

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Constitution Petition No. D-1520 of 2023

(*Ali Raza v. Province of Sindh & Others*)

Present:

Arshad Hussain Khan &
Sana Akram Minhas JJ

Petitioner: Ali Raza
Through Mr. Muhammad Sachal Awan, Advocate

Respondent No.6: Mumtaz Ali
Through Syed Tariq Ahmed Shah, Advocate

Official Respondents: Province of Sindh et al
Through, Mr. Rafique Ahmed Dahri, Advocate

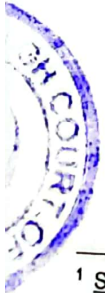
Date of Hearing: 3-9-2024

Date of Decision: 24-9-2024

ORDER

1. **Sana Akram Minhas, J:** The Petitioner, who was not a party in the proceedings below, is aggrieved by and has questioned the legality of an order issued by the Additional Sessions Judge, Hala on 30.9.2023 ("**Impugned Order**"). While the Petitioner does not contest the Impugned Order as a whole, his objection is specifically directed at the final paragraph No.16, which orders the restoration of possession of disputed agricultural land situated in District Matiari, collectively measuring about 73-01 acres ("**Disputed Land**") to the Respondent No.6 ("**Complainant**").
2. The Impugned Order arises from an Illegal Dispossession Complaint No.41/2019 dated 20.11.2019 (*Mumtaz Ali v. Bachal Shah & Others*) ("**Complaint**"), instituted under the *Illegal Dispossession Act, 2005* ("**IDA 2005**") by the Complainant against two individuals as the accused viz. Bachal Shah and Asghar Ali Shah, who are real brothers ("**Accused Brothers**"). The Impugned Order, while acquitting the Accused Brothers under Section 265-H(1)¹ of the *Criminal Procedure Code, 1898* ("**Cr.PC**"), simultaneously directs the relevant authorities to restore possession of the Disputed Land to the Complainant. The Accused Brothers, however, are not parties to the present Petition.

¹ Section 265-H Cr.PC: Acquittal or conviction (1) If in any case under this Chapter in which a charge has been framed the Court finds the accused not guilty, it shall record an order of acquittal.



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3. The Petitioner, claiming to be a co-owner of the Disputed Land and a cousin of the Complainant, asserts that he currently possesses a portion of it.
4. Following the institution of the instant Petition, this Court issued an interim order on 31.1.2024, suspending the operation of the Impugned Order.

Underlying Facts

5. The facts underlying this case are that the Complainant filed a Complaint dated 20.11.2019 under IDA 2005, against the Accused Brothers. In the Complaint, the Complainant asserted that he is the owner of the Disputed Land comprising of Survey Nos.154, 155, and 159 (measuring 22-21 acres) as well as Survey Nos.151, 156, 160, 161, 162, 163 and 169 (measuring 50-20 acres), situated in Deh Fatehpur, Taluka Saeedabad, District Matiari (collectively measuring about 73-01 acres). He claimed to have been in possession of the aforesaid land, with the revenue record reflecting his ownership. The Complainant further alleged that the Accused Brothers, being influential individuals in the area, forcibly dispossessed him and unlawfully occupied his land i.e. Disputed Land on 30.10.2019. Despite his efforts to reclaim possession, through complaints and applications to local administration, no action was taken. As a result, the Complainant ultimately filed the aforesaid Complaint in Court.
6. The Trial Court supplied documents to the Accused Brothers in terms of Section 265-C Cr.PC. Charge was framed against them by the Court on 7.3.2020 which was denied by the Accused Brothers and who claimed trial in terms of Section 265-E Cr.PC. The prosecution examined the Complainant and his two witnesses, after which Complainant closed his side of evidence. The Trial Court then recorded statements of the Accused Brothers under Section 342 Cr.PC, during which they denied the prosecution evidence. However, the Accused Brothers chose not to testify on oath under Section 340(2) Cr.PC and did not produce any defence witness.

Inquiry Report & Interim Relief Of Possession

7. An application under Section 7² of IDA 2005, was filed by the Complainant, seeking interim relief of possession during the pendency of the trial. In response to the Trial Court's order dated 10.12.2019, an on-the-spot inquiry was conducted by the Mukhtiarkar, who submitted a Compliance Report on the same date. The Mukhtiarkar's report indicated that the Petitioner was in

² Section 7(1) of IDA 2005: Eviction and mode of recovery as an interim relief – (1) If during trial the Court is satisfied that a person is found *prima facie* to be not in lawful possession, the Court shall, as an interim relief direct him to put the owner or occupier, as the case may be, in possession.

possession of a portion of the Disputed Land, and that the land in question comprised a shared area. Based on these findings, the Trial Court, in its order dated 14.4.2020, dismissed the Section 7 application for interim possession.

