

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 346 of 2021
&
Criminal Revision Application No. 141 of 2021

Appellant in : Kashif Mumtaz Shah
Cr. Appeal 346/2021 Through Syed Safdar Ali, advocate

Applicant in : Allauddin Malik
Cr. Rev. No. 141/2021 Through Mr. Muhammad Ramzan Tabasum.

Respondent : The State
Through Mr. Mohammad Mohsin, APG.

Date of hearing : 08.05.2025

Date of judgment : 20.05.2025

J U D G M E N T

KHALID HUSSAIN SHAHANI, J. – By this consolidated judgment, both the criminal appeal and revision application shall be adjudicated, as they arise from the same judgment dated 15.06.2021 passed by the court of learned IIInd Additional Sessions Judge Malir Karachi in I.D. Complaint No.18/2019. In Criminal Appeal No.346/2021 and Revision Application No.141/2021, the appellant and applicant, through their respective counsels, challenge the decision of the trial court, particularly with regard to the unlawful dispossession of the complainant's property by the accused Kashif, as well as the correct legal interpretation of the evidence presented during the trial. Specifically, the applicant, Allauddin Malik (the complainant in the Illegal Dispossession complaint), seeks the extension of punishment or conviction, proposing a sentence of up to 10 years. In contrast, the appellant, Kashif Mumtaz Shah (currently on bail), seeks the set-aside of the impugned judgment and his acquittal from the illegal dispossession charge.

2. Brief facts of the Criminal Appeal No.346/2021 are that; the appellant, Kashif Mumtaz Shah, claimed that he is/was living at House No. B-34, Street No. 12, Gulshan-e-Faisal, Bath Island, Clifton, Karachi, for an extended period of time. The appellant lawfully acquired the property through a Conveyance Deed, which was duly registered with the Sub-Registrar, Gadap Town, Karachi, under Registration No.10650 on 21.12.2015. The previous owner, Mst. Rukhsana Jehangir, purchased the property from Rasheed Khan in 2007, and Rasheed Khan, in turn, had bought it from Tanveer-ul-Haq in 2006. The appellant's ownership is supported by a valid and legal chain of ownership. Tanveer-ul-Haq, the original lessee, had appointed his son-in-law, Nadeem Mushtaq, as his General Attorney in 2003. However, Tanveer-ul-Haq revoked this Power of Attorney in 2004,

through a duly registered Revocation Deed No.2202 dated 10.12.2004, and a public notice regarding this revocation was published in the newspaper. Despite this, the complainant, Allahuddin Malik, claiming to be the attorney of Nadeem Mushtaq, allegedly fabricated and forged a sale agreement for the property dated 21.09.2003 between Tanveer-ul-Haq and himself. This sale agreement is contested by the appellant, who has filed a civil suit (Suit No. 384 of 2020) before this Court to cancel the agreement, alleging it to be fraudulent. In 2008, Nadeem Mushtaq filed a Civil Suit No.151 against Tanveer-ul-Haq and others, relying on the forged sale agreement. The suit was decreed ex-parte in favor of Nadeem Mushtaq, but the appellant asserts that the ex-parte decree was obtained by default due to Nadeem Mushtaq's failure to contest the matter. Despite the ongoing civil litigation, the respondent filed a criminal complaint under Section 3(2) of the Illegal Dispossession Act, 2005, claiming that the appellant had dispossessed him of the property on 21.04.2019, even though the appellant has been in lawful possession of the property since 2015. The trial court issued an impugned judgment on 15.06.2021, which the appellant now appeals, claiming it was unfair and flawed.

