearing 31.10.2023

Date of order 13.11.2023

Mr. Atta Hussain Khoso advocate for the applicants
Mr. Muhammad Rafi Kamboh advocate for Respondent No.1
Ms. Rahat Ahsan, Addl. P.G

ORDER

Through this Criminal Revision application under Section 439 Cr.P.C., the applicants Muhammad Naveed, and Parveiz Farooq have questioned the order dated 20.06.2019 passed by the VII Additional District & Sessions Judge (South) Karachi in Criminal Illegal Dispossession Complaint No. 296 of 2019 whereby their Petition under Section 3,4 and 7 of the Illegal Dispossession Act, 2005 was dismissed on the premise that mere denial of the relationship of landlord and tenant by the respondent does not make entitle the complainant to file the complaint under section 3, 4 & 7 of Illegal Dispossession Act 2005, an excerpt whereof is reproduced as under:-

“Moreover, it is also a matter of record that a civil suit has also been filed by respondent No.2 against the complainant in the court of learned XII Senior Civil Judge, Karachi South for declaration, cancellation, specific performance, mandatory and permanent injunction which is pending as per the police report dated 22.02.2019.”

2. The Theme of the arguments of the learned counsel for the applicants is that the impugned order dated 20.06.2019 is against the spirit of the law, and principles laid down by the Supreme Court on the subject issue. He has further contended that the applicants/ complainants are the owners of the suit property by registered sale deed dated 11.09.2005. He next argued that respondent No. 2 illegally and unauthorizedly trespassed on the 2 floor by making stairs and occupied the entire floor without entitlements. He next argued that the mere pendency of civil proceedings on the subject property is not grounds to occupy the Second Floor ad measuring 5000 sq feet in the building Plot No. R-13-12/19, Ram Bagh

Quarters, off M.A Jinnah Road, Karachi on the purported plea that there was/is a sale agreement between the previous owner and respondent No.2 as he failed to perform his part of the contract. Per learned counsel, the illegal dispossession proceedings initiated by the applicant before filing of the civil proceedings as such respondent No.2 managed things in his favor just to usurp the legitimate property of the applicants who had started the project but due to illegal occupation they could not carry out the project and has sustained huge losses. However, the trial Court not only ignored the police report filed by the SHO in terms of Section 5 of the Act of 2005 but also completely failed to follow the dictum laid down by the Supreme Court and dismissed the complaint without even going for a formal trial. Per learned counsel, the only ground for dismissal of the direct complaint was that respondent No.2 filed a civil suit against the complainant and did not fall within the definition of illegal dispossession. He emphasized that the provisions of subsection (1) of section 3 of the Illegal Dispossession Act, 2005 are in the form of preventive provisions. Which is reproduced as under:-

“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 owners or occupier of such property.*
- (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 provision of Section 544-A of the Code.*
- (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 the provisions of Section 544-A of the code.”*

3. Per learned counsel, this is a prohibitory mandate. There is no restriction as to the class of person. All persons have been prohibited from committing the offense detailed in this provision, be they male or female.

Per learned counsel in such like cases, the trial court was/is simply required to examine the material available before it to form an opinion as to whether a prima facie case was/is made out for holding that the person who had complained about his dispossession was/is in lawful possession or owner because the words used in section 3 of the Act are “owner” and “occupier” of the property. He added that the word occupier has been defined in section 2(c) of the Act viz. “occupier” means the person who is in lawful possession of a property, whereas respondent No.2 is in illegal possession of the subject premises as he has no title documents in his favor mere based on the sale agreement, and managed documents, which are not the title documents, he cannot dispossess the owners/applicants, which a cognizable offense and the respondent No.2 is liable to be prosecuted under the law. He prayed for a direction to the trial court to proceed with the matter and decide the issue under the Illegal Dispossession Act 2005, within reasonable time on merits.

4. Mr. Muhammad Rafi Kamboh advocate for Respondent No.1 has supported the impugned order dated 20.06.2019 and has submitted that the Respondent is the sole and absolute owner of 2nd Floor ad measuring 5000 sq feet in the building Plot No. R-13-12/19, Ram Bagh Quarters, off M.A Jinnah Road, Karachi. He further submitted that the applicants are land grabbers who have unlawfully dispossessed the respondent from the subject property and they are neither the owner nor authorized by the owner to be in possession and they do not have any title document. Per learned counsel, in the case in hand, the applicant admitted that respondent No.2 was an “occupier” and his possession was lawful since he was shown to be a tenant of the subject property in their application under section 15 of the Sindh Rented Premises Ordinance, 1979 (**SRPO 1979**), therefore, his dispossession was possible only through the application of SRPO 1979, which case has already been withdrawn by the applicants as such no new cause of action accrued to the applicants to lodge a criminal complaint under the illegal dispossession Act, 2005. However, without prejudice to the aforesaid stance, respondent No.2 has been inducted into the subject premises as the owner of the subject property as lawful occupier. As per learned counsel, respondent No.2 cannot be deprived of his several fundamental rights guaranteed to him under the constitution and law, which include the right to enjoy the protection of the law and to be treated under the law. Learned counsel referred to various documents attached with his objections and argued that no case for illegal dispossession is made out. He lastly prayed for the dismissal of the instant Criminal Revision Application.

