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(SB) (29)

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Cr. Rev. No 02/2015
Danish Ahmed Mustafa vs. Sped Sami Mustafa & 2 others.
SINDH HIGH COURT

Composition of Bench. Single/Judge
Honble Mr. Justice Mohammed Kazim Khan Aglee.

Dates of hearing: 18/05/2016

Decided on (i) 27/05/2016

(a) Judgment approved for reporting.

Yes
~~No~~

KAG

CERTIFICATE

Certified that the judgment */Order is based upon or enunciates a principle of law */decides a question of law which is of first impression/distinguishes/over-rules/ reverses/ explains a previous decision.

*Strike out whichever is not applicable.

NOTE:—(i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

SGP., Kar.--L (iii) 1459--5,000--6-93--T.S.S.

ASIA LAW HOUSE
High Court Compound
Court Road.
Phone: 243163-2431696,
Fax No. 243192,
KARACHI. ©

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BEFORE THE HIGH COURT OF SINDH AT KARACHI

(CRIMINAL JURISDICTION)

CRIMINAL REVISION APPLICATION NUMBER 2 OF 2015

DAANISH AHMAD MUSTAFA

Son of Mr. Syed Sami Mustafa, Muslim, adult, holding NIC number 422013-888783-1, having a present place of residence at 43 / S - 6, Block 6, PECHS, Karachi.

PRESENTED

06-01-2015

Fauz. Dy. Registrar (Jud) 6/1/15

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APPLICANT

Versus.

1. SYED SAMI MUSTAFA

Son of (late) Mr. Muhammad Mustafa, Muslim, adult, holding NIC number 42201-3664088-1 having a place of business at 205 Saba Avenue, Phase 8 PDOHA, Karachi.

Presently in illegal occupation of House number 4/1/1, 6th Zamzama Street, Phase 5 PDOHA, Karachi.

2. NAADIR AHMAD MUSTAFA

Son of Mr. Syed Sami Mustafa, Muslim, adult, holding NICOP number 422018-441029-5, having a place of business at 205 Saba Avenue, Phase 8 PDOHA, Karachi.

Presently in illegal occupation of House number 4/1/1, 6th Zamzama Street, Phase 5 PDOHA, Karachi.

3. THE STATE

RESPONDENTS

CRIMINAL REVISION APPLICATION UNDER SECTIONS 435, 439 &
561-A OF THE CODE OF CRIMINAL PROCEDURE 1898
READ WITH ARTICLE 199 OF THE CONSTITUTION
OF THE ISLAMIC REPUBLIC OF PAKISTAN

IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Justice Mohammed Karim Khan Agha

Cr. Revision Application No.02 of 2015

Daanish Ahmed Mustafa

Vs.

Syed Sami Mustafa

Date of hearing:	18.05.2016.
Date of Order	17.05.2016.
Applicant:	Through M/s Agha Faisal & Riaz Munir advocates a/w applicant.
Respondents:	Through M/s Adnan Iqbal Chaudhry & Abdullah Azzam advocates for respondents. Mr. Abdullah Rajput, Additional Prosecutor General for State.

ORDER

Mohammed Karim Khan Agha, J. This criminal revision application is directed against the impugned order dated 26.12.2014 passed by the learned IInd Additional Sessions Judge, Karachi South in criminal miscellaneous application No.1762/2014 Re- Daanish Ahmed Mustafa vs. Syed Sami Mustafa arising out of a complaint filed by the applicant under the Illegal Dispossession Act, 2005 (the Act).

2. Succinctly stated the facts of the case are that the applicant had filed a complaint under section 3 and 4 of the Act before the IInd Additional Sessions Judge, Karachi South wherein he claimed that the House No.4/1/1, 6th Zamzama Street, Phase-V, DHA Karachi (the Property) was under his lawful occupation along with his family since August 2011. The Property was in the name of his father, the respondent No.1 but it was purchased as joint property of respondent No.1 (father) and the applicants mother Naheed Ahmad. The respondent No.1 (father) made a text message to the applicant on 01.12.2014 at 05:33 p.m. to make sure that the applicant stayed away from the Property. Subsequently, the applicant received a telephonic call from his housekeeper, who informed him that unknown people were trying to force their way into the property. On receipt of such information, applicant called at Madadgar 15 and reported the happening/incident. Later on

Security Company informed the applicant that his father (respondent No.1) and brother (respondent No.2) have forcibly occupied the Property. Hence the applicant had no other efficacious remedy except to file a complaint under sections 3 & 4 of the Act against the respondents.

