

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.799 of 2024

Appellant : through Mr. Ghulam Abbas
Tanveer Hussain Lakhan Jatt, Advocate

State : through Mr. Siraj Ali Khan
Chandio, Addl. Prosecutor
General, Sindh.

Dates of hearing : 26.02.2025

Date of Judgment : 26.02.2025

JUDGMENT

ALI HAIDER 'ADA', J.- This appeal questioned the judgment dated 22.11.2024 passed by the learned 4th Additional Sessions Judge, Malir Karachi, in I.D. Complaint No. 06 of 2024 (Re: Atif Abbas Vs. Tanveer Hussain), filed by respondent No. 1 under Section 3(1)(2) of the Illegal Dispossession Act, 2005 (the "Act"). In said Judgment, the appellant was convicted and sentenced to suffer imprisonment of four years and six months with fine of Rs.300,000/-. The appellant was also directed to pay an amount of Rs.500,000/- to the respondent/complainant in view of section 3 (2) of the Act, read with section 544 Cr.P.C, as compensation. In case of default, he was directed to suffer one month more simple imprisonment, as per rules.

2. Brief facts of the case are that the respondent/complainant filed a complaint stating that he entered into an agreement of sale with the appellant regarding Shop No.12, Ground Floor, Bismillah Terrace, Plot No. S-14/FL-3, Sector No. 15-C, KDA Scheme No. 33, Karachi in total sale consideration of amount of Rs.2,75,00,000/- on 09.03.2021, both parties agreed that the settled amount should be paid by 09.09.2022 and if the appellant failed to fulfill this obligation, the agreement would be deemed cancelled, and the amount already paid by the appellant would be forfeited,

further, the respondent stated in his complaint that appellant was in default to pay a single penny and thus he illegally and unlawfully enjoyed the occupation of the property which caused the financial loss to him as the possession of appellant is illegal after expiry of agreement on 09.09.2022, so the cause of action arose from 09.09.2022.

3. After completing the codal formalities, the complaint was brought on record and the appellant was directed to furnish surety as he faced the trial and pleaded not guilty.

4. During trial, respondent / complainant, PW Muhammad Nadeem, witness of agreement, PW Fazal Khan, inquiry officer and PW Muhammad Shahnawaz, who was eye-witness of the agreement, were examined along with documents viz. the agreement, conveyance deed and inquiry report along with its annexures, respectively. Thereafter, the side was closed and the matter was fixed for recording statement of the appellant under Section 342 Cr.P.C as his statement was recorded with denial of allegation being false, and then the impugned judgment was passed.

5. Learned counsel for the appellant contends that it is admitted in the complaint in para-9 that civil suits were filed between the parties and further submits that the charge is misconceived as the learned trial Court framed the charge which is not available in the pleadings but the incident specifically shown in charge is missing in Court proceedings. Learned counsel further contends that the agreement was executed by the father of respondent/complainant, as per his chief-examination but such fact is contra with the material available on record. Learned counsel pointed out the cross-examination of respondent / complainant, in which it was deposed by the complainant that the possession of the said property was handed over to the appellant by his father through agreement and further in cross he admitted the pendency of civil suit and due to non-payment of the full amount, a civil suit was also filed against the appellant. He further pointed out in cross-examination that he has a dispute of balance amount with the appellant. Learned counsel prays that there is lack of evidence and impugned judgment is not sustainable, therefore, same is liable to be set-aside as the learned trial Court did not appreciate the doubt which creates upon the prosecution case; hence, the appellant is entitled for the acquittal. In support of his contention, learned counsel places reliance upon the cases

of Ghulshan Bibi and others Versus Muhammad Sadiq and others (PLD 2016 SC 769), Manzoor Ali and another Versus The State and another (2020 MLD 1138), Nadeem Waqar Khan Versus Javed Masood Ahmed Khan (PLD 2020 Sindh 8), Mir Daraz Khan and 2 others Versus Darya Khan (PLD 2009 Peshawar 81).

6. On the other hand, learned Addl. P.G, Sindh supports the judgment on the point that a prima facie case was established and the incident is very much available in which it is evident that by virtue of expiry of agreement, the appellant has no right to keep hold the possession as the reasoning of learned trial Court is justified for conviction as well as the award of sentence.

7. The record reveals that on 28.11.2024 notice was issued to complainant / respondent and on 06.12.2024 the complainant / respondent voluntarily appeared and in his presence a date was given and the matter was adjourned to 16.12.2024. On 30.12.2024 one Mr. Imtiaz Ali, Advocate, filed Vakalatnama on behalf of the complainant and claimed copy of the appeal, to which, learned counsel for the appellant was directed to supply the same to him and the matter was adjourned in his presence to 07.01.2025. On 07.01.2025 no one was appeared on behalf of complainant/respondent while the matter was adjourned on the request of learned counsel for the appellant, then on 20.01.2025 this Court issued notices to all concerned. On 14.02.2025 an urgent application filed by the appellant was granted and notices were issued to the respondent as well as his counsel. On 18.02.2025 again notice was repeated to respondent / complainant through SHO, P.S Sachal, Karachi for 26.02.2025 (today). Today, one report on behalf of SHO, P.S Sachal is submitted in which it is stated that SIP Muhammad Nawaz served the notice upon the father of Tanveer Hussain as he has termed with respondent / complainant, the father is also a complainant in I.D No.07 of 2024 and informed him about the order of this Court and bound down him to appear before this Court, but the respondent maintained his absence. As it appears that complainant / respondent intentionally is not appearing before the Court in order to delay the process of Court proceedings / instant matter and from his attitude it appears that he maintains his absence just because that the Court may not entertain the case in his absence. So, no option is left to this Court but to decide the matter on merits.