3. Learned advocate for appellant Kashif Mumtaz Shah argued that the trial court's judgment was passed hastily and with bias. The same trial judge, who had dealt with the case previously, issued the impugned judgment, and the appellant claims that this judge held a personal grudge against him, which affected the impartiality of the decision. The appellant further contends that he is the rightful owner of the property, having purchased it through a valid Conveyance Deed in 2015, and that he has made substantial investments in the property, including the construction of various amenities. The appellant asserts that the trial court's ruling, which stated that he unlawfully dispossessed the respondent, is erroneous. The appellant disputes the authenticity of the sale agreement dated 21.09.2003, which the respondent (Applicant in CrI. Rev. No. 141/2021) relies upon. He claims the agreement was forged and that the signature of Tanveer-ul-Haq on the document was manipulated. This issue is being litigated before this Court in Suit No.384 of 2020, where the appellant seeks to have the sale agreement declared null and void. Furthermore, the appellant maintains that there is no evidence to support the claim of illegal dispossession, as he has been in legal possession of the property for years. The trial judge even acknowledged that the appellant is not a professional land grabber, and there was no proof to suggest unlawful possession. Learned advocate for appellant points out that the trial judge relied on a Commissioner's report prepared ex-parte, without due process or transparency. No independent witnesses were present during the inspection of the property, which calls the credibility of the report into question. The appellant argues that the report's findings should not be given weight, as it lacked fairness and proper

procedure. Additionally, the appellant asserts that the matter is essentially a civil dispute over property ownership, not a criminal issue of illegal dispossession. The respondent's complaint should, therefore, have been dismissed, as it pertains to property rights, which fall under civil law. The appellant claims that the burden of proof was on the respondent to establish that the appellant's possession was unlawful, but the respondent failed to provide any evidence to support his allegations. Moreover, learned advocate for appellant emphasizes that the respondent failed to produce any witnesses to corroborate his claim of dispossession. In contrast, the appellant provided his statement under Section 340(2) Cr.P.C. and examined two independent witnesses to prove his lawful possession of the property. The trial judge's failure to consider this evidence led to an incorrect ruling. The appellant further argues that the trial judge misapplied the Illegal Dispossession Act, 2005, as the case concerns civil ownership rights, not criminal dispossession. The appellant's legal possession of the property, supported by documents, should have been enough to refute the claim of illegal dispossession, and the respondent's criminal complaint was an abuse of process. Lastly, the appellant points out that the SHO, after conducting an inquiry, submitted a report stating that the matter was civil in nature and did not fall within the ambit of the Illegal Dispossession Act. However, the trial judge ignored the SHO's findings and passed the impugned judgment. The appellant therefore prayed to review the case and set aside the impugned judgment, as it was based on faulty reasoning, and to grant appropriate relief.

4. Brief facts of the Criminal Revision No. 141 of 2021 are that; In this case, the applicant, Allauddin Malik, is aggrieved by the judgment dated 15th June 2021 passed by the learned II-Additional Sessions Judge Malir Karachi, which resulted in a lesser sentence for the accused, Kashif Mumtaz Shah. The applicant filed this criminal revision under Sections 435 and 439 CrPC, seeking an enhancement of the sentence and further relief. Applicant claims that he is the lawful owner of an immovable property situated at Plot No.C-42, Sector 8A/1, Al-Habib Cooperative Housing Society Ltd., KDA Scheme No.33, Karachi, which he acquired through a registered Sale Deed in 2013. The applicant had been in possession of the property until February 2019. He had constructed a boundary wall, a small room for a chowkidar, and installed an iron gate to secure the property. The applicant last visited the property in March 2019 and confirmed that it was still under his possession and control at that time. On 21st April 2019, when the applicant visited the property, he found that a shutter had been installed with the name "Brother Associates" written on it. Upon inquiry, a person who identified himself as an employee of the accused, Kashif Mumtaz Shah, claimed that the accused was now the owner of the property. The applicant was forcibly dispossessed by the accused, who issued threats to the applicant to vacate the property. The applicant

then reported the incident to the Ahsanabad Police Chowki, but the police refused to register the FIR, directing the complainant to approach the concerned police station. The applicant filed an Illegal Dispossession Complaint No.18/2019, which was taken up by the learned trial court after conducting an inquiry. The court framed charges, and the accused was directed to hand over the possession of the property to the complainant by order dated 8th November 2020. The accused did not comply, and instead filed a criminal revision, which was disposed of by this Court with a direction to the trial court to take possession through the Nazir. After the trial, the accused was convicted under Section 3(2) of the Illegal Dispossession Act, 2005, sentenced to three years of simple imprisonment, and ordered to pay a fine of Rs. 20,000. If the fine was not paid, the accused would serve an additional one-month imprisonment. The possession of the property was handed over to the complainant on 15th June 2021. The accused has filed Criminal Appeal No.346/2021 against this judgment, which is pending before this Court.