3. Learned counsel for the applicant contended that the impugned order suffers from legal and factual discrepancies and being contrary to the law is liable to be set aside. He further submitted that the impugned order is violative of the principles of fair administration, justice, fair play and good conscious and hence is liable to be set aside. He next submitted that the impugned order amounts to disenfranchising a victim of serious crime from obtaining due relief from the Court of rightful jurisdiction. He further submitted that the impugned order if left in the field would provide an impetus to perpetration of criminal actions upon victims by their relatives. He also submitted that the impugned order is prima facie contrary to the law laid down by the Superior Courts and is based purely on surmises and conjectures and is liable to be set-aside.

4. In support of his contentions, he placed reliance on the cases of **Rahim Tahir v. Ahmed Jan & 2 others** (PLD 2007 S.C. 423), **Anjum Jillani v. Mst. Feroza Jillani & another** (2008 YLR 2280), **Iftikhar Ahmed v. Zulfiqar Ali & 3 others** (PLD 2008 Lahore 59), **Muhammad Bakhsh v. Additional Sessions Judge & others** (2010 PCr.LJ 268), **Muhammad Ramzan @ Jani v. Muhammad Aslam & others** (2007 PCr.LJ 1784), **Ghulam Muhammad v. Maj. Dr. Waheed Rind & others** (2007 PCr.LJ 1878 Karachi), **Raza Muhammad & others v. The State** (PLD 1965 (W.P.) Karachi 637), **Mohammad Ashraf v. Faiz Ali & 11 others** (PLD 1975 S.C. 556) and **Mumtaz Hussain v. Dr. Nasir Khan & others** (2010 SCMR 1254).

5. Learned counsel for the respondents submitted that the learned trial court has rightly passed the impugned order keeping in view of all the facts and circumstances of the case as the applicant has no right to claim possession from the respondents as neither the applicant disclosed that under what capacity he was occupying the house or as to whether it was given to him for his residential purposes or as to whether it was let out to him. In this

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respect, the applicant has no sound reason to claim that the property was illegally occupied by the respondents as the respondent No.1 is lawful owner of the property and the respondent No.2 is son of the respondent No.1. He next submitted that even the applicant has filed a civil suit No.1079/2015 before this Court for Declaration, permanent injunction and mandatory injunction against the respondents. It was further contended that in civil suit the applicant has claimed that a declaration stipulating that the plaintiff is rightfully entitled to peaceful restoration of possession and his assets. He therefore contended that the learned trial court has rightly dismissed the criminal miscellaneous application of the applicant as the Act did not apply to the facts and circumstances of this case especially as a civil suit had already been filed and the Act only applied to land grabbers as such this criminal revision is liable to be dismissed.

6. In support of his contentions learned counsel placed reliance on **Zahoor Ahmed & 5 others v. The State & 3 others** (PLD 2007 Lahore 231), **Rahim Tahir v. Ahmed Jan & 2 others** (PLD 2007 S.C. 423) **Dr. Muhammad Safdar v. Edward Henry Louis** (PLD 2009 S.C. 404), **Mumtaz Hussain v. Dr. Nasir Khan & others** (2010 SCMR 1254), **Bashir Ahmed v. Additional Sessions Judge, Faisalabad & 4 others** (PLD 2010 S.C. 661), **Waqar Ali & others v. The State through Prosecutor/Advocate-General, Peshawar & others** (PLD 2011 S.C. 181), **Habibullah & others v. Abdul Manan & others** (2012 SCMR 1533), **Muhammad Kausar Iqbal v. Additional District & Sessions Judge & others** (2012 P Cr. L J 1405 Lahore), **Shahzada Khan v. Badar Islam & 2 others** (2012 YLR 2004 Peshawar) and **Muhammad Fareed v. The State & others** (2013 YLR 133 Sindh).

