

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Miscellaneous Application No.S-252 of 2024

Applicant: Syed Allah Dino Shah through Mr. Irfan Ahmed Qureshi, Advocate.

Respondents No.1&2: Fayaz Hussain Shah and Qasim through Mian Taj Muhammad Keerio, Advocate.

Respondent No.3: Nemo.

Respondents No.4to6: Through Mr. Irfan Ali Talpur, Assistant Prosecutor General Sindh.

Date of hearing: 13.01.2025.

Date of Decision: 13.01.2025.

ORDER

Amjad Ali Sahito, J: - Through instant criminal miscellaneous application, the applicant has impugned the order dated 24.04.2024 passed by learned Additional Sessions Judge, Matiari in I.D. Complaint No.06 of 2013 [Re-Syed Allah Dino Shah v. Fayyaz Hussain Shah and others], whereby directed for handing over the possession of subject property to respondent No.1 Fayyaz Hussain Shah.

2. Background of the case is that initially the applicant Allah Dino Shah filed an I.D. Complaint No.06 of 2013 in terms of sections 3 and 4 of Illegal Dispossession Act, 2005 before the Court of learned Sessions Judge, Matiari, against respondents No.1to3 [Fayaz Hussain Shah, Qasim and Siddique], same was transferred to the Court of Additional Sessions Judge, Matiari. After admission of the complaint, the case was proceeded and the accused respondents No.1to3 were convicted and sentenced to three years with fine of Rs.10,000/- each; in default whereof, the accused were ordered to suffer S.I. for one year more and the property was restored to the applicant Syed Allah Dino Shah. It is appropriate to reproduce para No.19 of the Judgment dated 30.07.2016 passed learned Additional Sessions Judge, Matiari which reads as under:-

“On the strength of findings on point No.1, I have come to conclusion that complainant has proved that accused entered into his property in order to

dispossess, grab and occupy without having lawful authority with intention to dispossess, grab and occupy his land and unlawfully occupied and grabbed it since 10.03.2013 therefore complainant has proved the charge u/s 3 (2) of Illegal Dispossession Act 2005 against the accused Fayaz Hussain Shah, Qasim Khokhar and Siddiq Machhi beyond the shadow of reasonable doubt hence I convict them u/s 265-H (ii) Cr.P.C. and sentence them to suffer imprisonment for three years and further sentence them to pay fine Rs.10,000/- each and in default in payment of fine, the defaulting accused shall further suffer S.I. for one month. The accused are present on bail hence they are taken into custody and be remanded to C.P. Hyderabad with conviction warrant/slip to serve out their sentence. Their bail bonds stand cancelled and surety stands discharged.”

3. Being aggrieved, the accused/respondents No.1to3 filed Criminal Appeal No.S-130 of 2016 before this Court. After hearing the parties, the impugned judgment of the trial Court was set-aside by this Court; however, parties were left to approach before Civil Court of competent jurisdiction for redressal of their grievance. It is appropriate to reproduce the concluding paras (iii) and (iv) of the judgment dated 24.01.2022 passed by this Court which reads as under:-

- iii. Faced with the above evidence learned counsel for the complainant frankly conceded that he had no objection if the order of the learned trial Court is set aside. However, he expressed his anxiety that the civil dispute be decided in accordance with law. It is abundantly clear from the evidence led at the trial that the prosecution was unable to prove its case. Hence, the appeal is allowed, the Impugned Order is set aside and the appellants are acquitted of the charges.....
- iv. The dispute regarding ownership/possession/partition and the exact location of the disputed land are issues which will have to be decided by a civil Court of competent jurisdiction. This remedy I understand has already been invoked by the parties. The learned trial Court is directed to conclude the trial expeditiously preferably within a period of six months without being influenced by any observation made herein.

4. Respondent Fayyaz Hussain Shah challenged the judgment passed by this Court in Criminal Appeal No. S-130 of 2016 by filing Criminal Petition No. 134 of 2022 before the Honourable Supreme Court of Pakistan and the Honourable Supreme Court of Pakistan has passed the order dated 26.01.2024 which reads as under:-

“... Consequently, the appeal filed by the petitioner was allowed and the order of the Trial Court was set

aside. When confronted, the learned counsel for the petitioner contends that as the order of the Trial Court has been set aside by the High Court, hence in order to avail remedy before the Trial Court for the possession of the property and in order to avail the remedy before the Civil Court, he wants to withdraw this petition. He may do so. This petition is dismissed as withdrawn.”

5. Per learned counsel, then the application was filed by Syed Fayyaz Hussain Shah before the learned Additional Sessions Judge, Matiari in Criminal Case No.06/2013 for restoration of the possession in compliance of the order dated 26.01.2024 passed by the Honourable Supreme Court. After hearing the parties, learned Additional Sessions Judge, Matiari passed order dated 24.04.2024 and restored the possession to the respondent Fayyaz Hussain Shah and being aggrieved with this order, learned counsel for the applicant/complainant Syed Allah Dino Shah has preferred this criminal miscellaneous application. Per learned counsel, in fact the accused was convicted by the learned trial Court and applicant Syed Allah Dino Shah raised no objection, as such, conviction and sentence was set-aside by this Court. However, the parties were left to approach before the Civil Court of competent jurisdiction for redressal of their grievance and the case was disposed of.

