

IN THE HIGH COURT OF SINDH KARACHI

Criminal Revision Application No. 34 of 2020

Muhammad Imran, Applicant : through Mr. Syed Ahmed Ali Shah,
Advocate assisted by M/s. Maheen
Bukhari, Syed sajjad Ali Shah &
Syed Majid Ali Shah, Advocates

State : through Ms. Seema Zaidi,
Addl. Prosecutor General, Sindh.

Nasir Patel, Respondent No.2 : through Mr. Malik Altaf Hussain,
Advocate assisted by
Mr. Danish Ali Naich, Advocate

Dates of hearing : 05.09.2023

Date of Judgment : 20.09.2023

J U D G M E N T

MUHAMMAD SALEEM JESSAR. J- By means of instant Criminal Revision Application filed under Sections 435 and 439 Cr. P.C., the applicant has assailed the order dated 29.01.2020 passed by learned IVth Additional Sessions Judge, Malir Karachi in Crl. Complaint No. NIL of 2017, filed by applicant, whereby learned Additional Sessions Judge while declining to take cognizance in the matter, has dismissed the complaint.

2. Brief facts of the case are that the complainant filed a complaint under Sections 3 / 4 of the Illegal Dispossession Act. 2005 against Tariq Zawari and Nasir Patel, respondents No.1 and 2 respectively herein, stating therein that the disputed land situated in Survey No.21, being 01 acre of agricultural land, out of total area measuring 03 acres and 25 Ghuntas, situated in Deh Gangiato, Tappo Landhi, Taluka and District Malir, Karachi was purchased by him from one Hamzo Khan for the total sale consideration of Rs.5,80,000/- through his attorney namely, Wahid Akhtar vide sale deed dated: 10.01.2017, which was duly registered by the orders of Additional District Judge-II, Malir, Karachi and execution application No.16/2008 filed before 1st Senior Civil Judge Malir, Karachi vide order dated: 03.09.2016 through Nazir of District & Sessions Court

Malir, Karachi. The complainant further stated that he was handed over peaceful vacant possession of the property in question by the Nazir of the Court. He also claimed to affix lock on the gates of the property in question in presence of Nazir. The complainant also added that when on 27.10.2017 at about 0430 hours he visited the said plot alongwith his companion Noor Muhammad, he found a watchman there and also found the broken locks whereupon he inquired from the person available there who pointed out that he was appointed by the respondent/accused.

3. Thereafter, on 28.10.2017 he moved application / complaint at P.S. Sukhan, Karachi which was duly received but no legal action was taken against the culprits. According to the complainant, he visited police station several times for registration of case and for restoring the possession of the property to him but all in vain. Thereafter, the complainant filed I.D. complainant on 31.10.2017.

4. The matter was inquired through the Inquiry Officer of P.S Sukhan who recorded the statements of complainant, proposed accused, their witnesses and collected the documents from both the parties, then he reported that the property in question was in the possession of Nasir Patel, respondent No.2 who claimed to be the tenant of respondent No.1. Thereafter, learned IVth Additional Sessions Judge, Malir Karachi vide impugned order dated 29.01.2020 dismissed the complaint by declining to take cognizance in the matter, hence the complainant has challenged the impugned order through instant Criminal Revision Application.

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

6. Learned counsel for the applicant submitted that originally the property was owned by one Hamzo Khan, who subsequently transferred / mutated it in the name of one Muhammad Hanif vide Entry No.322 dated 09.07.2002 (available at page-63 of the Court file). Later, Muhammad Hanif executed a General Power of Attorney in favour of the applicant on 13.06.2002 (available at page-53 of the Court file). Subsequently, said Hamzo Khan sold out the property to applicant Muhammad Imran through a registered sale deed dated 08.09.1997 (available at page-69 of the Court file). After execution of registered sale deed, the executant of registered sale deed was not handing over possession of the property to the applicant, therefore, the applicant and his