7. Learned Additional Prosecutor General (APG) submitted that the complaint is between private individuals and the learned judge before passing the impugned order had failed to consider all the facts before him and as such the case should be remanded back to him for reconsideration of the case based on all the documents and other information which has been brought before this court and which the learned Judge was unaware of. APG did not support the proposition that the Act only applied to land grabbers since the words, "illegal occupant" were also used.

8. I have considered the submissions raised by learned counsel for the parties, perused the material available on record and the case law cited at the bar.

9. The operative part of the impugned order reads as under:

"I have heard the arguments of the learned counsel and perused the record. According to the memo of application, it is not mentioned in it that the applicant is the lawful owner of the property, but according to the contents of the case, the proposed accused No.1 i.e. his father, is the lawful owner of the property in question. Furthermore, the applicant was also not the tenant of the property in question. Furthermore, it was the contention of the learned counsel for the applicant that all the taxes and utility bills were paid by the applicant of the property in question, but I am of the view that, the son with love and affection, if paid the utility bills/taxes of the property, such payment cannot entitle him to get the ownership, or the possession of the property, as he was residing therein being a son. Furthermore, it was also not available in the complaint in hand that whether, the applicant is the benami owner of the property. I am of the view that during lifetime of the father, children cannot claim the property of their father, being the legal heirs, as the owner of the property is alive and only after demise of the owner of the property/father/parents, they can claim so, but in the case in hand, it is a dispute between the father and son and may be such disputed, due to matrimonial issues, between the parties, as it is seen in our society.

In view of the above discussion, no case of illegal dispossession is made out, as if such like applications are to be allowed, then every son, who have some disputes with his parents will unnecessarily drag his parents before the courts of law, therefore, the applicant/complainant is failed to satisfy this court about the maintainability of this complaint, and the complaint in hand is dismissed accordingly."

10. Although I do not intend to go into or determine any factual issues as this is a matter of evidence it would be useful in determining the issue at hand for a brief over view of the facts in so far as they seem from the parties oral arguments not to be disputed.

11. The applicant is the son of the respondent who had been living in the UK with his family. On his return to Pakistan the respondent allowed the applicant to live at the Property whilst he and his wife lived in a different property in PECHS. The respondent

also helped the applicant get a job in CSA School. Since August 2011 the applicant had been living at the Property with his family and was paying all bills and taxes and according to him the Property had been gifted to him by his father although there appears to be no formal gift deed. The Property remained in the respondents name throughout the time which the applicant was occupying it with the permission of the respondent although now apparently the respondent's wife and mother of the applicant is now making a claim over the Property.

12. In any event the applicant and the respondent after about 3 years from the time when the applicant had first occupied the Property with the permission of the respondent fell out with each other. Apparently the respondent sent the applicant an SMS on 1-12-14 telling him to stay away from the Property and on the same day the respondent while the applicant was at the family home in PECHS with his mother received a call from his staff that the respondent was forcibly taking possession of the Property. The respondent with the assistance of the police did take back possession of the Property in the absence of the applicant and the applicant's possessions in the Property were removed. There upon the applicant registered a complaint against the respondent under S.3 of the Act. There after a civil suit was also filed before the Sindh High Court and other cross litigation ensued which is still pending before the Sindh High Court.

13. The bone of contention between the parties seems to be whether the case on its own particular facts and circumstances falls within the ambit of the Act. According to learned counsel for the applicant it does as he was in legal occupation and the respondent had no right to dispossess him in the manner in which he did.

14. On the other hand the respondent's contention is that the Act does not apply because as set out in the Preamble it was to be used against land grabbers and not in family cases such as this. Furthermore, he has also contended that once a civil suit has been filed proceedings under the Act are barred.

15. It would appear to me that, in the given circumstances, this case revolves around the sole legal issue of whether or not the Act

is applicable based on the facts and circumstances of the particular case.

16. Since the Preamble of the Act, S.3 of the Act and the definition of "occupier" under the Act are relevant to the determination of the case the same are set out below for ease of reference:

"Preamble: An Act to curb the activities of the property Grabbers.

Whereas it is expedient to protect the lawful owners and occupiers of immovable properties from their illegal or forcible dispossession therefrom **by the property grabbers."** (bold added)

"S.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 owner **or occupier of such property.** (bold added)
- (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 of the Code".