5. Ms. Rahat Ahsan Additional PG has supported the impugned order.

6. I have heard the learned counsel for the parties and have perused the material available on record.

7. The questions involved in the present proceedings are whether respondent No.2 has dispossessed the applicants from the 2nd Floor measuring 5000 sq. feet in the building Plot No. R-13-12/19, Ram Bagh Quarters, off M.A Jinnah Road, Karachi, and whether, in the presence of Civil proceedings pending adjudication before the competent Court of law, the criminal proceedings over the subject property could not be initiated and /or continued under the illegal dispossession Act, 2005, till decision thereon and whether the possession of the subject property could be restored to the owner under the Illegal Dispossession Act, 2005.

8. To appreciate the aforesaid proposition, foremost, it is expedient to have a look at the factual aspect of the case. In the present case, it appears from the record that Illegal Dispossession proceedings were initiated by the applicants on 06.02.2019, on the premise that they were/are lawful owners of the building (Formerly known as Rafiq Plaza), constructed on Plot No RB- 12/19, Ram Bagh Quarters, Facing M.A. Jinnah Road, Karachi, and the subject property were mutated in their name in the records of rights; and they had started the project known as 'Madina Plaza' after completing all the requisite formalities as required under the law. As per the Applicants, respondent No.1 illegally and unauthorisedly entered and trespassed on the Second Floor by constructing the stairs illegally and covering the area about 5000 Sq.ft. without their permission. As per the applicants, this was/is an illegal act on the part of respondent No.1, who dispossessed the applicants from the 2nd Floor; respondent No.1 was asked to pay damages for the subject premises to the tune of Rs 2,50,000/- per month as he illegally occupied the premises in question from September 2015; that applicants filed Rent Application No.453 of 2017 under Section 15 of the Sindh Rented Premises Ordinance 1979 in the Court of VII-Civil Judge and Rent Controller, Karachi, South wherein respondent No.1 filed written statement and denied the relationship as landlord and tenant, thereafter, the Rent Case was withdrawn by the applicants and filed the subject criminal complaint before the learned VII-Additional District & Sessions Judge (South) Karachi.

9. Respondent No.1 contested the complaint and filed the objection wherein he took a plea that he had purchased the property in question from the original owner Muhammad Sharif son of Haji Muhammad Rafiq under the sale agreement and possession of Godown No.5 admeasuring 2000 Sq

ft. at the basement of the building at plot No.R-13-12/19, survey No.19, however, he was given in area of 4000 sq. ft. on 2nd floor of the building in exchange for Godown No.5 and the same was handed over to him. He further contended that he had also paid a certain amount being part of the sale consideration, however, the owner failed to perform his part of the contract, therefore, he filed Suit No.296 of 2019 on 11.02.2019, for Declaration, Cancellation, Specific Performance, Mandatory and Permanent Injunction before the learned XII-Senior Civil Judge Karachi South, hence, the case does not fall within the ambit of Illegal Dispossession Act 2005. He further contended that the act of entering into or upon the property for dispossessing another person with intent to commit an offense or to intimidate or insult or annoy any person possessed of such property or having lawfully entered into or upon such property, unlawfully remains there with the above intention then such act is coming within the definition of criminal trespass and punishable under the PPC. He further added that in the present case, the question of the title of the property is already pending before the competent court of civil jurisdiction before filing the complaint, therefore, because of the rule laid down by the Supreme Court the present revision application is not maintainable and is liable to be dismissed. He added that applicants have to wait for the decision of such a suit either way.