8. Heard arguments and perused the material available on record.

9. The Act provides a shelter against the forcible or wrongful dispossession of the owner or occupier. The section 3(3) of the Act read as under;_

“3. Prevention of illegal possession of property, etc.____

(1)

(2)

(3) Whoever forcibly and wrongfully dispossesses any owner or occupier of any property and his act does not fall within subsection (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 provisions of section 544A of the Code”

10. It appears that the possession was handed over to the appellant by the complainant/respondent side through an agreement, as admitted by the respondent. The condition of the agreement was that if the appellant failed to fulfill the terms, they would be bound to return the property, so, the question of forcible dispossession is lacking in instant case. The respondent/complainant in his entire deposition, did not support the charge as framed by the learned trial Court. For the sake of reasons, the deposition of complainant/ respondent is reproduced as under;_

**“EXAMINATION IN CHIEF TO MR. GHULAM ABBAS BALOCH,
LEARNED COUNSEL FOR COMPLAINANT IN PRESENCE OF
LEARNED COUNSEL FOR ACCUSED.**

I am complainant in this case. The agreement was executed regarding shop in the name of Ayeza Shirin between me and accused Tanveer in the sum of Rs.2,75,00,000/-. I have received the consideration amount Rs.50,00,000/- only. As per agreement, there was the time of 18 months for entire payment. After expiry of 18 months, I have not received the amount from accused Tanveer who is in possession of the shop. I have nothing to say else. I produce original agreement dated 09.03.2021, the registered conveyance deed of the Shop No.12, Ground Floor, admeasuring 37.33 sq. Yards in the Project namely Bismillah Terrace having 1/5th undivided share, Sub-Plot No.FL3/S-12 in Plot No.FL3, Sector 15-C, KDA Scheme No.33 (Corridor), Karachi. Note: Original seen & returned. Copies kept at Exh.3/A & Exh.3/B respectively. The inquiry officer recorded my statement., Accused present in the Court is same.”

11. In cross-examination, it was admitted by him that said shop was sold out to the appellant under agreement, further, in cross he deposed that property was handed over under the peaceful manner to the appellant.

12. PW Muhammad Nadeem is not a witness of dispossession, if any, said witness is only a witness of agreement and schedule of payment.

13. The inquiry officer even did not depose about any incident as mentioned in the charge, as his verdict in deposition is that the appellant did not fulfill the obligation of agreement and the appellant made part payment to the complainant/respondent side. Such inquiry officer even admitted about the civil litigation between the parties and further in his cross he deposed that “.....It is fact that the accused has not dispossessed the complainant forcefully.....”. The PW Abbas Ali, who is shown as witness of amount transaction as his statement was not recorded by the inquiry officer, as admitted by him in his chief-in-examination.

14. The learned trial Court framed the charge on 27.03.2024, which is reproduced as under;_

“.....That on 09.09.2022, you accused have illegally grabbed possession of Shop No.13, Ground Floor, Bismillah Terrace, Plot No.S-14/FL-3, Sector 15-C KDA Scheme No.33, Corridor, Karachi, belonging to the complainant, thereby illegally dispossessing the complainant from the above mentioned offence defined under section 3(2) & (3) of Illegal Dispossession Act, 2005.

The above mentioned offence committed by all of you accused is within the cognizance of this Court and I hereby direct that you be tried by this Court on above mentioned charge.”

15. The charge is to be framed in view of Chapter XIX of the Criminal Procedure Code. 1898. The section 223 deals that the manner of committing the offence, must be stated but in charge, the manner of committing offence was available but such specific manner is not mentioned in entire proceedings, as conducted by the complainant, by the virtue of complaint, inquiry report and the depositions. This case does not fall under Illegal Dispossession Act, 2005 as the respondent / complainant side failed in proving the offence within the scope of the Act. Accordingly, instant Criminal Appeal is hereby allowed. Consequently, impugned judgment dated 22.11.2024 along with its order under Section 8 of the Act, passed by learned IVth Addl. Session judge, Malir Karachi in I.D Complaint No.06 of 2024 filed under Section 3(1) (2) of Illegal Dispossession Act, 2005 is hereby set-aside. The appellant is in custody, therefore, he shall be released forthwith, if his custody is not required in any other custody case.

16. It is pertinent to mention here that an acquittal would never prejudice the merits of any civil litigation.

JUDGE