S.2 (c) "Occupier" means the person who is in **lawful possession** of a property." (bold added)

17. Both parties have cited a large number of authorities in support of their respective contentions which has shown how the Act has been interpreted by the Courts over time. Although I have perused all the cited authorities I intend to confine myself to the latest Supreme Court authorities for necessary guidance.

18. The first case is **Mumtaz Hussain V Dr.Nasir Khan** (2010 SCMR 1245) which was cited by both parties in support of their contentions and was decided by a 3 member Bench of the Hon'ble Supreme Court on 2-12-2009

19. This case in minute detail examined the relevant law up to that point in time (and in particular considered in detail the relationship between the Preamble of the Act and S.3) and came to

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the conclusion that the Preamble was an aid to construction and would only be applicable if the substantive law was unclear and as S.3 of the Act was quite clear it was of little assistance in this case. The language used in S.3 had widened the scope of the Act not to restrict it to just land grabbers and it was also held to be applicable to any one who came within the definition and language of S.3 which was quite clear on its plain reading.

20. It endorsed the existing law at P.1260 at Para 6 in the following terms:

“From the examination of above case-law so far produced before us, the position is that the Act has no retrospective operation **whereas all the cases of illegal occupants, including property grabbers/Qabza group, without any distinction would be governed by the Act, except the cases which are already pending before other forum.**”
(bold added)

And at P.1270

“Whereas remedy under the Illegal Dispossession Act, 2005, cannot be restricted only against a ‘Qabza Group’. In the Statute, the definition of ‘Qabza Group’ or ‘Land Mafia’ has not been given except that the preamble provides that to protect the lawful owners and occupiers of the immovable property from their illegal or forcible dispossession there-from by the property grabbers. If it is accepted that the remedy under the Illegal Dispossession Act is available only against the professional land grabbers, though Statute has not defined what is meant by ‘land grabbers’ or ‘Qabza Group’, then a person, who illegally and unlawfully grabs or dispossesses or occupies the property from a lawful owner for the first time, cannot be prosecuted under the Act merely because there is no such previous history of him to call him a man professionally engaged in the activity of land grabbing.”

21. It would therefore seem that by virtue of this case any person whether a land grabber or not could come within the ambit of the Act provided that the requirements of S.3 were met and there was no pending civil suits over the property at the time when the complaint was filed.

22. The next Supreme Court case on this issue was the case of **Bashir Ahmed V Additional Sessions Judge Faisalabad** (PLD 2010 SC 661) which was decided only around 3 months after the case of Mumtaz Hussain discussed above and since the 3 members

of this bench were not a part of the 3 member bench of Mumtaz Hussain's case which was not mentioned in Bashir Ahmed's case it may well be that this 3 member bench was not aware of the recently decided Mumtaz Hussain's case and as such was unable to consider it and take any benefit from it. In this case the Court tended to suggest that the Act was only applicable to land grabbers and held as under:

"It had also been declared by the Full Bench of the Lahore High Court, Lahore in that case that the Illegal Dispossession Act, 2005 was introduced in order to curb the activities of Qabza groups/property grabbers and land mafia. It has been conceded before us by the learned counsel for the petitioner that no material is available with the petitioner to establish that respondents Nos.2 to 4 belonged to any Qabza group or land mafia or that they had the credentials or antecedents of being property grabbers. In view of the discussion made above the impugned acquittal of respondents Nos. 2 to 4 recorded by the learned Additional Sessions Judge, Faisalabad upon acceptance of their application submitted under section 265-K Cr.P.C. has been found by us to be entirely justified and dismissal of the petitioner's writ petition by the learned Judge of the Lahore High Court, Lahore has also been found by us to be unexceptionable. In the circumstances of this case mentioned above we have entertained an irresistible impression that through filing of his complaint under the Illegal Dispossession Act, 2005 the petitioner had tried to transform a bona fide civil dispute between the parties into a criminal case so as to bring the weight of criminal law and process to bear upon respondents Nos.2 to 4 in order to extract concession from them. Such utilization of the criminal law and process by the petitioner has been found by us to be an abuse of the process of law which cannot be allowed to be perpetuated."

23. The final case cited by the respondent was the case of **Waqar Ali V The State** (PLD 2011 SC 181) where by a 3 member Bench of the Supreme Court found that for an act to fall under the Act there had to be both actus reus and mens rea.