10. The pros and cons lead me to the conclusion that without adverting to the bone of contention, the learned trial court dismissed the complaint on the ground that a civil suit between the parties is pending. The basic element of the case is whether the applicant was dispossessed or not, this crucial fact remained untouched by the trial court which had a paramount significance for the just and proper decision of the complaint moved under sections 3 & 4 of the Illegal Dispossession Act, 2005. The applicant claims ownership and Mukhtiarkar submitted his partial report on the status of the subject property. Besides The Doctrine of equity of part performance is enunciated by section 53-A of the Transfer of Property Act 1882, as such the same should be inured from the legality and enforceable contract between the transferor and the transferee. Where the possession of the transferee is not under a proper, legal, and enforceable contract the protection of 53-A of the Transfer of Property Act is not available to him and the transferee cannot use the same as a weapon. The doctrine of part performance as developed by equity, having been given statutory recognition by “means of enacting Section 53-A of the Transfer of Property Act. The principle of part performance is based upon golden rules of fairness, justness, and righteous dealing between the parties. To avail plea of part performance embodied in Section 53-A, one

had to show that contract was in writing signed by the transferor in respect of the immovable property; transfer could be ascertained with reasonable certainty from such writing and in part performance of the contract, transferee had taken possession of property or any part thereof or if he was in possession, he continued to be in possession in part performance of the contract and had done some act in furtherance of contract and transferee had performed or was willing to perform his part of the contract.

11. The Illegal Dispossession Act of 2005 was enacted to protect the lawful owners and occupiers of immovable properties from their illegal or forcible dispossession by property grabbers. The Act states that no one shall enter into or upon any property to dispossess, grab, control, or occupy it without having any lawful authority to do so to dispossess, grab, control, or occupy the property from owners or occupiers of such property. This Act was promulgated to provide a more efficacious means for private individuals to recover their property from illegal and forcible dispossession without having to first establish right or title through lengthy civil proceedings. It applies to dispossession from the immovable property by property grabbers, qabza group, and land mafia with punishment. Under section 7 of the Illegal Dispossession Act, 2005, possession can be restored.

12. The Supreme Court in the case of *Rahim Tahir vs. Ahmed Jan* (**PLD 2007 SC 423**) held that mere filing of the suit after the filing of the complaint based on a document having no legal foundation was of no consequences and significance to protect the illegal and unauthorized possession. Since in the Rahim Tahir case, the Supreme Court also held that the Illegal Dispossession Act 2005 has a retrospective effect, therefore, this aspect was considered by the supreme court in its subsequent Judgment reported in **PLD 2009 SC 404** in which it was held that making a law providing for retrospective punishment of a person was specifically prohibited by Article 12 of the Constitution. Finally, it was held that the Rahim Tahir case was not a correct law to the extent of retrospective operation of the Illegal Dispossession Act, of 2005. This Judgment makes it abundantly clear that the Rahim Tahir case (supra) was considered not to be a correct law only to the extent of declaring the operation of the Illegal Dispossession Act 2005 retrospectively, but the basic principle laid down in the Judgment about the filing of the civil suit after filing a complaint under Illegal Dispossession Act and its effect was affirmed and also relied upon the judgment reported in **2008 SCMR 1254**.

13. So far as the filing of civil proceedings, initiated by the respondent seeking declaration, cancellation, specific performance, mandatory and

permanent injunction in respect of the subject property claiming its ownership, which factum has been denied by the applicants. In principle, the mere filing of a civil suit after the filing of the complaint based on a document to be thrashed out at the trial now at this stage was/is of no consequence and significance to protect illegal and unauthorized possession. The purpose of the Illegal Dispossession Act 2005 is to protect the right of possession of the lawful owner or occupier and not to perpetuate the possession of illegal occupants.

14. Prima-facie till such time the Civil Court passes a decree against the applicants in a Suit for specific performance, as discussed supra, the court can take possession of the subject premises and /or handover to its actual owner, under section 7 of the Illegal Dispossession Act, 2005, if occupied illegally by the respondent as such the stance of the respondent is contrary to the law laid down by the Supreme Court, in the cases of Haji Jumma Khan V/S Haji Zarin Khan, PLD 1999 SC 1101, Kassim and another V/S S. Rahim Shah, 1990 SCMR 647, Muhammad Iqbal Haider and another V/S Vth Rent Controller/Senior Civil Judge, Karachi Central, and others, 2009 SCMR 1396, Syed Imran Ahmed V/S Bilal and another, PLD 2009 SC 546, and Abdul Rasheed V/S Mqbool Ahmed and others, 2011 SCMR 320.

15. The whys and wherefores lead me to an irresistible conclusion that the bone of contention between the parties whether the case of illegal dispossession was made out or not was overlooked and ignored by the trial court and an incomprehensible and patently improbable order was passed without adverting to an imperative contemplation that mere filing of a suit after the filing of a complaint based on a document which has no legal foundation, would be of no significance to protect the illegal and unauthorized possession.

16. In view of the above Criminal Revision Application is allowed along with pending application(s) and the matter is remanded to the trial court to expedite the trial of the case and conclude the pending proceedings within two months by examining the parties including Mukhtiarkar concerned and official of KMC on the subject issue.

JUDGE