Inspection By Commissioner

8. By Order dated 18.4.2020, the Trial Court appointed the Civil Judge & Judicial Magistrate, Hala as Commissioner in the Complaint. The latter in its report dated 30.5.2020 notes that at the time of inspection, the Petitioner was found to be present on Survey No.155, who stated that he was residing inside the compound wall with his family.

Findings In Impugned Order

9. Significantly, paragraphs 6 and 9 of the Impugned Order note that the Complainant's Counsel favoured the restoration of possession of Disputed Land over pursuing the conviction of the Accused Brothers. The Accused's Counsel raised no objection, asserting that the Accused Brothers had neither dispossessed the Complainant nor had any concern with the Disputed Land. These statements were signed and acknowledged by both parties.
10. The Trial Court in its Impugned Order framed the following two points for determination:

“ 1. Whether the present accused persons along with 9/10 other unknown persons, all being duly armed made heavy firing at complainant and others and thereafter dispossessed him from his Otaq and agricultural land deh Fatehpur Talka Saeedabad District Matlari as alleged by him?

2. What should judgment be? ”

11. The Impugned Order acquitted the Accused Brothers but in its findings on Point No.2 (in paragraphs 14 and 15), the Trial Court observed that:

“ 14.
Point No.1 is, therefore, answered as Doubtful.

Point No.2

15. Consequently, for finding on point No.1 supra and law applicable thereto I feel no hesitation to acquit present accused named above of charge in terms of section 265-H(i) Cr.P.C by extending benefit of doubt. Present accused are present on bail, their bail bonds stand cancelled and sureties are discharged.



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16. *It is worth observing that under the attending circumstances SHO and Mukhtiar Revenue concerned are directed to restore possession of complainant Mumtaz Ali Gahoti's land to him mentioned in complaint as per Revenue Record within a week as per law without fail under compliance report.*"

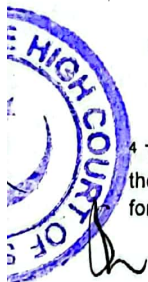
Opinion of Court

12. The Impugned Order is riddled with inconsistencies and exemplifies a perverse application of the law amongst others. These are:
- i) On one hand, it concludes that the Accused Brothers (from whom possession was sought in the Complaint), were not in possession of the Disputed Land and acquits them. On the other hand, the Impugned Order rules that the Complainant is entitled to regain possession of the Disputed Land under Section 8(2)³ of IDA 2005 and directs the restoration of possession without specifying or identifying the individual from whom the possession is now to be recovered. The Impugned Order is vague and lacks specificity. It fails to identify who currently illegally possesses the Disputed Land or from whom it should be restored to the Complainant. The Trial Court's ruling only declares the Complainant's entitlement to the Disputed Land without issuing any concrete directions for restoration of possession from any accused or any individual claiming through them.
 - ii) The Impugned Order references a submission of the Complainant's Counsel, as contained in paragraph 5 of the High Court's order dated 17.11.2022⁴ (passed in Crim. Revision App. No.S-218/2021 – *Syed Bachal Shah Lakyari & Another v. Mumtaz Ali & Others*), which stated that the Petitioner had been put in possession by the Accused Brothers. This submission has subsequently been used by the Impugned Order to justify the application of Section 8 of IDA 2005 (which section allows a Trial Court to order the accused, or anyone

³ Section 8 of IDA 2005: Delivery of possession of property to owner, etc

- (1) On conclusion of trial, if the Court finds that an owner or occupier of the property was illegally dispossessed or property was grabbed in contravention of section 3, the Court may, at the time of passing order under sub-sections (2) and (3) of that section, direct the accused or any person claiming through him for restoration of the possession of the property to the owner or, as the case may be, the occupier, if not already restored to him under section 7.
- (2) For the purpose of sub-section (1), the Court may, where it is required, direct the officer-in-charge of the police station for such assistance as may be required for restoration of the possession of the property to the owner or, as the case may be; the occupier.