brother Muhammad Hanif had filed a Civil Suit for Declaration, Specific Performance, Possession and Permanent Injunction, bearing No.231 of 2004 before the Court of 1st Senior Civil Judge, Malir Karachi; however, the plaint filed by the applicant was rejected under Order VII Rule 11 CPC vide judgment and decree dated 18.03.2008. Therefore, the applicant filed a Civil Appeal bearing No.16 of 2008 before the District Judge, Malir Karachi, who subsequently assigned it to 2nd Addl. District Judge, Malir Karachi (The appellate Court). The appellate Court, after hearing the parties and perusing the record, allowed the appeal and decreed the suit filed by applicant, as prayed vide judgment and decree dated 10.05.2008 (available at pages-131 & 143 of the Court file). The said judgment and decree were not assailed by the judgment debtor / defendant, which ultimately attained finality; however, there was some typographical mistakes in the decree, therefore, the applicant had filed a Misc. Application under Section 152 CPC read with Section 151 CPC, which too was allowed by means of order dated 03.09.2016 (available at page-147 of the Court file). Hence, the applicant as well as his co-plaintiff Muhammad Hanif had filed Civil Execution Application No.16 of 2008 before the 1st Senior Civil Judge / Rent Controller / Executing Court which too was allowed by means of order dated 26.02.2009 (available at page- 157 of the Court file). In compliance of Execution Application, Bailiff of the Court was directed to put the applicant in safe and vacant possession of the property in dispute; hence, the applicant was put in the possession of property, in question on 29.07.2009 vide Mashirnama as well as writ of possession (available at pages-161 & 163 of the Court file). After entering into possession of property in dispute, the applicant remained in its peaceful possession from 29.07.2009 to 27.09.2017.

7. Learned counsel further submitted that on 27.09.2017, when applicant visited the property, he found that respondent No.1 was holding its possession and he had deputed one watchman over the property. However, on further inquiry made by the applicant, it transpired that respondent No.1 was the tenant of respondent No.2. Therefore, the applicant filed I.D complaint before the District Judge, Malir Karachi, who subsequently assigned it to 4th Addl. District Judge. The learned trial Court, after calling reports from the concerned and hearing the parties, dismissed his complaint vide impugned order dated 29.01.2020 (available at page-31 of the Court file). Learned counsel next submitted that the trial Court has dismissed his complaint on the basis of the title documents shown by respondent No.2, copies whereof has also been

submitted before this Court through Statement dated 04.08.2023. According to learned counsel, applicant is not only a *bonafide* owner of the property in dispute but his right of ownership is also protected under the provisions of Transfer of Property Act. 1882. He added that the finding given by the trial Court that matter is of civil nature, carries no weight as there is no ambiguity or legal bar to the effect that civil proceedings cannot run side by side with the criminal proceedings. He further submitted that impugned order does suffer from many illegalities as well as infirmities as the findings given by the trial Court, are beyond the scope of the Scheme of Illegal Dispossession Act, 2005 as Section 3 of the Act does not provide any bar, as has been observed by the trial Court. In support of his contention, learned counsel placed reliance upon the cases of *MUHAMMAD SALEH and 2 others Versus PROVINCE OF SINDH through District Coordination Officer and 6 others* (PLD 2015 Sindh 14). As far as, claim of respondents' counsel that respondents purchased the property by way of an Open Auction conducted by the KMC through District Government, Karachi, is concerned, learned counsel submitted that officers of that era, who allegedly granted false leases to different persons, were booked under NAB laws and besides, the properties, as alleged, were mortgaged by those criminal officers, who in order to save their skin and to defeat the process of law, had got mortgaged the same; hence, claim of the respondent cannot be acceded to. As far as, alleged Auction is concerned, as argued by learned counsel for respondent No.2, learned counsel for the applicant submitted that KMC had not published any notice through largest circulated or any daily newspaper for the public at large, which, according to learned counsel for the applicant, was necessary under the law. He further argued that not a single document or any newspaper cutting showing publication of such notice, has ever been brought on record by the respondents or by the inquiry officer appointed by the trial Court, therefore, alleged auction through which the disputed property was allegedly purchased by respondent No.2, is nullity in the eye of law. He also argued that even the KMC had not shown title documents or the notification by which said land was assigned / allotted or was made under the ownership of the KMC. Therefore, all these arguments are without force. According to him, the applicant has adduced documentary evidence which is sufficient to maintain the claim of the applicant to be the bonafide purchaser/owner of the property in question hence, right of ownership of the applicant cannot be vitiated as it is to be protected by virtue of the provisions of Transfer of Property Act, 1882. He; therefore, submitted that it would be appropriate to set-aside the impugned order and the case may be remanded back to trial Court by