6. The Respondent No.1 Fayyaz Hussain Shah approached before Honourable Supreme Court by impugning the judgment; however, he did not press said Criminal Petition on the ground that he will approach before the Civil Court as well as trial Court for possession of the property and the Honourable Supreme Court ordered as “He may do so” and dismissed the Criminal Petition as withdrawn. Per learned counsel, nowhere it is written that after hearing the parties the case was decided by the Honourable Supreme Court but at the request of respondent No.1 Fayyaz Hussain Shah that he is not pressing the Criminal Petition, which was therefore dismissed as withdrawn; however, the learned trial Court by wrongly interpreting has passed the impugned order and restored the possession to respondent No.1 Fayyaz Hussain Shah. He also submits that since the case/I.D. Complaint No.06/2013 was not pending before learned Additional Sessions Judge Matiari, as such, learned Additional Sessions Judge had no jurisdiction to enter the application of respondent No.1 and on the basis of principle of *functus officio*, the Court's jurisdiction had ceased but even then the learned Court has

passed the impugned order, which is illegal, unlawful and liable to be set-aside.

7. On the other hand, according to learned counsel appearing on behalf of respondents No.1&2 that in fact the Honourable Supreme Court has passed the order by directing the respondent No.1 to approach before the trial Court for possession of property, as such, he has rightly filed the application before the learned trial Court and same was rightly decided by the learned trial Court and rightly restored the possession to respondent No.1 Fayyaz Hussain Shah since the possession was already restored to Syed Allah Dino Shah, hence, no illegality or irregularity is committed by the learned trial Court. Lastly, he prayed for dismissal of instant application.

8. Learned Assistant Prosecutor General representing the respondents No.4to6 has supported the impugned order.

9. Heard and perused.

10. Record reflects that initially an I.D. Complaint No. 06 of 2013 was filed by the applicant Syed Allah Dino Shah under Sections 3 and 4 of the Illegal Dispossession Act, 2005, against respondents No.1to3 and after admission of the complaint, the case proceeded; the accused/respondents No.1to3 were convicted and sentenced to three years imprisonment with a fine of Rs. 10,000/- each. In case of default in payment of the fine, the accused were ordered to undergo for further sentence of one year. The property was restored to the applicant, Syed Allah Dino Shah. Respondents No.1to3 challenged the said judgment of the learned trial Court and filed Criminal Appeal bearing No.S-130 of 2016 before this Court, which was allowed and the impugned judgment was set-aside on the ground that complainant frankly conceded that he had no objection if the order of learned trial Court is set-aside. However, he had expressed his anxiety that the civil dispute be decided in accordance with law. Hence, ownership and possession of the disputed land and exact location of the property were left to be decided by the Civil Court of competent jurisdiction and the learned trial Court was directed to conclude the trial expeditiously preferably within a period of six months without being influence by any observation made herein. So far the direction issued to the trial Court for conclusion of the trial within six months is concerned, it is

essential to mention here that this Court meant the same by assuming that the remedy in respect of ownership/partition and the exact location of the disputed land had already been invoked by the parties before Civil Court of competent jurisdiction and in this regard, the relevant paragraph-iv of the judgment of this Court has already been reproduced in the preceding para-3 of this order.

11. Respondent No.1, Fayyaz Hussain Shah, also challenged the judgment of this Court before the Honourable Supreme Court of Pakistan, by filing Criminal Petition No.134 of 2022. The Honourable Supreme Court, by order dated 26.01.2024, dismissed the petition as withdrawn at the request of respondent No.1. Nevertheless, respondent No.1 did not press said Criminal Petition on its merit but he simply submitted before the Honourable Supreme Court that he will approach before the Civil Court as well as trial Court for possession of the property and the Honourable Supreme Court ordered as “He may do so” and dismissed the Criminal Petition as withdrawn. On the basis of the order of Honourable Supreme Court, respondent No. 1 filed an application before the learned Additional Sessions Judge, Matiari, requesting the restoration of possession of the property and the learned judge passed the order dated 24.04.2024, whereby allowed the application and restored the possession to respondent No.1, Fayyaz Hussain Shah.

12. It is also important to note that the case of the applicant Syed Allah Dino Shah had already been decided by this Court in Criminal Appeal No. S-130 of 2016, where the order of the trial Court was set aside and the dispute regarding ownership and possession was referred to the Civil Court, as such, no issue of possession remained with the learned trial Court even after passing the order by the Honourable Supreme Court with regard to withdrawal of the Criminal Petition. Hence, the learned Additional Sessions Judge, Matiari, acted in excess of jurisdiction in passing the impugned order to restore possession to respondent No. 1, as the case was no longer pending before the learned trial Court. The application of respondent No. 1 was not maintainable before the learned trial Court as its jurisdiction had ceased by virtue of the principle of *functus officio* and the learned trial Court has wrongly assumed the jurisdiction thereby wrongly interpreted the order of Honourable Supreme Court.

13. For the reasons stated above, the impugned order dated 24.04.2024 passed by the learned Additional Sessions Judge, Matiari, is found to be illegal and without jurisdiction. Therefore, the same is hereby set aside. However, the parties are liberty to approach the Civil Court of competent jurisdiction for adjudication on the dispute regarding ownership and possession of the property in accordance with law.

14. Instant criminal miscellaneous application stands **allowed** in the above terms.

JUDGE

Abdullah Channa/PS