24. Based on the facts and circumstances of this case it appears that there was both an actus reus (taking over of the Property) and mens rea (intention to illegally dispossess)

25. The real issue is which of the two Supreme Court Judgments each decided by 3 member benches is to be followed i.e. **Mumtaz Hussain** which suggested that the Act was not restricted to land

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grabbers or **Bashir Ahmed's case** which suggested that the Act only applied to the land grabbers?

26. Having considered both cases in some depth and bearing in mind A.189 of the Constitution (and also bearing in mind that the Mumtaz Hussain case considered the matter in far greater detail viz a viz the relationship between the Preamble and S.3 than Bashir Ahmed's case) with ut most respect and deference to the Hon'ble Supreme Court, I am of the view that until a final decision is made on this issue by the Hon'ble Supreme Court (namely whether the Act only applies to land grabbers or other persons as well) a hybrid approach between the two judgments may be adopted whereby prima facie the Act should be mainly but not solely restricted to land grabbers. As there may be exceptional cases which also fall within the ambit of the Act which are not cases of land grabbing but justify the initiation of proceedings under the Act. Such cases must be judged on their own particular facts and circumstances.

27. In my view an important aspect of this case is that the applicant made contact with the police for their assistance immediately on the day that his father took over the house and the complaint under the Act was a natural consequence of his contact with the police in the given circumstances and before the civil litigation commenced. Had the civil litigation over the Property commenced a few weeks or months before the complaint under the Act my finding may have been different. From the record it seems that on the date of dispossession i.e. 1-12-14 the applicant immediately called the police on the Madagar 15 to complain about the illegal dispossession and seek police assistance. On 2-12-14 (the next day) the applicant filed a formal complaint with the police and 2 days after that on 4-12-14 the applicant filed a complaint under the Act which was dismissed by the impugned order on 26-12-14 which is the subject of this criminal revision application. On 4-12-14 respondent no.1 filed a Civil Suit for declaration, injunction and possession and damages against the applicant. There after civil suits were also filed by the applicant and the respondents' wife for possession of the Property. The civil litigation therefore in my view followed the criminal aspect of the case which was initiated immediately when the father took possession of the Property. Thus it seems highly likely under the given

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circumstances that the applicant was not trying to convert a purely civil case into a criminal case to put pressure on the respondent. It seems that the applicant's first port of call was the police and then under the Act and there after civil proceedings followed on both sides.

28. It is also in my view relevant that the respondent gave his permission to his son to live in the Property with his family exclusively without interference for around 3 years. That the applicant paid all the bills and taxes, engaged his own staff and entered into a security agreement for the protection of the Property etc and in effect in my view on account of such acts most likely became the legal occupier of the Property for the purposes of S.3 of the Act keeping in view the definition of "occupier" under S.2© of the Act and the fact that by his conduct the respondent had treated the applicant as the lawful occupier. He may even have been estopped from taking the action which he did.

29. Although in such cases the Court is involved in a difficult balancing act between the rights of the lawful owner (in this case the respondent) and the person who appears to be in lawful occupation (in this case the applicant) I am of the view that under the facts and circumstances of this particular case the respondent ought not to have in effect simply taken over the Property with the help of the police. In my view he ought to have given his son written notice of a reasonable time in which to vacate the Property bearing in mind that he was living with his family in the Property with the permission of the respondent for the past three years and thereafter if the applicant failed to vacate the Property initiate, if so advised, the appropriate civil proceedings in order to recover the Property whereby the due course of law would be followed.

30. In my view chucking families out of properties which you had allowed them to live in peacefully for a number of years who had no where else to go without giving any notice is to be both discouraged and avoided. However frustrating it may be for the person who claims to be the actual owner as in this case the respondent due process of the law must be followed. In this case it seems that the respondent took the law into his own hands and simply without notice chucked the applicant and his family out of the Property. Again the concept of citizens taking the law into their own hands must be both avoided and discouraged

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31. Accordingly the criminal revision application is allowed and the impugned order dated 26.12.2014 is set aside and it is to be determined whether or not an offense has been committed under S.3 of the Act based on the evidence adduced before the trial Court. In the meantime civil proceedings may continue in parallel without prejudice to the criminal proceedings which are different in nature.

Dated: 27-05-2016


JUDGE