directing it to record evidence of the parties and then decide the fate of the complaint, on the basis of evidence to be adduced and the material to be placed before the trial Court.

8. Learned Addl. P.G. Sindh appearing for the State, did not support the impugned order and recorded her no objection to the grant of revision application. She further submitted that it will be appropriate to remand the case to trial Court so that issues involved in this case may be scrutinized through recording of evidence.

9. Learned counsel for respondent No.2 opposed the revision application and supported the impugned order. While arguing his case, he referred to paras-2 & 6 of the impugned order and submitted that the trial Court had got inquired the issue through inquiry officer and per report submitted by the inquiry officer inquiry/SHO, applicant was not in possession of the property, in dispute, as claimed. He also referred to statement dated 04.08.2023 filed on behalf of respondent No.2 and submitted that respondent No.2 had got permission from the concerned authorities to get the property in dispute mortgaged and ultimately he got loan from Meezan Bank Limited. He also referred to inquiry report (available at page-125 of the statement) and submitted that it is sufficient to discard the revision application as according to him, after remand of the case, no fruitful result will be achieved. On query being raised by the Court that whether before putting the property in dispute under said Open Auction, KMC had published any notice through any newspaper, he very candidly, submitted that he has no knowledge nor such evidence has been brought on record by both the parties including inquiry officer. He, however, submitted that by dismissing the revision application, impugned order may be maintained.

10. **It appears that the case of the applicant / complainant is that** disputed land situated in Survey No.21, being 01 acre of agricultural land, out of total area measuring 03 acres and 25 Ghuntas, situated in Deh Gangiata, Tappo Landhi, Taluka and District Malir, Karachi was purchased by him from one Hamzo Khan for the total sale consideration of Rs.5,80,000/- through his attorney namely, Wahid Akhtar vide sale deed dated 10.01.2017. However, physical possession of the said property was not being handed over to the applicant, therefore he had to undergo civil litigations and ultimately, vide orders passed by 2nd Additional District Judge, Malir, Karachi on 10.5.2008 in Civil Appeal No.16 of 2008 and the Order passed on 03.09.2016 by 1st Senior