⁴ The Criminal Revision Application No.S-218/2021 was instituted by the Accused Brothers wherein, the High Court by its order of 17.11.2022 upheld the rejection of the Accused Brothers' third application for acquittal under Section 265-K Cr.PC.



deriving possession through them, to restore possession of the property to the owner or occupant). This reasoning is perverse and untenable:

- (a) Firstly, for the Impugned Order to assert that the Petitioner's possession was obtained through the Accused Brothers, it would require a finding of guilt against them. Since the Impugned Order acquitted the Accused Brothers, it cannot simultaneously hold the Petitioner responsible for possessing the land through them.
 - (b) Secondly, this was a mere allegation of the Complainant recorded in the High Court's order and was not its finding.
 - (c) Thirdly, the Impugned Order ignores paragraph 4 of the same High Court order which records the submissions of the advocates for Accused Brothers and the Petitioner that they are co-sharers and in possession of the Disputed Land.
- iii) The Impugned Order (in paragraph 11) observes that no action has been taken by the Complainant against the Petitioner, despite the latter having been found to be in possession. Despite this, the Impugned Order directs that possession of Disputed Land be restored to the Complainant (which possession as per the Petitioner is to be recovered from the Petitioner despite the latter not being a party in the proceedings and nor having been specifically identified in the Impugned Order).
- iv) On being queried, the Complainant's Counsel informed this Court that no Criminal Acquittal Appeal has been filed by the Complainant to challenge the acquittal of the Accused Brothers under the Impugned Order. Despite this, the Complainant in his Counter-Affidavit presented on 20.1.2024 to the main Petition (specifically in the unnumbered penultimate paragraph), persists in alleging collusion between the Accused Brothers and the Petitioner. These accusations, made without any further legal action by the Complainant against them, appear to lack substance and credibility. Given that the Complainant has not contested the acquittal of the Accused Brothers, it is inconsistent to accuse them of placing the Petitioner in possession of the Disputed Land. Similarly, it is unjust and unfair to hold the Petitioner responsible for obtaining possession through the Accused Brothers in the Petitioner's absence.



13. It is clear from Section 8, read in conjunction with Section 3(2) and (3) of IDA 2005, that the Court can only order the restoration of immovable property

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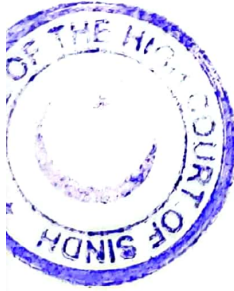
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upon the conviction of the accused. However, in this case, the learned Trial Court has both acquitted the accused and simultaneously ordered the restoration of possession of the Disputed Land to the Complainant. In other words, a conviction is a prerequisite for ordering the restoration of possession under Section 8. The findings of the learned Trial Court are, therefore, inconsistent with the provisions of the IDA 2005 and have resulted in a grave miscarriage of justice.

14. Finally, and in addition to the above, the Impugned Order infringes on the fundamental principles of natural justice and violates Article 10-A of the *Constitution of Pakistan, 1973* by condemning the unidentified current possessor of the Disputed Land – whom the Petitioner asserts is himself – without granting that person any opportunity, let alone a fair opportunity, to be heard. By ordering the restoration of possession without identifying or considering the current possessor's claim or perspective, the order effectively denies the fundamental right to a fair hearing. This failure to provide the Petitioner, or any other party in possession, the chance to present their case undermines the fairness and legality of the judicial process. Any adverse order issued or action taken by any forum or authority that breaches the principles of fair trial and due process, affecting valuable rights, will be considered invalid and without legal effect⁵.

Conclusion

15. For the foregoing reasons, we hold that the paragraph 16 of the Impugned Order is wholly illegal, perverse and fails to uphold the principles of natural justice. Consequently, the Petition is allowed and the Impugned Order to the extent it orders restoration of possession to the Complainant is declared as without lawful authority and of no legal effect. Since the Complainant has not appealed the acquittal of the Accused Brothers but has explicitly consented not to pursue their conviction (as detailed in paragraphs 6 and 9 of the Impugned Order), no grounds exist for this Court to refer the case back to the Trial Court for reconsideration. There will be no order as to costs.



CERTIFIED TO BE TRUE COPY

(Signature)
25/9/2024
(Ghuffran Saboor)
I/C Assistant Registrar
High Court of Sindh,
Circuit Court, Hyderabad.

Hyderabad

Dated: 24th September, 2024

(Signature)
Sd/-MS SANA AKRAM MINHAS.
JUDGE.

Sd/-ARSHAD HUSSAIN KHAN.
JUDGE.

⁵ 2017 CLC 1571 (*Zamrad Begum v. Muhammad Rafiq Choudhary*); 2019 YLR 2623 (*Sheharyar Waqas Malik v. Province of Sindh*)