5. Learned advocate for applicant of Cr. Rev. No. 141/2021 & respondent in Criminal Appeal No. 346/2021 argued that the learned trial court, after carefully reviewing the entire documentary evidence, did not commit illegality whatsoever while passing the judgment. However, the applicant's counsel argues that the trial court imposed a lesser sentence, whereas the full conviction under Section 3(2) of the Illegal Dispossession Act should have warranted the maximum sentence of up to ten years as provided by law. The applicant's counsel points out that during the cross-examination of the accused, the latter admitted to filing civil suits to protect his illegal possession and acknowledged that he had no proof of lawful possession of the property from 2009 to 2019. This admission supported the complainant's version of events. Furthermore, the accused's tenant, Fahad Baig, admitted that the accused had illegally occupied the property, and this was also corroborated by the applicant's evidence. The applicant's counsel emphasizes that the charge of forcible dispossession against the accused has been fully established, and the conviction should have been enhanced in light of the severity of the offence. It is argued that if the charge has been conclusively proven, the maximum punishment should be awarded rather than a lenient sentence. The applicant's counsel seeks the enhancement of the sentence from three years to ten years and requests compensation under Section 544 of the Cr.P.C. for the loss caused by the illegal dispossession. The applicant's counsel concludes by requesting that this Court call the record and proceedings from the learned trial court, enhance the sentence, and ensure that justice is served in accordance with the provisions of the law.

6. Both the learned counsel for the appellant and the applicant have presented and rebutted each other's contentions vigorously. The counsel for the appellant argued that the trial court had erred in convicting the respondent under Section

3(2) of the Illegal Dispossession Act, asserting that the charges had not been proven beyond a reasonable doubt and that the lesser sentence imposed was justified based on the circumstances. In contrast, the learned counsel for the applicant contended that the evidence presented, including the admissions of the respondent during cross-examination, clearly established the unlawful dispossession and occupation of the property. The applicant's counsel further emphasized that the lenient sentence imposed by the trial court was not commensurate with the seriousness of the offence and requested the enhancement of the sentence to the maximum penalty provided under the law. Both counsels disputed the relevance and weight of certain evidence presented during the trial, seeking to advance their respective positions before this Court.

7. Record reflects, applicant Allauddin Malik, testified that he and Nadeem Mushtaq purchased the subject property in 2003 from Tanveer ul Haq, receiving full possession and original title documents. The applicant/complainant further filed Civil Suit No. 151/2008, which resulted in a decree in his favor, confirming his possession of the property. Despite his ongoing possession, on 21.04.2019, the complainant discovered that unknown individuals had unlawfully trespassed and occupied the property. The complainant subsequently filed a criminal complaint against the accused, Javed, Fahad, and Kashif. Upon cross-examination, the defense attempted to cast doubt on the complainant's credibility, alleging fraud in the obtaining of the judgment and decree in the civil suit. However, the complainant's case was substantiated by documentary evidence, including the original purchase and lease documents coupled with court decree. The defense failed to challenge the material facts regarding the complainant's possession of the property since 1993. The defense raised allegations of misrepresentation in the civil suit, claiming that the complainant had filed it against wrong parties and failed to include a relevant person in the suit. The key issue in this case is whether the accused unlawfully trespassed on the property with the intent to dispossess the complainant, and the defense's arguments on the fraud in the civil suit do not affect the present criminal proceedings. In light of evidence regarding the complainant's ownership and possession of the property, the court below rightly finds that the complainant's claim of unlawful dispossession remains credible. The appellant has failed to present a sufficient challenge to the complainant's case. Therefore, the complainant's possession of the property and the accused's trespass on it stand established.