Civil Judge Malir, Karachi in Execution Application No.16/2008, he was handed over possession of the property in question on 29.7.2009 through bailiffs of the Court vide Mashirnama, copy whereof has been placed on record at page 163 of the Court File. The grievance of the applicant is that on 27.10.2017 when he visited the property in question, he found that the respondents had illegally entered into the property in question by breaking the lock affixed on the gate of the property and had deputed their watchman there, thereby illegally dispossessing the applicant / complainant from the property in question. It seems that in the entire pleadings of the respondents either before the trial Court or even before this Court during the proceedings of instant Cr. Revision Application, they have not said a single word that the applicant / complainant has made false and fabricated assertions regarding ultimate success in civil litigations in respect of property in question and consequently handing over its possession to him under the orders of the Court through bailiffs of the Court. What plea have they taken, is that they (respondents) were put in possession of the property in question upon succeeding in an Open Auction held by K.M.C. authorities. Nothing has been brought on record to establish that either the respondents or even KMC had challenged the orders passed by competent Courts of Law whereby the applicant / complainant became owner and possessor of the property in question. When admittedly, no one had challenged said orders of the Courts passed in favour of the applicant / complainant, then the same attained finality and, therefore, it is not understandable as to how and under what authority the KMC Officers, who were subsequently involved in some proceedings initiated by NAB Authorities in respect of certain properties including the property in question had put it under Auction and then given to the respondent. It may be made clear that it is not necessary for establishing a claim of illegal dispossession under the Illegal Dispossession Act, 2005 that at the time of alleged illegal and unlawful entry into the property by any person who does not have any lawful authority to do so, the owner or occupier of such property should be present and available inside the property and he would have been physical dispossessed, but for establishing such claim of illegal dispossession it is enough that even if one has got constructive possession of certain property and at the relevant time of illegal and unlawful entry even if he is not present / available inside the property and the same has been locked by him and then certain person(s), not necessarily belonging to Land Mafia Group and / or Land Grabbers, as has been observed by the trial Court in the impugned order, by breaking open the lock, enter such property without any lawful authority.

11. The trial Court in the impugned order has observed that the applicant / complainant has not produced any document which could establish that he was put in possession of the property in question under the orders of the concerned Court and that when the property in question was an open plot and when no gate was installed there, then as to how the complainant put the lock on the gate. It seems that the trial Court while making such observation has not properly gone through the documents produced by the applicant / complainant before the Inquiry Officer and / or Court. The applicant has produced copy of Mashirnama dated 29.7.2009, copy where is available at page 163 of the Court File, whereby he was handed over possession of the property in question through bailiffs on the orders of the concerned court. From the perusal of the said mashirnama it is apparent that the bailiffs of the concerned Court namely, Shafqat Hussain and Mohammad Shahid, have stated therein in clear terms that when they reached the property in question, they found that the boundary wall was erected around the property and one *iron gate* was affixed there. They further stated they had visited the property in question alongwith complainant Mohammad Imran and that at the relevant time there was no one else inside the property in dispute. Then, they handed over physical possession of the property in question to the complainant / applicant.

12. From this, it is evident that the observation made by the trial Court are not correct.

13. From above, it is clear that disputed facts are involved in instant case. 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 under the law, which of the parties would be said to be in the physical possession of the property in question and as to whether the accused persons had illegally got the complainant dispossessed therefrom. I am of the firm view that unless and until 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 Inquiry Officer / SHO concerned; however, without getting such facts adjudicated by means of recording of evidence, it has given findings against the complainant and dismissed his complaint in a hasty and mechanical manner which has not been appreciated by the Superior Courts. 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.”

14. The trial Court, while declining to take cognizance and dismissing the complaint under the Illegal Dispossession Act, 2005 has also laid much stress on the point that the matter is of civil nature. However, again while giving such findings, the trial Court has miserably failed to take into consideration the well settled principle of law enunciated by Superior Courts that even the pendency of a 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. There is also no bar on the running of civil proceedings side by side along with the criminal proceedings under the Illegal Dispossession Act. In this connection, reference may be made to a judgment pronounced by Honourable Supreme Court reported as in the case of *Shaikh Muhammad Naseem*, reported in 2016 SCMR 1931, wherein 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."

Reference may also be made to the case of *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."

15. The upshot of above discussion is that instant Revision Application is hereby allowed. Consequently the impugned order dated 29.01.2020 passed by learned IVth Additional Sessions Judge, Malir Karachi in CrI. Complaint No. NIL of 2017 (re-Muhammad Imran Versus Tariq Zawari Police Wala and another), 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 the parties to lead their respective evidence and after appreciation of such evidence, dispose of the matter strictly in accordance with law within a period of six months' time under intimation to this Court.

J U D G E

Dated: 20th September, 2023.