8. The appellant/convicted contended that he purchased the subject plot from Mst. Rukhsana Jahangir in 2015, receiving a conveyance deed, and that he had been in possession of the plot since 2009 due to a cordial relationship with her. It is settled law that when an accused presents a specific plea, the burden of proof

lies upon him. Consequently, the accused testified on oath, presenting two witnesses, Muhammad Azam and Muhammad Nadeem, in his defense. The appellant/convicted accused, in his sworn statement (Ex.5), asserted that he purchased the plot from Mst. Rukhsana Jahangir on 21.12.2015, as evidenced by the conveyance deed registered in 2016. He further claimed that he had been in possession since 2009, due to his familial relations with Mst. Rukhsana, and provided supporting documents, including a certified copy of the conveyance deed and NOC for the sale. The accused also mentioned a public notice regarding a missing file of the plot and a revocation of the power of attorney, which was dated 2004. During cross-examination, the accused's claim of continuous possession since 2009 was challenged, as the record revealed inconsistencies in his statements. The accused admitted to not mentioning the possession claim in earlier statements or affidavits related to the plot, and failed to provide any documentary evidence supporting his assertion of possession from 2009. Learned court below rightly held that the accused's testimony was found to be unreliable, as he could not substantiate his claim of possession since 2009. His inability to produce proof or any consistent documentation regarding his possession significantly undermined his defense, rendering his statement untrue. Therefore, his claim of possessing the plot since 2009 was rightly rejected. The defense witness Muhammad Azam, who claimed to have been a watchman on the plot from 2009 to 2015, was termed to be unreliable. The testimony of another defense witness, Muhammad Nadeem Sheikh, who rented the plot in 2016, was similarly unconvincing as he failed to produce any supporting evidence, such as a tenancy agreement or rent receipts and the court below rightly held the same. Furthermore, the accused's credibility was further damaged during cross-examination, where contradictions in his statements regarding his professional status and ownership of the plot were exposed. This inconsistency in the defense testimony weakened the appellant's case. The defense counsel argued that the matter was of a civil nature, with both parties claiming ownership of the plot, citing pending civil proceedings. However, this court's role under the Illegal Dispossession Act is not to determine the title of the property but to form a prima facie opinion for the purpose of addressing the criminal complaint. In this case, the complainant's original documents, executed in 2013, take precedence over the accused's documents, which were executed later. In accordance with the provisions of the Illegal Dispossession Act, 2005, the complainant has shown that he is the lawful owner in possession of the plot and that the accused entered the plot without authority with the intent to dispossess him. Given the lack of credible evidence from the accused, the complainant's ownership and possession remain established.

9. Although the learned advocate for appellant argued that the matter was civil in nature, the court, in its capacity under the Illegal Dispossession Act, 2005,

is not concerned with determining the title of the property but rather forming a prima facie opinion based on the criminal complaint. In this case, the complainant's original documents, executed in 2013, take precedence over the accused's documents, which were executed at a later date. Therefore, in light of the unchallenged and credible evidence supporting the complainant's ownership and possession, and the lack of persuasive evidence from the accused, the court finds that the complainant's claim of unlawful dispossession by the accused is well-founded and establishes the accused's unlawful entry with the intent to dispossess the complainant.

10. In light of the foregoing findings, I am firmly of the opinion that the impugned judgment dated 15.06.2021 is free from illegality or material irregularity. Accordingly, the judgment is upheld, and both the appeal and the criminal revision application are hereby dismissed along with pending application(s) if any.

11. At the time of pronouncement of the present judgment, Appellant Kashif Mumtaz Shah, remained absent without prior intimation or justification. Accordingly, perpetual Non-Bailable Warrants of Arrest are hereby directed to be issued against the said appellant for securing his custody. Simultaneously, notice be issued to the surety for the purpose of effecting service of the conviction and sentence already imposed by the learned trial Court. Furthermore, a certified copy of this judgment shall be transmitted to the learned trial Court via facsimile for its information and for necessary action in accordance with law.

J U D G E